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Investment Facilitation Joint Statement Initiative: No home in the WTO

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In a recent paper, Hamid Mamdouh considers three legal options for integrating an outcome from the investment facilitation (IF) plurilateral negotiations into the WTO as binding and enforceable, and concedes it can't be done under existing rules.[1]

1. Inscribing the IF outcome in GATS and GATT schedules

The first option is to inscribe the outcome in schedules to the General Agreement on Tariffs and Trade (GATT), but more especially the General Agreement on Trade in Services (GATS). This has been favoured by Mamdouh in several other writings on the Joint Statement Initiatives (JSIs) as means to adopt the outcomes of plurilateral initiatives launched at the 11th WTO Ministerial Conference (MC11) in 2017.[2]

1.1 Sector-specific schedules

As with his previous opinions, Mamdouh treats GATS schedules as appropriate for adopting general rules and ignores their clear limitation to sectoral commitments.[3] Schedules are located in Parts III and IV of the GATS (on Specific Commitments and Progressive Liberalization, respectively), which deal solely with entries on market access, national treatment or additional commitments that are sector-specific. The appropriate place to adopt new generic rules, which is what the IF JSI proposes, is in GATS Part II on General Obligations and Disciplines. Part II includes general rules that apply only to the sectors committed in a Member's schedule.[4] Amending Part II of the GATS, pursuant to Article X of the Marrakesh Agreement, requires consensus, a route which Mamdouh wants to avoid.

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1 Hamid Mamdouh, Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure, International Trade Centre/DIE, September 2021.

2 Hamid Mamdouh, Plurilateral Negotiations and Outcomes in the WTO, April 2021, King & Spalding, Geneva, https://fmg-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/

3 For a critique of these arguments, see Jane Kelsey, Why the Joint Statement Initiatives Lack Legitimacy in the WTO. A response to Hamid Mamdouh: Plurilateral Negotiations and Outcomes in the WTO, University of Auckland, June 2021, https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf

4 For example, Articles III.3 on Transparency, VI.1 and VI.5 on Domestic Regulation, VIII on Monopolies and Exclusive Service Suppliers, and XI on Payments and Transfers.

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1.2 Certification of schedules

The erroneous use of schedules for rules is reinforced by the mechanisms for certifying modification of schedules, which involve one or more Members objecting to modifications through consultation processes that may ultimately end in arbitration.[5] Mamdouh finds the certification process attractive because, he says, it allows for objections but does not require a consensus, as an amendment would. However, the objective of certification is to ensure the balance of sectoral commitments agreed in Members' schedules is not disturbed, and, where it is, to recalibrate those commitments to restore that balance. Clearly, this envisages modifications that are sectoral, as per Parts III and IV, not rules as per Part II.

1.3 Precedents for plurilaterals in schedules

Mamdouh cites several precedents in support of his proposition that a subset of Members can adopt the outcomes of unmandated plurilateral negotiations through schedules. However, the negotiation and mechanism for adoption of these outcomes were all backed by prior consensus of the whole.

The post-Uruguay-Round negotiations on financial services[6] and on basic telecommunications[7] proceeded under multilateral mandates agreed by consensus at the conclusion of the Uruguay Round and set out in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 1994. The scope and processes for conducting the negotiations, the bodies nominated to oversee them, and the modalities for their implementation were specified through consensus decisions. Both the instruments on financial services and basic telecommunications were sector-specific, as appropriate to schedules adopted under Part III and Part IV of the GATS.

1.4 Foreign direct investment in the WTO

Even though Mamdouh does not address these flaws in his argument, he acknowledges that the limited scope of both the GATT and the GATS poses problems for IF because the latter deals with foreign direct investment (FDI). While the GATS does cover commercial establishments in services, its schedules could not apply to non-services FDI or to investors that do not meet the definition of a "service supplier". That leads Mamdouh to conclude that scheduling is a sub-optimal means to adopt the IF text.

2. Adopting IF through a new agreement

The second option proposed by Mamdouh is to adopt a new agreement by a formal amendment to the Marrakesh Agreement.

