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RESEARCH NOTE

Beyond Investment Protection and ISDS: Towards an Investment Law Research Agenda Focusing on Investment Facilitation and Liberalization Commitments

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Abstract

This research note contributes to moving the scholarly field of international investment law beyond its dominant focus in recent decades on issues of post-admission investment protection and investor–State dispute settlement (ISDS). Specifically, it maps a future research agenda focusing on issues of investment facilitation and investment liberalization. This research note analyses several common and important themes that arise in relation to treaty-based investment facilitation and investment liberalization commitments. These include the value-added of international legally binding obligations, the impact of international commitments on States' applied policies, and a notable shift away from investor–State arbitration towards State–State dispute settlement only and mechanisms for ongoing cooperation between the treaty parties. These themes raise challenging questions, which often call for future empirical research employing methods other than traditional legal analysis. Nevertheless, this research note suggests that the scholarly field of international investment law has much to gain from shifting some of its focus away from well-versed issues of investment protection and ISDS towards under-researched questions concerning investment facilitation and investment liberalization commitments.

Keywords: Investment facilitation; investment liberalization; pre-establishment guarantees; investment promotion; committees; future work programmes

1. Introduction

Open a contemporary textbook on international investment law and one typically finds sparse reference to issues of investment facilitation or investment liberalization compared to a heavy focus on issues of investment protection and investor–State dispute settlement (ISDS).[1] This is

[1]See e.g. the following limited references to investment liberalization or investment facilitation issues in leading textbooks: R. Dolzer, U. Kriebaum, and C. Schreuer (2022) *Principles of International Investment Law*, 3rd edn. Oxford University Press, 132–142; Y. Radi (2020) *Rules and Practices of International Investment Law and Arbitration*. Cambridge University Press, 61–68; J.W. Salacuse (2021) *The Law of Investment Treaties*, 3rd edn. Oxford University Press, 252–272; C. McLachlan, L. Shore, and M. Weiniger (2017) *International Investment Arbitration: Substantive Principles*, 2nd edn. Oxford University Press, [2.17]–[2.20], [7.47]–[7.53], [7.272]; A. de Nanteuil (2020) *International Investment Law*. Edward Elgar, [2.04]–[2.31], [7.04]–[7.14]; A. Newcombe and L. Paradell (2009) *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International, 121–146; B, Sabahi, N.D. Rubins, and D. Wallace Jr (2019) *Investor–State Arbitration*, 2nd edn. Oxford University Press, 336–339; M. Sornarajah (2021) *The International Law on Foreign Investment*, 5th edn. Cambridge University Press, 115–148, 330–332, 422–424, 429–432. For no reference to issues of investment liberalization or investment facilitation, see C.L. Lim, J. Ho, and M. Paparinskis (2021) *International Investment Law and Arbitration: Commentary, Awards and Other Materials*, 2nd edn. Cambridge University Press.

not a coincidence. In recent decades, the scholarly field of international investment law has been overwhelmingly focused on issues of post-admission investment protection and ISDS.[2] At one level, this focus is understandable, given the unprecedented expansion of treaty-based investor–State arbitration over the last 25 years. However, this dominant focus has come at the cost of insufficient scholarly attention being paid to other issues in investment law and policy. This research note helps remedy this gap by identifying a research agenda for the field of international investment law beyond the conventional focus on investment protection and ISDS. More specifically, this research note contributes to identifying a research agenda concerning issues of investment facilitation and investment liberalization, issues which are high on the investment policy agenda and increasingly feature in international investment agreements (IIAs).[3] The purpose of this research note is not to be the final word on these topics, but to help advance the scholarly field of international investment law beyond its current overwhelming focus on investment protection and ISDS. This research note shares a similar motivation to other recent calls for focusing on a broader concept of 'investment governance', rather than a narrow concern with investment protection and investor–State arbitration.[4] While this research note is focused on expanding the horizon of international investment law scholarship – which too often focuses exclusively on investment protection and ISDS – we will see that the broader 'investment governance' focus that this research note advocates often calls for approaches beyond a traditional legal methodology. In particular, the wider 'investment governance' focus often raises challenging empirical questions, which may be answered by resort to extended case studies, interviews or surveys with treaty negotiators and policymakers, and other interdisciplinary approaches.

In addition to addressing a relative blind spot in investment law scholarship, there are three further rationales for this research note's focus. First, in recent years a variety of novel forms of investment-related international agreements have emerged that focus on issues of investment facilitation and/or investment liberalization rather than the traditional focus on investment protection and ISDS. Examples include the WTO Agreement on Investment Facilitation for Development (IFDA), the EU's first Sustainable Investment Facilitation Agreement (SIFA) with Angola, and the EU–China Comprehensive Agreement on Investment (CAI), concluded in 2020, which focuses on guaranteeing market access and the governance of investment-related issues, and is now paused.[5] Significantly, none of these agreements include traditional investment protection obligations nor provide for investor–State arbitration.[6] Other notable developments include the recently concluded Investment Protocol to the Agreement establishing the African Continental Free Trade Area (AfCFTA), which emphasizes investment promotion and facilitation, governance of investment-related issues and investor obligations alongside certain traditional

[2]Similarly, J. Bonnitcha (2019) 'Investment Wars: Contestation and Confusion in Debate about Investment Liberalization', *Journal of International Economic Law* 22, 629, 631, 653.

[3]IIAs include both Bilateral Investment Treaties (BITs) and other treaties that provide for similar investment protections and may include consent to ISDS, e.g. investment chapters of Preferential Trade Agreements (PTAs): see e.g. J. Bonnitcha, L.N. Skovgaard Poulsen, and M. Waibel (2017) *The Political Economy of the Investment Treaty Regime*. Oxford University Press, 3–4.

[4]See e.g. M.D. Brauch (2022) 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration', Columbia Center on Sustainable Investment, 15 March 2022, https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds. E. Aisbett et al. (2018) *Rethinking International Investment Governance: Principles for the 21st Century*. Columbia Center on Sustainable Investment Books, 1, 20, 74, 133, 147, 149, https://scholarship.law.columbia.edu/sustainable_investment_books/1/. J. Ostřanský and J. Bonnitcha (2024) 'Rethinking Investment Treaties: A Roadmap', IISD; L. Cotula and N.M. Perrone (2024) 'Seeing Santurbán Through ISDS: A Sociolegal Case Study of *Eco Oro v. Colombia*', *Leiden Journal of International Law* 37, 440, 461.

[5]Similarly, G. Matteo Vaccaro-Incisa and W. Giemza (2022) 'Economic Integration via Novel Investment Agreements: CAI's Focus on Market Access vis-à-vis the Current Bilateral Investment Treaties between China and European Union Member States', *Journal of World Investment & Trade* 23, 521, 542–543.

[6]'WTO Investment Facilitation for Development Agreement', WT/MIN(24)/17/Rev.1, 29 February 2024, Annex, art. 2.2 ('WTO IFDA'); EU–Angola SIFA, art. 2(3); EU–China CAI, section 6(2), art. 3.

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investment protection obligations, and leaves mechanisms for ISDS to be resolved via future negotiations;[7] and Brazil's cooperation and facilitation investment agreements (CFIAs), which combine certain traditional investment protection obligations with a focus on investment facilitation and mechanisms for State–State cooperation and dispute settlement. While many of these new forms of investment-related agreements have been studied in isolation, existing scholarship has not fully appreciated that these developments are part of a powerful, broader shift towards a focus on issues beyond the traditional agenda of investment protection and ISDS.

Second, investment facilitation and investment liberalization sit at the intersection of different scholarly and policy fields, taking investment law into areas traditionally regulated by international trade law, particularly trade in services regulation,[8] and thus bring together scholarly and policy communities that have not consistently communicated with each other.[9] Part of the reason for the relative scholarly neglect of issues of investment facilitation and liberalization issues to date is that they do not easily fit within the conceptual categories that have dominated investment law scholarship in recent decades.[10] This research note helps bridge such scholarly divides, identifying how the field of investment law should adjust its focus to account for the rise of agreements focused on investment facilitation or investment liberalization, rather than investment protection and ISDS.

