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Comments on the investment facilitation framework: Are there real benefits to bringing it under the umbrella of the WTO?

Kinda Mohamadieh
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1. The stated objective of the investment facilitation (IF) disciplines is 'facilitating the flow of foreign direct investment between Members/Parties, particularly to developing and least developed country Members/Parties, with the aim of fostering sustainable development' (see Article 1 under WTO document INF/IFD/W/52). Yet, the way the disciplines have been designed does not effectively serve this projected objective. Instead, it exposes developing countries and least developed countries (LDCs) to extensive burdens of implementation, especially because the institutional and administrative approaches required by the disciplines are generally based on practices applied in developed countries. Overall, the disciplines focus on the obligations of host States of investors and keep largely unaddressed any real or hard requirements for home States of investors. There is nothing in the text that would require home States of investors to properly regulate the conduct of their nationals abroad so as to avoid harm that might emerge through their investments and to hold them to account in case they are involved in such harmful activities. Furthermore, the text includes weak corporate social responsibility language that reinforces a voluntary approach to responsible business conduct.

2. While proponents argue that signing up to the IF disciplines would enhance a country's ability to attract foreign direct investment (FDI), studies show that there is no conclusive evidence on such a correlation and that it is unlikely that the IF disciplines would have a significant impact on investment flows. Instead, studies show that factors of primary concern to investors include size and growth potential of markets, infrastructure development, and availability of resources (natural resources and abundant labour).

3. The IF disciplines cover a much broader scope of measures and regulatory authorities in comparison to existing WTO agreements such as the Trade Facilitation Agreement (TFA) or General Agreement on Trade in Services (GATS). The disciplines cover measures directly or indirectly related to investment, in all sectors (services and non-services), and over most of the life-cycle of the investment from establishment, acquisition and expansion to operation, management, maintenance, and sale or other disposal of an investment (rather

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Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA **Tel**: 60-4-2266728/2266159 **Fax**: 60-4-2264505
Email: twn@twnetwork.org **Website**: www.twn.my

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than just the supply of a service as under the GATS). The text lacks a definition of 'investment'. This would allow an expansive interpretation of the scope which extends beyond FDI that adds economic and developmental value, and might cover portfolio investments and other kinds of assets including intellectual property. The very broad scope means that the burden of implementation extends beyond that of implementing the GATS and TFA. States that faced challenges in implementing their obligations under the TFA could expect to face compounded challenges with regard to implementing the proposed IF disciplines.

4. The IF disciplines will expose the institutional and regulatory conduct pertaining to authorizing foreign investments, at all levels of government, to potential international scrutiny under a set of broad multilateral standards (this could affect licensing, environmental and other impact assessments, and screenings to the extent applicable at the establishment stage of an investment, among other measures directly or indirectly related to foreign investment). The way the scope is defined, coupled with the 'definitions' and broad most-favoured nation (MFN) clause, which is not nuanced by a clarification of 'likeness' of investors and investments, means that the disciplines do not provide grounds for differentiation between investments that add value for development and other types of investments. In effect, this would impede the ability of governments to privilege sustainable investments. This falls in tension with governments' need for policy and regulatory tools to align investment with sustainable transformations in the economy.

5. The standards applicable under the IF disciplines (particularly under Section III of the text, Articles 13 and 14) could be used to challenge regulation that is based on the subjective balancing required when there are multiple criteria for assessing an investment, such as its environmental, economic, cultural and community impacts. This could undermine the authority and restrict the regulatory space of national regulatory authorities. Failure to meet these standards could provide grounds for international trade tribunals to weigh public interest and policies against private interests, and could potentially become grounds for challenges under international investment agreements through investor-state dispute settlement (ISDS).

6. Negotiators of the IF disciplines have been worried about the possibilities that IF commitments could be raised in ISDS cases, whereby investors and/or arbitrators in ISDS may be able to rely on IF commitments in investment disputes. Many States have been facing tremendous challenges as a result of ISDS and want to limit, rather than increase, their potential exposure to liability under ISDS. For these reasons, negotiators of the IF text attempted to create a 'firewall' to stop the potential of using ISDS to sue governments adopting the IF disciplines for non-compliance, by inserting in the IF text a provision on the relation with international investment agreements and language under the provisions on scope, MFN and dispute settlement. However, experts on investment law and international investment agreements point out that, notwithstanding the intentions of the negotiators, there remains significant uncertainty as to how the IF framework will interact with existing international investment agreements, especially in the context of ISDS, and that it may not be possible to eliminate or reduce these risks through mere language in the IF text, absent the amendment of the investment agreements themselves.