2.1 A new Annex 1 multilateral agreement

Annex 1 of the Marrakesh Agreement covers the three principal multilateral agreements: the GATT, the GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Including IF as a new standalone agreement in Annex 1 would require consensus to amend the Marrakesh Agreement pursuant to Article X. The Trade Facilitation Agreement, which introduced new rules to the WTO, was adopted as a

[5] Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted by the Council for Trade in Services on 14 April 2000, S/L/84 (18 April 2000); Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 19 July 1999, S/L/80 (29 October 1999).

[6] Decision on Institutional Arrangements for the General Agreement on Trade in Services, adopted on 15 April 1994, LT/UR/D-5/3; see also S/L/1 (4 April 1995), GATS Second Annex on Financial Services at [3], Fifth Protocol to the General Agreement on Trade in Services, S/L/45 (3 December 1997).

[7] World Trade Agreement 1994, III. Ministerial Decisions and Declarations, 7(d) Decision on Negotiations on Basic Telecommunications, adopted 15 April 1994, LT/UR/D-5/4. See also Annex to the GATS on Negotiations on Basic Telecommunications, Fourth Protocol to the General Agreement on Trade in Services, S/L/20 (30 April 1996).

new agreement in this manner through a consensus decision of the WTO General Council in 2014.[8] Making a new Annex 1 agreement enforceable would also require amending Annex 2 on the Dispute Settlement Understanding, again by consensus.

Politically, there will be no consensus for those amendments when it comes to the IF outcome. Mamdouh also notes a legal problem. The current intention is to negotiate and adopt the JSI agreements plurilaterally and then apply them to all WTO Members on a most-favoured-nation (MFN) basis (what the JSI participants term "open plurilateralism"). But an agreement under Annex 1 is defined in Article II.2 of the Marrakesh Agreement as a Multilateral Trade Agreement that is binding on all Members. The JSIs would not meet that definition.

2.2 A new Annex 4 plurilateral agreement

Alternatively, Mamdouh notes the IF text could be adopted as a new Plurilateral Agreement in Annex 4. However, Article X.9 of the Marrakesh Agreement states that a decision to amend Annex 4 is exclusively by consensus, confirming that plurilateralism is aberrant in a multilateral WTO. Further, Annex 4 applies to agreements that operate only among the parties. While Mamdouh suggests that parties to an Annex 4 agreement could nevertheless apply it on an MFN basis, the Article II.3 definition says "Plurilateral Trade Agreements do not create rights or obligations for Members that have not accepted them".

2.3 Redefining multilateral to include plurilateral

In a radical attempt to circumvent these definition problems, Mamdouh suggests amending the most fundamental tenet of the WTO by redefining "multilateral" to require common rights, but not common obligations. It is unclear how he thinks this would be done.

The most obvious path, aside from amendment to the Marrakesh Agreement and Annex 1 agreements by consensus, would involve an authoritative interpretation of "multilateral". Under Article IX.2 of the Marrakesh Agreement, three-quarters of Members can approve such an interpretation. However, "multilateral" recurs throughout the Marrakesh Agreement and most Annexes. Recommendations for an interpretation of the GATT, the GATS and the TRIPS Agreement would need to come to the WTO General Council from all three of the Councils responsible for those agreements. The interpretation must also not be a means of circumventing amendment by consensus under Article X, which is clearly the intention here.

3. A new annex for "open plurilateral" agreements

3.1 A new Annex 5

The third option proposed by Mamdouh is to create a new Annex 5 for "open plurilateral" agreements that apply to all Members on an MFN basis. That would also require an amendment to the Marrakesh Agreement by consensus.

Adopting the new annex could form part of the agenda for WTO reform, he suggests. That would involve trade-offs and would come at an (unspecified) price. It would also take time (the Uruguay Round took more than seven years, the Doha Round continues after 20 years).

3.2 Provisional application of the IF outcome

Here, Mamdouh gets especially creative. Pending the adoption of a new Annex 5 (which could take an indefinite amount of time), he suggests the parties could apply the IF outcome (and presumably other JSI outcomes) on a provisional basis. This relies on Article 25 of the Vienna Convention on the Law of Treaties

8 Protocol to Amend the Marrakesh Agreement Establishing the World Trade Organization, Decision of the General Council adopted on 27 November 2014, WT/L/940 (28 November 2014).