Third, while existing literature has not tended to link issues of investment facilitation and investment liberalization, this research note draws attention to such a link because investment facilitation and investment liberalization raise several common and important questions. These common questions or themes mean that it is appropriate to consider investment facilitation and investment liberalization in the same research note, while remaining attentive to potential differences between them (which are addressed in section 6). Specifically, in relation to both investment facilitation and investment liberalization, the value-added of international legally binding commitments is debated, given that such measures can already be taken by States unilaterally.[11] As will be demonstrated in section 3, some (although not all) of the arguments regarding the value-added of international legally binding commitments are common to both investment facilitation and investment liberalization. Additionally, investment facilitation and investment liberalization both raise important, under-researched questions regarding the impact of international obligations on States' applied laws and policies. Unlike investment protection obligations, investment facilitation and investment liberalization commitments are not routinely made subject to investor–State arbitration. Rather, investment facilitation and investment liberalization commitments are frequently only subject to State–State dispute settlement. Compared to traditional investment protection-focused investment treaties, which were conceived as 'one-off deals' where questions of interpretation were largely delegated to arbitral tribunals, investment facilitation and investment liberalization also both involve a shift towards increasingly understanding investment treaties as frameworks for ongoing cooperation between the treaty parties.[12] Thus, it is common for international agreements focused on investment facilitation or investment

[7]'Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment', draft, January 2023, art. 46 ('AfCFTA Investment Protocol'), www.bilaterals.org/?afcfta-protocol-on-investment-48215.

[8]Similarly, W. Alschner (2019) 'Heading for Divorce? Investment Protection Rules in Free Trade Agreements', in M. Elsig, M. Hahn, and G. Spilker (eds.), *The Shifting Landscape of Global Trade Governance*. Cambridge University Press, 351–352.

[9]Similarly, R. Adlung (2016) 'International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS', *Journal of World Investment & Trade* 17, 47, 49, 54.

[10]F. Hees and H.C. Moraes (2020) 'Investment Facilitation and the Contribution of the Brazilian Approach to the Reform of the Investment Treaty Regime', in C. Cai and H. Chen (eds.), *The BRICS in the New International Legal Order on Investment: Reformers or Disruptors*. Brill Nijhoff, 24 (making this claim regarding investment facilitation).

[11]See below text at n. 29.

[12]UNCTAD, 'Investment Facilitation in International Investment Agreements: Trends and Policy Options', IIA Issues Note Issue 3, 2023, 8.

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liberalization to contain a work plan or agenda to be addressed by the treaty parties in the future, and to create an institutional structure for cooperation.[13]

This research note begins with a short initial section that distinguishes the concepts of investment protection, investment facilitation, and investment liberalization. It then turns to under-researched questions common to investment facilitation and investment liberalization, namely the value-added of international commitments (section 3), the impact of international commitments on States' applied policies (section 4), and the shift away from investor–State arbitration towards frameworks for ongoing cooperation (section 5). A final section offers additional remarks on the research agenda that lies ahead, including identifying potential differences between investment facilitation and investment liberalization commitments.

While this note seeks to sketch a future, more well-rounded research agenda for international investment law, a caveat is necessary at the outset. In short, the cross-cutting questions analysed in sections 3–5 are not put forward as the only questions concerning international investment governance that may warrant future scholarly attention or analysis. For instance, there is a large, primarily economic literature concerning the effects of IIAs and ISDS provisions on foreign direct investment (FDI), some of which has focused specifically on agreements that address investment facilitation or investment liberalization.[14] This potential line of inquiry is not further addressed here because this research note is not written from an economics perspective, nor as an intervention in economics debates, rather this research note is written from a legal perspective, albeit one that is open to the insights of interdisciplinary methods.

2. Some Working Definitions

The wider 'regime complex' for international investment consists of a range of 'partially overlapping and non-hierarchical institutions' that address the governance of foreign investment.[15] In the last 25–30 years, one aspect of this wider regime complex, centred on investment treaties and investor–State arbitration based on those treaties, has risen to prominence both as a burgeoning area of legal practice and as a field of scholarly inquiry.[16] *Investment protection* refers to a common set of protections that exist under over 3,000 IIAs. In most IIAs, these protections only apply in the post-admission phase, after a State has decided to admit a foreign investment into its territory.[17] IIAs have led to over 1,300 investor–State arbitrations, almost all in the last 20 years, which have almost exclusively concerned investment protection in the post-admission phase of investments.[18] The existing investment treaty regime, focused on post-admission investment protection and

[13]Ibid.

[14]See e.g. C. Bellak and M. Leibrecht (2024) 'Do the New Brazilian Agreements on Cooperation and Facilitation of Investment Promote Outward Foreign Direct Investment?', *Journal of World Investment & Trade* 25, 535; A. Berger et al. (2013) 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box', *International Economics and Economic Policy* 10, 247 (analysing the effects on FDI of pre-establishment investment liberalization commitments); E.J. Balistreria and Z. Olekseyuk (2024) 'Investment Facilitation for Development Agreement: Potential Gains', working paper of February 2024, https://balistreri.createunl.com/Papers/IFD_2024.pdf; for general reviews of such debates, see e.g. Bellak and Leibrecht, above in this footnote, 547–550; Bonnitcha, Poulsen, and Waibel, supra n. 3, 155–164, 178–180; P. Egger, A. Pirotte, and C. Titi (2023) 'International Investment Agreements and Foreign Direct Investment: A Survey', *The World Economy* 46, 1524, 1552–1561.

[15]Bonnitcha, Poulsen, and Waibel, supra n. 3, 6–7; Y. Soo Kim and C. Lee (2019) 'The Regime Complex for Investment Governance: Overlapping Provisions in PTAs and BITs', in M. Elsig, M. Hahn, and G. Spilker (eds.), *The Shifting Landscape of Global Trade Governance.* Cambridge University Press, 361; K. Raustiala and D.G. Victor (2004) 'The Regime Complex for Plant Genetic Resources', *International Organization* 58, 277, 279.

[16]See generally S.W. Schill (2011) 'W(h)Ither Fragmentation? On the Literature and Sociology of International Investment Law', *European Journal of International Law* 22, 875.

[17]See e.g. Bonnitcha, Poulsen, and Waibel, supra n. 3, 17–18, 103.

[18]On the point that pre-establishment guarantees have rarely featured in existing ISDS cases, see e.g. A. de Mestral (2015) 'Pre-Entry Obligations Under International Law', in M. Bungenberg et al. (ed.), *International Investment Law: A Handbook.* Hart Publishing, 696–698; Bonnitcha, Poulsen, and Waibel, supra n. 3, 104.

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investor–State arbitration, has proved highly politically controversial and is in a state of rethinking and reform.[19]

Investment *facilitation* concerns:

> the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries. It focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and information available to investors, more efficient and effective administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors.[20]

As well as encouraging new investments, investment facilitation is typically understood to include efforts to retain existing investors, to encourage them to expand existing investments, and to maximize the benefits of foreign investment for the host State.[21] In recent years, there has been significant interest in formalizing investment facilitation commitments in treaty form, reflected, for example, in Brazil's CFIAs and the recently concluded WTO IFDA.[22] A handful of other commentators have also noted in passing that the rise of agreements focused on investment facilitation, rather than on the traditional focus of investment protection and ISDS, may represent a paradigm shift in international investment governance.[23]

Investment *liberalization* concerns the power of States 'to allow, restrict, or place conditions on new foreign investment in their own territory'.[24] Traditionally, investment treaties have largely left untouched States' discretion to decide whether to admit foreign investments into their territory. However, a growing proportion of newer investment treaties apply binding obligations, which are aimed at prohibiting nationality-based discrimination and other restrictions on market access, to the pre-admission phase.[25] Treaty-based investment liberalization obligations involve a commitment by States to a degree of openness to foreign investment, typically subject to various exceptions. Investment liberalization commitments are particularly common in the investment chapters of PTAs, as distinct from BITs, with PTAs aiming to embed investment issues within a broader agenda of trade and investment liberalization.[26]

At this point, it is necessary to acknowledge that the distinctions between investment facilitation, investment liberalization, and investment protection are not always entirely clear. First, as the debate on investment facilitation has demonstrated, international organizations

[19]See e.g. C. Moehlecke and R.L. Wellhausen (2022) 'Political Risk and International Investment Law', *Annual Review of Political Science* 25, 485, 501.

[20]UNCTAD (2017) 'Global Action Menu for Investment Facilitation', 4. See also A. Berger et al. (2021) 'Facilitating Sustainable Investment to Build Back Better', *Journal of World Trade* 55, 883, 884; for calls for a narrower concept of investment facilitation, see J. Bonnitcha, S.H. Nikiéma, and T. St John (2023) 'Rethinking National Investment Laws: A Study of Past and Present Laws to Inform Future Policy-Making', International Institute for Sustainable Development, 21, 45.

[21]A. Novik and A. de Crombrugghe (2018) 'Towards an International Framework for Investment Facilitation', OECD Investment Insights 3; N. Jansen Calamita and S. Schacherer (2022) 'Investment Facilitation for Sustainable Development within the Context of the Regional Comprehensive Economic Partnership, the ASEAN Investment Facilitation Framework and the WTO Draft Investment Facilitation Framework for Development', UNESCAP, United Nations, 5.

[22]D. Gaukrodger (2021) 'The Future of Investment Treaties – Possible Directions', OECD Working Papers on International Investment 2021/03, 10–11.

[23]M. Chi (2022) 'Investment Facilitation and Sustainable Development: Insufficiencies and Improvements of ASEAN Investment Treaties', *Journal of International Economic Law* 25, 611, 616–617; UNCTAD, supra n. 12, 2.

[24]Bonnitcha, supra n. 2, 630.

[25]Bonnitcha, Poulsen, and Waibel, supra n. 3, 17–18, 103; M. Lubambo (2019) 'Entry of Foreign Investments: Convergence of International Trade and Investment Law?', PhD thesis. University College London, 59–60.

[26]Kim and Lee, supra n. 15, 373, 377, 380; V. Chornyi, M. Nerushay, and J.-A. Crawford (2016) 'A Survey of Investment Provisions in Regional Trade Agreements', WTO Working Paper ERSD-2016-07, 5–6.

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and commentators do not necessarily use these terms to mean precisely the same thing.[27] Second, some types of State measures, and some investment treaty obligations, may cut across these three categories. For example, discussions of investment screening have highlighted that such measures may raise questions of investment liberalization and investment protection and may also raise difficulties in drawing the exact distinction between the pre- and post-establishment phases.[28] Despite these qualifications, it is submitted that it is possible to distinguish meaningfully between investment facilitation, investment liberalization, and investment protection, as outlined above. Furthermore, the fact the distinctions between these categories are not always water tight does not undermine this research note's essential starting point, namely that the vast majority of existing investment law scholarship has focused on issues of post-admission investment protection and ISDS, and that questions of investment liberalization and investment facilitation are under-researched.

3. The Value-Added of Binding International Commitments

As others have observed, States can, and often do, adopt investment facilitation and investment liberalization measures unilaterally; they do not need to enter into an international agreement to do so.[29] A key question then becomes, what is the value-added of a treaty governing these issues? Commentators have provided a variety of answers to this question. Particularly, in relation to investment facilitation, one contribution of an international legally binding framework may be to coordinate technical assistance and capacity building for developing countries.[30] This consideration has clearly played a major role in shaping the WTO IFDA, which includes an elaborate set of provisions on special and differential treatment and the provision of technical assistance and capacity building for developing countries.[31] Similarly, the EU–Angola SIFA includes a provision on technical assistance and capacity building for Angola, to be overseen by the Agreement's Committee on Investment Facilitation.[32] Nevertheless, as Calamita has argued, the value-added of binding international commitments in securing increased technical assistance and capacity building largely remains to be established.[33]

A related idea is that a legally binding framework governing these issues may be important in creating a forum for cooperation between the treaty parties.[34] As demonstrated in section 5 below, there is an undeniable trend in recent IIAs towards providing for institutional mechanisms for cooperation between the treaty parties, e.g. in the form of joint committees.[35] Also, as Radi has noted, increasingly IIAs add specific content to the common obligation of the treaty parties to promote and facilitate reciprocal investment, e.g. by including a non-exhaustive list of

[27]See e.g. the definitions of investment facilitation discussed in the references cited above n. 20–21, including the call for a narrower, more precise concept of investment facilitation by Bonnitcha, Nikiéma, and St John, supra n. 20, 21, 45.

[28]See K. Wagner (2024) 'Determining the Role of FDI Screening in International Investment Law', in J. Hillebrand Pohl et al. (eds.), *Weaponising Investments*, vol. 2. Springer, 120–121, 125–136.

[29]N. Jansen Calamita (2020) 'Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value', *Journal of International Economic Law* 23, 973, esp. 981, 984; Singh K., 'Investment facilitation: Another Fad in the Offing?', Columbia FDI Perspectives No. 232, 13 August 2018, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/No-232-Singh-FINAL.pdf; Ostřanský and Bonnitcha, supra n. 4, 9–10, 13–14.

[30]K.P. Sauvant (2020) 'The Potential Value-Added of a Multilateral Framework on Investment Facilitation for Development', *Transnational Dispute Management* 17, 1, 14; Calamita and Schacherer, supra n. 21, 75; for earlier suggestions regarding linking investment liberalization commitments with technical assistance and capacity building, see P. Sauvé (2006) 'Multilateral Rules on Investment: Is Forward Movement Possible?', *Journal of International Economic Law* 9, 325, 346–347.

[31]See generally WTO IFDA, arts. 27–36.

[32]EU–Angola SIFA. arts. 42–44; consider also, AfCFTA Investment Protocol, arts. 42–43; Pacific Agreement on Closer Economic Relations Plus, ch. 9, art. 20.

[33]Calamita, supra n. 29, 982–984.

[34]See e.g. ibid. 986–987.

[35]See below section 5.

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cooperative activities to be undertaken.[36] It is notable that such provisions place certain (typically qualified) obligations on the home State to cooperate with the host State in promoting and facilitating investment.[37] Yet the value-added of a legally binding framework in supporting cooperative activities is not obvious. Many of the same activities (e.g. cooperation between domestic regulatory authorities or investment promotion agencies, information exchange) could be undertaken without a legally binding framework. Non-legally binding Memoranda of Understanding (MoUs), which include a future work plan and mechanisms for cooperation between domestic authorities, are frequently used to regulate investment-related issues. A good example from recent practice are the so-called 'International Green Economy Collaborations', which address various investment-related issues and have been undertaken as non-legally binding MoUs.[38]

Another argument is that an international treaty can contribute by creating obligations of home States, e.g. regarding transparency of home State support measures for outwards investments, or investor obligations imposed by home States, including potentially making home State support for outwards investments conditional on meeting responsible business conduct standards.[39] There is a plausible argument that some of these issues (e.g. home State imposition of investor obligations) may be under-addressed if investment facilitation issues were only regulated on a unilateral basis. Yet to date the new wave of investment facilitation-focused international agreements have not led to a notable strengthening of investor obligations, including from the home State side.[40] In principle, IIAs could also regulate home support measures in other significant ways, e.g. if States agreed to only make support available to sustainable investments and to phase out support for unsustainable investments.[41] However, such commitments are not yet found in IIAs. In relation to investment liberalization, as Vandevelde envisaged some time ago, it is conceivable that home States might assume obligations aimed at preserving the openness of their policies towards outwards investment flows, e.g. committing to allowing their nationals to establish investments in the territory of a treaty partner.[42] However, recent developments concerning outwards investment screening on the grounds of national security move in the opposite direction.[43]

A further argument made by proponents of international regulation of investment facilitation or investment liberalization is that international rules can help 'incentivize, undergird, and guide reforms at the national and subnational levels'.[44] There is little empirical evidence provided to support this claim[45] – instead, it essentially amounts to an assertion that domestic opposition to regulatory reforms may be overcome by a government being able to point to an international

[36]Radi, supra n. 1, 63; see e.g. Regional Comprehensive Economic Partnership Agreement, arts. 10.16–10.17. China–Ecuador FTA, arts. 9.1–9.2.

[37]K.P. Sauvant and E. Gabor (2021) 'Facilitating Sustainable FDI for Sustainable Development in a WTO Investment Facilitation Framework: Four Concrete Proposals', *Journal of World Trade* 55, 261, 281 (highlighting Morocco–Nigeria BIT, art. 25). See also Rwanda–Central African Republic BIT, art. 19(1), (3).