(VCLT) under which provisional application of a treaty or part of a treaty can occur pending its entry into force if the treaty itself so provides or negotiating states have in some other manner agreed.

It is unclear if Mamdouh is talking about adoption of the JSIs by WTO Member states outside of the WTO, as was envisaged for the failed Trade in Services Agreement (TiSA). There is nothing to stop them doing so, but they could not assert it is a WTO agreement or bring it within any of the WTO's institutional provisions and arrangements.

Mamdouh has also recognized that any such provisional implementation would be of a political nature and thus would not be legally enforceable. Given this context, the use of Article 25 of the VCLT is erroneous as this article does not allow parties to implement a treaty *politically*. Any treaty that has been provisionally accepted by the parties will be subject to the rule of *pacta sunt servanda*, i.e., the IF outcome will be binding on the parties and will have to be performed in good faith. Therefore, the provisional application under Article 25 is not supposed to be treated as an informal or political mutual understanding, but in fact has legal bearing of its own. This is further evident from Article 25.2 of the VCLT, which provides an express method for termination of the provisional treaty with respect to a state that expresses its intention to not become party to the treaty. Overall, it is difficult to accept Mamdouh's use of Article 25 of the VCLT for the provisional implementation of the IF outcome.

3.3 Provisional application of the IF outcome within the WTO

Any provisional application of the IF outcome (with or without being subject to Article 25) would only be made legally binding as per the amendment rules and procedures of the WTO. If Mamdouh is suggesting the IF outcome could apply on a provisional basis within the WTO, that would be untenable even as a political rather than legally enforceable instrument. Article 5 of the VCLT makes it clear that it applies to a treaty that is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization. The use of the phrase "without prejudice to any relevant rules of the organization" is a key element of the Article that reiterates the relationship between *lex generalis*, i.e., the VCLT, and *lex specialis*, i.e., the distinct rules of the international organization.[9] It has been accepted as an important principle of customary international law that when an international organization has formulated and chosen to be governed by an entirely different set of rules regarding the implementation of treaties, these *lex specialis* rules will have priority over the VCLT, i.e., *lex generalis*.

For a treaty to come into force provisionally within the WTO, it needs to be consistent with the WTO's constituent instrument, the Marrakesh Agreement. The IF outcome, and the other JSI outcomes, would not be. The Marrakesh Agreement makes no provision for an early harvest or provisional application, except where agreed by consensus, for example under paragraph 47 of the Doha Work Programme.

Provisional application in the case of IF, and the other JSIs, would be especially untenable given their context. Multilateralism is the founding tenet of the WTO. The JSI negotiations have not been mandated by the WTO and there is no existing mechanism for such agreements to enter into force, only a hypothetical possibility that a new Annex might be agreed by consensus at some time in the future.

3.4 Precedents for provisional application

Mamdouh provides two precedents, neither of which is convincing. The Protocol of Provisional Application of the GATT 1947 was an agreement to apply provisionally a treaty to which the signatories were parties. A clear distinction can be made between the negotiating process under the JSI and the International Trade Organization (ITO). The Geneva meetings that led to the creation of the tariff schedules and the GATT were always intended to have legal standing as part of the ITO. It was only after the ITO failed to materialize

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[9] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009).

that the signatory parties agreed to give the already completed GATT agreement and the tariff schedules enforceable international legal standing via the Provisional Protocol.[10] It was not a sub-agreement within a treaty whose terms had been agreed by the parties and does not provide for provisional entry into force of unmandated negotiations and outcomes.

The second example, the Disciplines Relating to the Accountancy Sector, fully conforms to the Marrakesh Agreement. The Council for Trade in Services decided in 1998 by consensus that these disciplines would apply to Members with sectoral commitments on accountancy services at the end of the multilateral GATS 2000 round.[11] The accountancy disciplines were also sector-specific, as appropriate to GATS schedules.