[38]See generally E. Aisbett et al. (2023) 'International Green Economy Collaborations: Chasing Mutual Gains in the Energy Transition', *Energy Research & Social Science* 104, 103249. Other examples include the non-binding agreements concerning critical raw materials supply chains that the EU has concluded with numerous partners: V. Crochet and W. Zhou (2024) 'Critical Insecurities? The European Union's Strategy for a Stable Supply of Minerals', *Journal of International Economic Law* 27, 147, 162–163, and the non-binding ASEAN Investment Facilitation Framework (2021).

[39]Sauvant, supra n. 30, 10–13; Sauvant and Gabor, supra n. 37, 281–283; Calamita and Schacherer, supra n. 21, 75.

[40]See e.g. WTO IFDA, art. 37; EU–Angola SIFA, art. 34. Note that, as distinct from investment treaties, there has been a strengthening of home State obligations imposed by domestic or EU-level human rights due diligence laws: see e.g. Ostřanský and Bonnitcha, supra n. 4, 24.

[41]See e.g. Ostřanský and Bonnitcha, supra n. 4, 12.

[42]K.J. Vandevelde (1998) 'The Political Economy of a Bilateral Investment Treaty', *American Journal of International Law* 92, 621, 630, 637.

[43]See e.g. UNCTAD, 'Outward FDI Policies: Promotion and Facilitation – Regulation and Screening' (Investment Policy Monitor issue 27, 2024) 13–16.

[44]Berger et al., supra n. 20, 884.

[45]Calamita, supra n. 29, 984.

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agreement which requires it to undertake such reforms.[46] In relation to investment liberalization commitments, existing studies suggest that such commitments only rarely go beyond States' pre-existing domestic policies.[47] In other words, international commitments on investment liberalization that require States to undertake domestic regulatory reforms have been the exception rather than the rule.[48] Yet there are instances where investment liberalization commitments have been associated with changes in States' applied policies. Examples include increased investment screening thresholds applied to investors from PTA partners,[49] exemptions for nationals of PTA partners from specific measures aimed at foreigners,[50] and, on occasion, IIAs being used as an argument to justify opening restricted sectors to foreign investors.[51] The trade in services literature has also identified various instances where PTA commitments have led to changes in domestic policies being phased in over time, often in respect of mode 3 services (provision via a commercial presence).[52]

In relation to investment liberalization, international commitments could also have an important 'locking in' effect if they bind States to existing levels of openness and prevent the future introduction of measures more restrictive of foreign investment.[53] Indeed, the aim of preventing future policy reversals is a key reason for the use of negative-list agreements, standstill obligations, and so-called ratchet mechanisms which prevent reversals of any future liberalization that occurs of non-conforming measures.[54] Arguably, this locking-in effect may perform an important function in establishing a relatively predictable baseline of market access around which foreign investors can plan.[55] In contrast, it is less clear whether such a locking-in effect is significant in relation to investment facilitation commitments.

[46]Sauvant, supra n. 30, 10.

[47]See e.g. Y. Lo Ko and T. Jung Park (2023) 'Ineffective Trade in Service and Investment Agreements', *Journal of World Trade* 57, 277, 278, 288, 292; B. Gootiiz et al. (2020) 'Services', in A. Mattoo, N. Rocha, and M. Ruta (eds.), *Handbook of Deep Trade Agreements*. World Bank Group, 138. Bonnitcha, Poulsen, and Waibel, supra n. 3, 218.

[48]See e.g. Ko and Park, supra n. 47, 291–292; J.A. Marchetti and M. Roy (2009) 'Services Liberalization in the WTO and in PTAs', in J.A. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services*. Cambridge University Press, 94; M. Roy, J. Marchetti, and H. Lim (2007) 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?', *World Trade Review* 6, 155, 178–179.

[49]E.g. both Australia and New Zealand apply different investment screening thresholds for investors from certain PTA partners. See e.g. Australian Government, 'Monetary Thresholds', https://foreigninvestment.gov.au/guidance/general/monetary-thresholds and K. Docherty and T. Baker (2024) 'Foreign Direct Investment Reviews 2024: New Zealand', www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-new-zealand.

[50]See e.g. D. Atanasova (2022) 'The Impact of Investment Treaties on the Rule of Law in Singapore', in N. Jansen Calamita and A. Berman (eds.), *Investment Treaties and the Rule of Law Promise*. Cambridge University Press, 189 (highlighting the example of Singapore exempting nationals of PTA partners from an additional stamp duty obligation regarding residential property that applied to foreigners). Note also that, due to PTA commitments, New Zealand exempts Singaporean nationals from restrictions on foreigners, who are not resident in New Zealand, purchasing residential property. See e.g. MFAT, 'Common questions' www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-singapore-closer-economic-partnership/common-questions#:~:text=Why%20can%20Singaporeans%20still%20buy,existing%20commitments%20in%20the%20CEP.

[51]See J. Ostřanský and F. Pérez Aznar (2023) *National Governance and Investment Treaties: Between Constraint and Empowerment*. Cambridge University Press, 261–262 (documenting evidence in relation to the Argentine Congress in the 1990s of IIAs being used as an argument in favour of investment liberalization measures).

[52]See Roy, Marchetti, and Lim, supra n. 48, 178, 180–83.

[53]On the locking-in effect, see e.g. Marchetti and Roy, supra n. 48, 96; Bonnitcha, Poulsen, and Waibel, supra n. 3, 217–218; Ko and Park, supra n. 47, 287–88; WTO (2019) *World Trade Report 2019: The Future of Services Trade*, 11, 154, 162.

[54]On negative list, standstill and ratchet mechanisms, see e.g. Ko and Park, supra n. 47, 286; S. Yeon Kim and M.S. Manger (2017) 'Hubs of Governance: Path Dependence and Higher-Order Effects of Preferential Trade Agreement Formation', *Political Science Research and Methods* 5, 467, 472–473. In a study of EU and US PTAs with developing countries, Baccini and Urpelainen find significant evidence that such PTAs are used by leaders in developing countries to lock-in economic reforms: see L. Baccini and J. Urpelainen (2014) *Cutting the Gordian Knot of Economic Reform: When and How International Institutions Help*. Oxford University Press, esp. 185–186, 202–203, 216.

[55]See Berger and others, supra n. 14, 250; T. Pollan (2006) *Legal Framework for the Admission of FDI*. Eleven Publishing, 175. OECD (2017) *Services Trade Policies and the Global Economy*, 70–71.

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In the context of investment facilitation, an international framework is also argued to allow for the development of 'an inventory and a benchmark of good practices'.[56] Yet, as Calamita has argued, national experiences can be shared in the absence of a legally binding international agreement on investment facilitation and there are significant dangers in formalizing 'best practices' that are not supported by empirical evidence.[57] Similarly, Fauchald has highlighted the dangers of hardening investment liberalization policies into binding international commitments, noting:

> Countries need flexibility to adjust FDI incentives and regulation according to changing needs. This is in particular so for LDCs and low-income countries that experience significant variation in conditions. Moving in the direction of increased use of IIAs would be challenging from a policy space perspective, since IIAs may be hard to renegotiate in cases of changed circumstances and some IIAs prevent countries from applying amendments retroactively.[58]

Overall, there are no clear-cut answers regarding the value-added of an international legally binding framework governing investment facilitation and investment liberalization issues. Nevertheless, this seems likely to remain a key question, the answers to which will likely be context specific.

4. The Impact of International Commitments on States' Applied Policies

Another set of questions concerns the impact of investment facilitation and investment liberalization commitments on States' applied policies. In other words, given States are increasingly assuming treaty-based obligations covering investment facilitation and investment liberalization issues, what impact (if any) do such obligations have on States' behaviour? To a significant degree, these issues require empirical study, for example through case studies, which are beyond the scope of this research note. Furthermore, claims about the impact of investment facilitation and liberalization obligations should be treated with some caution given that the existing empirical literature – although not focusing specifically on these types of commitments – has only found limited evidence of IIA obligations being internalized within government decision-making processes.[59]

With those caveats, one can nevertheless identify some broad avenues for future inquiry. For example, how (if at all) do increasingly common investment facilitation obligations, e.g. obligations to provide investors a right to comment on proposed laws and regulations[60] or to seek review of administrative decisions,[61] impact States' behaviour? Do such obligations, as some commentators fear, end up skewing domestic regulatory processes disproportionately towards the

[56]Sauvant, supra n. 30, 9–10; Calamita and Schacherer, supra n. 21, 75.

[57]Calamita, supra n. 29, 985.

[58]O.K. Fauchald (2021) 'International Investment Law in Support of the Right to Development?', *Leiden Journal of International Law* 34, 181, 196. See also Ostřanský and Bonnitcha, supra n. 4, 9–10 (on the risks in terms of future policy space involved in assuming treaty-based investment liberalization obligations).

[59]See generally N.J. Calamita and A. Berman (2022) 'Assessing the Rule of Law Promise: The Impact of Investment Treaties on National Governance', in N.J. Calamita and A. Berman (eds.), *Investment Treaties and the Rule of Law Promise*. Cambridge University Press; J. Bonnitcha and Z.P. Williams (2024) 'The Impact of Investment Treaties on Domestic Governance in Developing Countries', *Law & Policy* 46, 140, 141, 161; M. Sattorova (2018) *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*. Hart Publishing.

[60]See e.g. WTO IFDA, art. 10.3; EU–Angola SIFA, art. 8(3)–(4); EU–New Zealand FTA, art. 22.7(1); UNCTAD finds that 30% of IIAs concluded between 2015 and 2023 include a right to comment on proposed regulatory measures: UNCTAD (2024) *World Investment Report 2024: Investment Facilitation and Digital Government*, United Nations, 130.

[61]See e.g. WTO IFDA, art. 20; EU–China CAI section III(2), art. 6; Türkiye–UAE CEPA, art. 10.5. See also UNCTAD, supra n. 12, 4, 7.

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interests of foreign investors?[62] Or is impact of such obligations limited, similar to existing findings concerning the impact of other IIA obligations?[63] In this regard, the qualified language often found in such commitments seems significant, e.g. that an opportunity to comment on proposed measures is to be afforded '[t]o the extent practicable and in a manner consistent with … [each Party's] legal system for adopting measures',[64] or that a right to review is not be construed 'to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system'.[65] Do all States assuming such obligations have sufficient bureaucratic capacity to comply with them?[66] The emphasis on capacity building and technical assistance in recent investment facilitation agreements would suggest not.

In the investment liberalization context, there is a general shortage of empirical work concerning whether such obligations lead to genuine liberalization, i.e. changes in States' applied policies.[67] As noted above, existing studies suggest that investment liberalization commitments typically bind reforms that States have already adopted unilaterally at the domestic level, although there are some exceptions.[68] While binding or locking-in reforms already adopted at the domestic level could be an important effect of treaties,[69] there is also a lack of empirical evidence regarding whether and how this effect operates in practice. For instance, in an interview-based case study focused on Myanmar, while Bonnitcha found a general awareness among specialized government officials of the potential for investment liberalization commitments to constrain Myanmar's ability to restrict new foreign investment, he also found a lack of evidence that IIA-based liberalization commitments had caused Myanmar to refrain from imposing such restrictions.[70] More work is needed on whether, as an empirical question, treaty-based investment liberalization commitments discourage policymakers from rolling back existing levels of openness to foreign investment.

Another question that would benefit from further empirical investigation is whether investment liberalization commitments are applied on a discriminatory basis, i.e. only to the relevant treaty partner.[71] Some studies – drawing either on econometric models or qualitative case studies – have suggested that the investment liberalization aspects of PTAs are often applied in a discriminatory manner, with the benefits only afforded to investors from the relevant treaty partner, in turn leading other States to seek a PTA with the host State that provides equivalent levels of market access for their investors.[72] Relatedly, others have found in the trade in services

[62]Bonnitcha, Nikiéma, and St John, supra n. 20, 45; J. Coleman et al., 'What Do We Mean by Investment Facilitation?', Columbia Center on Sustainable Investment, 21 February 2018, https://ccsi.columbia.edu/news/what-do-we-mean-investment-facilitation.

[63]See above n. 59. For claims about the possible effects of transparency provisions in IIAs, without empirical evidence provided, see R. Echandi (2011) 'What Do Developing Countries Expect from the International Investment Regime?', in J.E. Alvarez and K.P. Sauvant (eds.), *The Evolving International Investment Regime*. Oxford University Press, 14–15.

[64]WTO IFDA, art. 10.3; EU–Angola SIFA, art. 8(3)–(4).

[65]WTO IFDA, art. 20.2; EU–China CAI section III(2), art. 6(4).

[66]Ostřanský and Bonnitcha, supra n. 4, 15.

[67]See e.g. Bonnitcha, supra n. 2, 653; Bonnitcha, Poulsen, and Waibel, supra n. 3, 218. Regarding trade in services generally, see e.g. Roy, Marchetti, and Lim, supra n. 48, 178; C. Fink (2009) 'PTAs in Services: Friends or Foes of the Multilateral Trading System?', in J.A. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services*. Cambridge University Press, 143–144.

[68]See above text at n. 47–48.

[69]See above text at n. 53–55.

[70]J. Bonnitcha (2022) 'The Impact of Investment Treaties on the Rule of Law in Myanmar', in N. Jansen Calamita and A. Berman (eds.), *Investment Treaties and the Rule of Law Promise*. Cambridge University Press, 142–143, 152–153; Bonnitcha and Williams, supra n. 59, 152–153.

[71]For this point in relation to services commitments in PTAs generally, see Fink, supra n. 67, 144; J. Francois and B. Hoekman (2010) 'Services Trade and Policy', *Journal of Economic Literature* 48, 642, 678.

[72]L. Baccini and A. Dür (2015) 'Investment Discrimination and the Proliferation of Preferential Trade Agreements', *Journal of Conflict Resolution* 59, 617, 622–625; M.S. Manger (2009) *Investing in Protection: The Politics of Preferential Trade Agreements between North and South*. Cambridge University Press, 3–4, 221–222.

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context, and particularly in relation to mode 3 services (commercial presence), that preferential treatment of PTA partners occurs more often than might be expected, contrary to the conventional wisdom that it is difficult for States to maintain different regulatory regimes for different treaty partners.[73] The examples mentioned above of increased investment screening thresholds for nationals of PTA partners or nationals of PTA partners being exempted from certain measures,[74] suggest that investment liberalization commitments are sometimes applied on a discriminatory basis.

Similarly, in relation to investment facilitation, future empirical research might consider whether such commitments are sometimes applied on a preferential or discriminatory basis only for the benefit of investors from the relevant treaty partner. At first glance, this may seem unlikely, both as investment facilitation measures are often linked to the generally applicable regulatory framework of the host State,[75] and as the WTO IFDA is to be applied by its parties on an unconditional most-favoured nation (MFN) basis, for the benefit of investors from all WTO members.[76] Yet, on the latter point, there is an exception to the MFN obligation for superior treatment resulting from an 'international investment agreement'.[77] Furthermore, certain types of investment facilitation commitments undertaken at the bilateral level could clearly involve preferential treatment of investors from treaty partners – for example, commitments regarding visa facilitation and temporary movement of business persons.[78]

Overall, advancing this aspect of a future research agenda will require researchers to track how (if at all) treaty-based investment facilitation and investment liberalization obligations are affecting States' behaviour.

5. Governance and Dispute Settlement Frameworks: Moving Away from Investor–State Arbitration and Towards Frameworks for Ongoing Cooperation

This section argues that investment facilitation and investment liberalization commitments differ from traditional investment protection obligations in that the former are not routinely made subject to investor–State arbitration. Instead, investment facilitation and investment liberalization commitments are frequently only subject to State–State dispute settlement, and there is far greater emphasis on cooperation between domestic authorities, capacity building, and technical assistance. Despite this emphasis, it will be acknowledged throughout this section that there is a shortage of existing knowledge regarding how mechanisms for State–State cooperation over investment facilitation or investment liberalization issues have operated in practice (e.g. whether such mechanisms have facilitated meaningful cooperation or only exist on paper).