4. No home for IF in the WTO

4.1 IF and other JSIs lack any authorization

Mamdouh's analysis, and the additional major problems identified in this briefing paper, pose a more fundamental question: how has the situation been allowed to arise whereby several subsets of WTO Members have been conducting negotiations for so-called Joint Statement Initiatives within the WTO, supported by the Secretariat and the Director-General, before the legality of both those negotiations and the mode for their adoption has been resolved through the mandated WTO bodies and according to its formal rules? These matters need to be a priority before any moves are made to implement any JSI in reliance on Mamdouh's arguments.

4.2 IF negotiations subject to a negative mandate

These issues are even more stark for investment facilitation than the other JSIs. The coverage of investment is much broader than what the "facilitation" in the title, and Mamdouh, suggest. Proposed IF provisions on transparency, notification, prior comments, review and appeals are about rule-making and apply to "measures by Members affecting the admission, establishment, acquisition and expansion of investments in services and non-services sectors". That extraordinarily broad coverage of all kinds of investment measures will affect regulation of market access and impose onerous burdens on developing countries' national authorities.

There is no legal basis on which negotiations on investment can occur within the WTO. Article III.2 of the Marrakesh Agreement says very clearly that the WTO "may provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference". The positioning of the commas shows that both the negotiations and the implementation are decided by the WTO Ministerial Conference, which operates by consensus. Not only is there no mandate to negotiate on investment in the WTO, such negotiations are explicitly precluded.

From the Singapore Ministerial Conference in 1996 onwards, a significant part of the WTO membership has repeatedly rejected the inclusion of investment in the WTO as not a matter involving Members' multilateral trade relations. The 2001 Doha Ministerial Declaration required explicit consensus among Members on modalities before negotiations on long-term cross-border investment could begin in the WTO. There was no explicit consensus at the Cancun Ministerial Conference in 2003.

The July 2004 package in the General Council went further and adopted a negative mandate on investment: there would be no work towards negotiations, let alone negotiations themselves, in the WTO during the Doha Round. The Doha Round has not been formally concluded or terminated, despite a number of developed countries asserting that it is. What is not legally able to be negotiated within the WTO cannot legally be adopted through whatever modality.

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[10] Mitsuo Matsushita et al., *The World Trade Organization: Law, Practice and Policy* (3rd edition, 2015), at 2.

[11] Decision on Disciplines Relating to the Accountancy Sector, adopted by the Council for Trade in Services on 14 December 1998, S/L/63 (15 December 1998).

4.3 IF is not about development

As a final point, Mamdouh claims several times that the investment facilitation JSI was launched and driven by aspirations of developing countries and least-developed countries (LDCs). The ministerial statement issued by 70 countries at MC11 in Buenos Aires was signed by a significant number of developing countries, and more are among the 106 or so participants in 2021. But numbers do not equate with influence. The signatories also include the world's major capital exporters (minus the United States).[12]

Leaving aside concerns about the substantive development asymmetries in the text,[13] it must not be assumed that developing countries that participated in the IF JSI on the promise of benefits to them have endorsed the adoption of an outcome through mechanisms that violate the WTO's rules. Some will also have participated under pressure from capital-exporting countries to which they are indebted. Equally, encouraging developing countries' participation on the basis that this JSI is "pro-development" must not be allowed to preempt their objections to moves, such as those suggested by Mamdouh, that are designed to normalize similar unmandated plurilateral negotiations and rules, and the circumvention of consensus decision-making, in the future.

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12 Joint Ministerial Statement on Investment Facilitation, 13 December 2017, WT/MIN(17)/59.

13 The most recent draft of the IF agreement shows significant development asymmetries in the agreed text: WTO Structured Discussions on Investment Facilitation for Development. Consolidated document by the coordinator "Easter Text" revision, INF/IFC/RD/74/Rev.1 (23 July 2021), https://www.bilaterals.org/?wto-plurilateral-investment-45062. For example, "transparency" provisions aim to ensure that foreign investors are consulted prior to the adoption of measures that affect them. That would give the capital-exporting states and their investors the opportunity to lobby, pressure and potentially threaten investment disputes under other international investment treaties. Conversely, special and differential treatment involves transitional and phase-in periods and promises of technical assistance and capacity building.