The above-mentioned shift is the clearest in relation to agreements focused on investment facilitation. In such agreements, the primary emphasis is on cooperative mechanisms, with provision for focal points or ombudspersons and joint committees, which are given wide-ranging mandates to solve problems investors may encounter, provide information in response to requests, and pursue a range of cooperative activities.[79] The provisions in these agreements for

[73]Roy, Marchetti, and Lim, supra n. 48, 184–185; Marchetti and Roy, supra n. 48, 94–96. On the benefits of services PTAs being applied in a preferential manner, and the interaction with 'rules of origin' for services, see generally Fink, supra n. 67.

[74]See above text at notes 49–50.

[75]See UNCTAD, *World Investment Report 2024*, supra n. 60, 135.

[76]WTO IFDA, art. 5.1. Note however that footnote 5 clarifies that the IFDA does not create obligations nor rights for WTO Members that are non-parties to the Agreement. See R. Jose (2024) 'Investment Facilitation for Development Agreement: A Reader's Guide', IISD, 4–5.

[77]WTO IFDA, art. 5.2(a).

[78]UNCTAD finds that 37% of IIAs signed between 2015 and 2023 include provisions addressing entry and stay of personnel: *World Investment Report 2024*, supra n. 60, 130.

[79]See e.g. EU–Angola SIFA, arts. 22–23, 43–44; WTO IFDA, arts. 22, 26, 39; Brazil–India CFIA, arts. 13–14; Brazil–UAE CFIA, arts. 18–19; UNCTAD finds that of IIAs signed between 2015 and 2023, 46% include institutional frameworks for cooperation and 17% include focal points for investors: UNCTAD, *World Investment Report 2024*, supra n. 60, 130.

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cooperation and information exchange go well beyond simply being a means of investor–State dispute prevention or management, instead they often include a significant agenda aimed at improving the investment climate, disseminating information about investment opportunities, and ultimately facilitating reciprocal investment.[80] For example, Brazil's CFIAs typically include a provision on exchange of information between the parties concerning 'business opportunities, procedures, and requirements for investment', which covers a wide range of specified topics,[81] an obligation of each party to disseminate to the private sector information concerning the investment environment and opportunities in the other treaty party,[82] and sometimes a provision for cooperation between investment promotion agencies.[83] Additionally, in Brazil's CFIAs the functions of the Joint Committee typically include discussing and disseminating 'opportunities for the expansion of mutual investment' and coordinating a mutually agreed agenda for investment cooperation and facilitation.[84] In some (but not all) of Brazil's CFIAs, an annex sets out a specific further agenda to be addressed through the Joint Committee, and such further negotiations may result in additional protocols to the agreement,[85] with a few such further agreements reportedly having been concluded.[86]

Similarly, in the Investment Protocol to the AfCFTA, the national focal points are envisaged to provide a variety of information to investors from other Parties.[87] The new Pan-African Trade and Investment Agency is also given a wide-ranging mandate, which includes assisting 'State Parties, their investment promotion agencies and their private sector through … providing technical and other support for the promotion and facilitation of investment', and 'facilitating coordination, interaction and dialogue between and among national focal points, investment promotion agencies and other relevant stakeholders to enable the sharing of information with respect to … investment opportunities, peer learning and good practices'.[88] These are not isolated developments. For instance, recent PTAs that include a dedicated chapter on investment promotion and facilitation frequently establish a committee, which is given a mandate to undertake a variety of cooperative activities aimed at promoting and facilitating reciprocal investment.[89] In the EU–Angola SIFA, the Committee on Investment Facilitation's tasks include considering 'ways to further enhance investment relations between the Parties'.[90] In the WTO IFDA, where the implementation of certain provisions by developing countries is linked to the provision of technical assistance and capacity building, there is a strong emphasis on cooperation.[91]

[80]Suggestions that IIAs could regulate such issues and that transparency obligations (e.g. regarding investment opportunities) could be placed on home states as well as host states are not new: see Vandevelde, supra n. 42, 638. Sauvé, supra n. 30, 347.

[81]See e.g. Brazil–UAE CFIA, art. 20(1); Brazil–Ethiopia CFIA, art. 19; 2015 Brazil Model CFIA, art. 19.

[82]See e.g. Brazil–UAE CFIA, art. 22; Brazil–Ethiopia CFIA, art. 21; Brazil–Guyana CFIA, art. 22; Brazil Model CFIA, art. 21.

[83]Brazil–UAE CFIA, art. 23; Brazil–Ethiopia CFIA, art. 22; Brazil–Guyana CFIA, art. 23.

[84]E.g. Brazil–UAE CFIA, art. 18(4)(b)-(c), 26; Brazil–India CFIA, art. 13.4(b)(c); Brazil Model CFIA, art. 17(4)(b)(c). See also Mercosur–Singapore FTA, art. 9.13(3)(b)(c); Morrocco–Nigeria BIT, arts. 4(b) and 5.

[85]E.g. Brazil–Malawi CFIA, art. 7 and annex 1. See R. Polanco and C. Rodríguez-Chiffelle (2023) 'Investment Facilitation at the WTO: What's Old? What's New? What's Missing?', in J. Chaisse and C. Rodríguez-Chiffelle (eds.), *The Elgar Companion to the World Trade Organization*. Edward Elgar Publishing, 318.

[86]See M.R. Sanchez Badin and F. Morosini (2017) 'Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)', in F. Morosini and M.R. Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South*. Cambridge University Press, 225, fn27.

[87]AfCFTA Investment Protocol, art. 9(1)–(2). See also WTO IFDA, art. 22.

[88]AfCFTA Investment Protocol, art. 42(3)–(4).

[89]See e.g. India–EFTA TEPA, arts. 7.3–7.4 and annex 7.A; UAE–India CEPA, art. 12.3–12.5; UAE–Indonesia CEPA, arts. 10.3–10.6; Türkiye–UAE CEPA, art. 10.9; UAE–Cambodia CEPA, arts. 10.6–10.8; China–Cambodia FTA, art. 8.5.

[90]EU–Angola SIFA, art. 44(1)(a).

[91]See generally WTO IFDA, arts. 27–36.

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In a nutshell, this forwards-looking and cooperative focus of agreements focused on investment facilitation contrasts sharply with traditional investment protection-focused IIAs, where there were typically no significant treaty institutions for cooperation established and most issues were delegated to investor–State arbitral tribunals to decide.[92] Linking back to section 4, there is an important empirical question regarding the extent to which these new provisions for cooperation and information exchange are being used – i.e. whether they are, in practice, leading to significant cooperation between treaty parties. While agreements focused on investment facilitation generally do not make such obligations subject to investor–State arbitration, they frequently provide, as a last resort, for binding State–State arbitration or adjudication.[93] It is worth emphasizing that provision for treaty-based committees or for State–State arbitration are not new, rather they have existed in IIAs for decades, and there are limitations in existing, publicly available information regarding how such mechanisms have operated (e.g. how regularly joint committees have been convened, whether they have facilitated meaningful cooperation or only exist on paper). This lack of information regarding how provisions for State–State cooperation have functioned in practice is also true of Brazil's innovative CFIAs, only three of which have entered into force.[94]

Investment liberalization obligations are also frequently only subject to State–State dispute settlement. First, there are a significant number of PTAs that include investment liberalization obligations, which are subject to State–State dispute settlement, but do not include an ISDS mechanism or traditional investment protection obligations. Prominent examples include the EU–UK TCA and the EU–Japan EPA.[95] Second, even where the same parties also conclude a parallel BIT that includes mechanisms for ISDS, frequently the BIT will only cover post-establishment issues, leaving pre-establishment investment liberalization issues solely covered by the PTA and State–State dispute settlement. Examples include the EU–Singapore Investment Protection Agreement (IPA), the EU–Vietnam IPA,[96] and numerous BITs of the United Arab Emirates (UAE) that co-exist with PTAs between the same parties which cover investment liberalization issues.[97] Third, even where a PTA or BIT provides for ISDS, there is no guarantee that the ISDS mechanism covers pre-establishment obligations. For example, in the investment chapters of CETA and the new EU–Chile Advanced Framework Agreement, the investment liberalization obligations are excluded from the treaty's 'investment court system'

[92]UNCTAD, supra n. 12, 8. See also Ostřanský and Bonnitcha, supra n. 4, 29.

[93]See e.g. WTO IFDA, art. 44; Brazil–India CFIA, art. 19; Brazil–UAE CFIA, art. 25; EU–Angola SIFA, arts. 37(4), 38 (note that this agreement does not contain advance consent to State–State arbitration, but requires the respondent to consent in each dispute and provides for alternative remedies where the respondent rejects the request for arbitration).

[94]See e.g. A.R.F. da Silva and R.R. Codeço (2024) 'Brazilian CFIA: Evolution Towards the Traditional?', in N. Monebhurrun, C. Olarte-Bácares, and M.A. Velásquez-Ruiz (eds.), *International Investment Law and Arbitration from a Latin American Perspective.* Springer, 47 (arguing that the practical results of the governance structure in Brazil's CFIAs 'are yet to be seen').

[95]EU–UK TCA, arts. 127–133, EU–Japan EPA, arts. 8.6–8.13. Beyond these examples, the EU has concluded a significant number of economic and cooperation treaties (e.g. association agreements, PTAs) that include commitments concerning investment liberalization and investment promotion, but which do not include ISDS nor common investment protection obligations. These agreements vary as to whether they provide for legally binding, or only political forms, of State–State dispute settlement: see generally A. Dimopoulos (2011) *EU Foreign Investment Law.* Oxford University Press, 146–194; S. Schacherer (2021) *Sustainable Development in EU Foreign Investment Law.* Brill Nijhoff, 195–199. An additional reason why the EU may favour the conclusion of agreements with State–State dispute settlement only is that issues of investor–State arbitration have been found to be issues of shared competence and hence to require approval by EU Member States: see e.g. Schacherer, ibid., 169–170.

[96]EU–Singapore IPA (coexists with EU–Singapore FTA, ch. 8, sec C, which addresses 'Establishment'); EU–Vietnam IPA (coexists with EU–Vietnam FTA, ch. 8, sec B, which addresses 'Liberalisation of Investment').

[97]See e.g. 2024 UAE–India BIT, art. 2.2 (coexists with India–UAE CEPA, ch. 8, which covers mode 3 trade in services); 2023 UAE–Türkiye BIT, art. 2(2) (coexists with Türkiye–UAE CEPA, ch. 8, which covers mode 3 trade in services); UAE–Indonesia BIT, art. 2(2) (coexists with UAE–Indonesia CEPA, ch. 8, which covers mode 3 trade in services); UAE–Israel BIT (coexists with UAE–Israel CEPA, ch. 8, which covers mode 3 trade in services).

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but remain subject to State–State dispute settlement.[98] Similarly, while several IIAs concluded by ASEAN include pre-establishment investment liberalization commitments, these are excluded from the scope of ISDS procedures.[99] Fourth, as Lubambo has shown, even where investment liberalization obligations are in principle subject to ISDS, there are a variety of procedural impediments that may prevent potential claimants bringing ISDS claims regarding the admission or establishment of investments, including the requirement common to numerous IIAs that, in order to submit a claim, the investor must show loss or damage caused by the alleged treaty breach.[100] In short, unlike investment protection obligations – but similarly to investment facilitation obligations – investment liberalization obligations are not routinely made subject to ISDS.

Like investment facilitation commitments, investment liberalization obligations are also a common focus of the future work programmes or agendas for cooperation that are increasingly built into IIAs. As Park has demonstrated, in IIAs that contain investment liberalization obligations, the lists of reservations and non-conforming measures that are central to the operation of such obligations are often not completed when treaty negotiations are concluded.[101] Instead, many IIAs are missing these reservation lists, and this is frequently addressed by providing for a future work programme that includes a commitment to renegotiate, e.g. on completing the lists of reservations and non-conforming measures.[102] Building on Park's work, and as touched on above, the more difficult question is whether such commitments to renegotiate are acted upon? That is, is provision for future work programmes leading to further cooperation between the treaty parties, e.g. completion of missing schedules of reservations? Or is the norm that such commitments to renegotiate frequently remain unfulfilled, perhaps due to lack of bureaucratic capacity or due to an unwillingness to liberalize domestic investment regimes?[103] More empirical research is needed on these sorts of issues. Such future empirical research could, for example, use interviews or surveys with treaty negotiators and other officials to study how particular IIAs have operated in practice. At this stage, it is only possible to point to certain examples. For instance, the investment chapter of the ASEAN–Australia–New Zealand FTA, originally concluded in 2009, featured a future work programme that included completing the schedules of reservations for the chapter within five years of entry into force, unless otherwise agreed.[104] Yet it was only with the Second Protocol to amend the Agreement, concluded in 2022 after a general upgrade of the FTA, that the schedules were finalized.[105] However, contrary to this example, there are numerous other instances where commitments to negotiate on investment liberalization obligations appear to remain dormant – e.g. where missing schedules of reservations have not been completed, despite a commitment to do so in future.[106] Thus, even in those IIAs that contain

[98]CETA esp., art. 8.18(1); EU–Chile Advanced Framework Agreement, arts. 10.24(1), 10.7(1)–(2), 10.9(1)–(2).

[99]See e.g. ASEAN Comprehensive Investment Agreement (ACIA), art. 32(a); ASEAN–Australia–New Zealand FTA (as amended) ch. 11, arts. 21(a), 3–6; ASEAN–Japan EPA (as amended), art. 51.13(6)(a); ASEAN–Korea Investment Agreement, art. 18(1).

[100]See generally M. Lubambo (2020) 'Entry Rights and Investments in Services: Adjudicatory Convergence between Regimes?', in S. Gáspár-Szilágyi, D. Behn, and M. Langford (eds.), *Adjudicating Trade and Investment Disputes*. Cambridge University Press, 99–105. Note also that certain IIAs limit awards regarding 'an attempt to make an investment' to sunk costs 'sustained in the attempt to make the investment': e.g. CPTPP art. 9.29(4).

[101]T.J. Park (2022) *Incomplete International Investment Agreements: Problems, Causes and Solutions*. Edward Elgar Publishing, 44–45, 48–54; T.J. Park (2021) 'Missing Reservation Lists in China's International Investment Agreements', *Asian Journal of WTO & International Health Law and Policy* 16, 99.

[102]See generally Park, *Incomplete International Investment Agreements*, supra n. 101, 138–141, 144–149.

[103]See ibid. 99–100, 108–111.

[104]See ASEAN–Australia–New Zealand FTA (original version), ch. 11, art. 16.

[105]For the text of the schedules, see www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/Pages/official-documents.

[106]See e.g. Australia–Malaysia FTA, art. 12.16; New Zealand–Malaysia FTA, art. 10.17; ASEAN–India Investment Agreement, art. 6; India–Malaysia FTA, art. 10.17. Searches of relevant government websites provided no indication that the relevant schedules of reservations had been completed for these IIAs. This may be affected by the fact that some of

a future work programme concerning investment liberalization issues, the extent to which such agreements actually function as frameworks for ongoing cooperation between the parties remains unclear and warrants future empirical investigation.

Besides future work programmes focused on completing missing schedules of reservations or non-conforming measures, there are several other reasons to think that treaty-based investment liberalization commitments might sometimes function as frameworks for ongoing cooperation between the treaty parties. For example, many Japanese IIAs create a Committee on Investment and give the Committee a role in reviewing the parties' non-conforming measures that derogate from investment liberalization commitments.[107] In numerous Japanese IIAs, the Committee on Investment's functions include reviewing the parties' existing non-conforming measures 'for the purpose of contributing to the reduction or elimination of such exceptional measures', and discussing any future non-conforming measures 'for the purpose of encouraging favourable conditions for investors of the Parties'.[108] Such an approach, based on discussions within a treaty committee, is very different to the arbitration-centric approach of traditional investment protection-focused IIAs.[109] In future, it would be helpful to study empirically whether such provisions are leading to meaningful cooperation between the treaty parties over investment liberalization issues. A related aspect of investment liberalization commitments that could involve IIAs functioning as frameworks for ongoing cooperation are the qualified commitments in certain agreements to reduce or eliminate non-conforming measures over time.[110] Again, the challenging empirical question that warrants future investigation is whether such commitments have any practical bite – e.g. do they ever cause States to engage in additional liberalization over time, or, as seems more likely, are they largely hortatory? A final instance of IIAs involving ongoing cooperation over investment liberalization issues concerns the evolution of the prohibition on performance requirements in the ASEAN Comprehensive Investment Agreement (ACIA). The initial agreement, concluded in 2009, included a relatively limited provision, incorporating by reference WTO commitments, with an agreement to undertake an assessment of the need for additional commitments.[111] Subsequently, the Fourth Protocol to amend the ACIA, signed in 2020, incorporates a more extensive, NAFTA-style provision on performance requirements, with a commitment to review annually the possibility of also prohibiting headquarters localization requirements.[112] However, the new prohibition on performance requirements does not apply immediately; rather, it depends upon members concluding discussions on modifying their schedules of reservations.[113] Again, this suggests that future empirical research could investigate whether, and under what conditions, IIAs may operate as frameworks for ongoing cooperation

these IIAs overlap with other agreements between the same parties; for additional examples of missing reservation lists, see Park, *Incomplete International Investment Agreements*, supra n. 101, 49–54.

[107]See e.g. Australia–Japan EPA, art. 14.18(2)(b); EU–Japan EPA, art. 8.4(2)(a); UK–Japan CEPA. art. 8.4(2)(a).

[108]See e.g. ASEAN–Japan EPA (as amended), art. 51.22(b)(c); Japan–Vietnam BIT, art. 20(1)(b)(c); Japan–Korea BIT, art. 20(1)(b)(c); Japan–Myanmar BIT, art. 24(1)(b)(c); Japan–Peru BIT, art. 24(1)(b)(c); Japan–Angola BIT, art. 26(1)(b)(c); Japan–Uzbekistan BIT, art. 22(1)(b)(c).

[109]Consider also the Singapore–Mercosur FTA, which includes investment liberalization commitments, where the Subcommittee on Investment's functions include to 'discuss relevant subjects for commercial presence … and share opportunities for the expansion of commercial presence, in consultations with private sector and civil society when appropriate': Singapore–Mercosur FTA, art. 9.13(3)(b). See also the suggestion of Vandevelde that IIAs should contain 'an obligation to negotiate reductions in discriminatory measures at fixed intervals': K.J. Vandevelde (2000) 'The Economics of Bilateral Investment Treaties', *Harvard International Law Journal* 41, 469, 500.

[110]See e.g. Australia–Japan EPA, art. 14.10(5); EU–Japan EPA, art. 8.5(1); ASEAN–Japan EPA (as amended), art. 51.7(5); Japan–Korea–China Investment Agreement, art. 3(3); China–Korea FTA, art. 12.3(3); ACIA (as amended), art. 9(4). In some agreements, a review of the parties' schedules of reservations, with the aim of reducing reservations, is tied to a general review of the PTA: India–Korea FTA, art. 10.9(2); India–Malaysia FTA, art. 10.13(2).

[111]ACIA (original), art. 7(1)-(2).

[112]See Fourth Protocol to amend ACIA, art. 1.

[113]Fourth Protocol to amend ACIA, art. 4.

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over investment liberalization issues. Given that there is often a lack of publicly available information concerning how the above treaty-based institutions and processes (e.g. joint committees) operate in practice, the future research proposed here could incorporate interviews or surveys with treaty negotiators and other relevant officials to develop understanding of the practice of particular States and particular IIA relationships. As just outlined, a core question that future research should interrogate is the extent to which treaty-based commitments on investment facilitation and/or investment liberalization lead to meaningful cooperation between treaty parties.

6. Conclusion: Charting a Research Agenda beyond Investment Protection and ISDS

The aim of this research note has been to help push the scholarly field of international investment law beyond its current overwhelming focus on investment protection and ISDS. To this end, it has drawn attention to issues of investment facilitation and investment liberalization, which are increasingly the focus of international agreements, and has explored several common themes raised by these topics, namely: the value-added of international commitments; the impact of international commitments on States' applied policies; and shifts in governance and dispute settlement frameworks away from investor–State arbitration and towards State–State dispute settlement only and mechanisms for ongoing cooperation between the treaty parties. This research note does not claim to have provided definitive answers on these issues, rather the aim has been to widen the research agenda of the scholarly field of international investment law. While it has been common in the last 20 years or so to view international investment law as simply consisting of those substantive and procedural issues that arise in investor–State arbitration,[114] this research note has shown that such a focus is too narrow and misses significant areas of international investment governance, including most aspects of investment facilitation and investment liberalization.

While this research note has emphasized that investment facilitation and investment liberalization commitments raise a variety of common questions, the differences between these types of commitments should not be ignored. For example, the political economy of investment liberalization commitments can be challenging as they involve opening economic sectors to foreign investment and thus potential foreign competition and foreign ownership. In contrast, the political economy of investment facilitation commitments is arguably less challenging as they often involve improvements to the general business environment that are likely to benefit both foreign and domestic investors alike.[115] That said, as noted above, there may be legitimate concerns regarding whether some investment facilitation measures – e.g. a right to comment on proposed measures – may skew domestic administrative processes unduly in favour of powerful economic interests.[116] Whereas arguments about reciprocity – i.e. the exchange of market access commitments across different sectors – are common in relation to investment liberalization commitments,[117] it is less clear that a logic of reciprocity applies in relation to investment facilitation commitments. The rise of an economic security agenda in recent years also means that investment liberalization commitments are likely to face a challenging wider political and economic

[114]See Schill, supra n. 16, 884 (reviewing contemporary textbooks and characterizing international investment law as 'the substantive and procedural aspects of the law applicable to and within investor–state arbitration under international investment treaties'). See also 877, 883.

[115]ASEAN Secretariat and UNCTAD (2022) *ASEAN Investment Report 2022: Pandemic Recovery and Investment Facilitation*, 109, 171.

[116]See above n. 62 and accompanying text. See also P. Mertenskotter and R.B. Stewart (2018) 'Remote Control: Treaty Requirements for Regulatory Procedures', *Cornell Law Review* 104, 165.

[117]See e.g. B. Hoekman, A. Mattoo, and A. Sapir (2007) 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', *Oxford Review of Economic Policy* 23, 367, 381, 387; Fink, supra n. 67, 130–140; Contrast R. Adlung (2007) 'The Contribution of Services Liberalization to Poverty Reduction: What Role for the GATS?', *Journal of World Investment & Trade* 8, 549, 559–560.

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context, with the pertinent question probably being whether there is even a willingness to maintain existing levels of openness towards new foreign investment. In contrast, some aspects of an investment facilitation agenda appear compatible with the prevailing economic security paradigm, e.g. initiatives to encourage investment and the development of supply chains between allies. A good example are commitments concerning certain investment facilitation issues found in the Supply Chain Resilience and Clean Economy Agreements concluded within the Agreement on the Indo-Pacific Economic Framework for Prosperity (IPEF).[118]

A final question that should be kept under review is whether investment facilitation and investment liberalization commitments are viewed as a complement to, or a substitute for, the traditional agenda of investment protection obligations and ISDS. At this stage, it appears there is no universal answer to this question; rather approaches differ, likely due to the different preferences existing in different treaty relationships. For example, as touched on above, the EU's practice has been quite varied regarding whether to supplement investment liberalization obligations with investment protection obligations and provision for ISDS mechanisms. Even Brazil, which has pursued a distinctive policy emphasizing investment facilitation, has maintained certain traditional investment protection obligations (e.g., protection against direct expropriation and against denial of justice)[119] and in some relationships investment liberalization obligations have also been assumed.[120] In short, there is significant variation in how States have combined and coordinated the elements of investment facilitation, investment liberalization, and investment protection across their networks of IIAs.

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[118]See IPEF Agreement relating to Supply Chain Resilience, arts. 2(2)–(3), 3(2), 4; IPEF Agreement relating to a Clean Economy, arts. 4(2)(b), 17(1)–(4), 18(1)(e). Other examples are the non-binding agreements concerning critical raw materials supply chains that the EU has concluded with numerous partners: Crochet and Zhou, supra n. 38, 162–163.

[119]See e.g. Brazil–India CFIA, arts. 4.1(a), 6; da Silva and Codeço, supra n. 94, 27–28, 30–31, 34, 40–41 (arguing that Brazil's CFIAs have evolved over time and more recent CFIAs more closely resemble traditional BITs, e.g. regarding the provision on standards of treatment).

[120]See e.g. Singapore–Mercosur FTA, art. 9. 9 and Annex III (Brazil undertakes negative list investment liberalization obligations).

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