7. Among other implications, the disciplines could impede the ability of developing countries to rely on investment authorization fees as a source of revenue to support different policy objectives or regulatory functions, although developing countries may need these revenues where they have limited capacity to levy income tax or where they want to limit regressive taxes. Certain 'transparency' requirements under the IF framework (such as the hard requirement to provide investors, other interested persons and other Members with the opportunity to comment on proposed measures to regulate FDI) would set in place an intrusive regime giving foreign corporations an enforceable right to lobby and pressure host States on various regulations related to investments. In effect, it cements broad rights of investors to lobby, interfere and influence domestic regulatory and legislative processes.

8. At the same time, special and differential treatment provided for under the disciplines boils down to transition periods and is not enough to address the potential impact on regulatory space. The disciplines do not provide any guarantee of access to financial and technical assistance to alleviate the burden of

implementation. Further, to benefit from the disciplines, developing countries and LDCs have to fulfil complex procedural requirements of notifications within tight timeframes. It is not clear from the IF text how timelines associated with notifications run (i.e., whether timelines run from the agreement's entry into force or from the date of entry into force for the specific country, which could be later than the former). Effectively benefitting from the section on special and differential treatment depends on effective assessment of the capacity to implement given the potential challenges of implementation, which in itself is a burdensome, costly and challenging exercise to undertake. Thus, it is questionable what benefits are there for developing countries and LDCs in agreeing to a set of binding WTO disciplines which are subject to dispute settlement in the absence of firm commitments to fund and support technical assistance and capacity building and in the absence of evidence that the disciplines will attract FDI.

9. The disciplines provide very limited exceptions (incorporating the general and security exceptions from the General Agreement on Tariffs and Trade and GATS and the financial prudential carve-out of the GATS). These WTO exceptions have proven to be difficult to use, particularly because of the multiple tests, including the necessity test, that should be fulfilled under these exceptions. The IF text does not provide for other mechanisms that would allow developing countries to carve out or exempt certain measures or sectors or levels of government from the disciplines, or to opt out of selected provisions (such as MFN or others), or to carve out certain provisions or sections from dispute settlement.

10. While the initiative was presented as open and transparent, it was evident that developing countries taking part faced multiple challenges to effectively reflect their positions in the negotiations. Multiple important propositions made by developing countries, such as on the definition of investment (calling for an enterprise-based definition) and on clarification of the MFN clause (particularly in relation to 'likeness'), were sidelined. These process issues led at least one country to withdraw from the initiative and several others to raise concerns.

11. Under the current WTO rules there is no legal avenue to bring the IF framework under the umbrella of the WTO as long as there is no consensus on this issue among WTO Members. Adopting a new plurilateral agreement under Annex 4 of the Marrakesh Agreement is done exclusively by consensus. There is also no precedent for adopting Annex 4 WTO agreements through the route of Article X.9 of the Marrakesh Agreement; the existing Annex 4 agreements were carried forward from the Uruguay Round negotiations. Moreover, there are several legal issues embroiled in this process, including: (1) whether the IF framework qualifies as a 'trade agreement' under Article X.9 of the Marrakesh Agreement, and (2) who qualifies as 'Parties to a trade agreement' under Article X.9 that can request the addition of the IF agreement under Annex 4. The Vienna Convention on the Law of Treaties defines 'Party' to mean 'a State which has consented to be bound by the treaty and for which the treaty is in force'. This means that the request to add the IF agreement to Annex 4 might have to come from Members that have fulfilled their domestic procedures to sign and ratify the agreement, and for which the agreement has entered into force (requiring acceptance by 75 States as per the provisions of the IF agreement).

12. Countries are advised to undertake a cost-benefit analysis when considering whether to adopt the disciplines and whether to support bringing the disciplines under the umbrella of the WTO as a plurilateral Annex 4 agreement. This cost-benefit analysis ought to incorporate the following four considerations:

i. There are significant implementation challenges that would be associated with the IF disciplines and the burden of implementation will primarily fall on developing countries and LDCs. The expected implications are not only on the institutional front (such as reviewing institutional practices and setting in place new ones such as a single window). The implications on the regulatory space ought to be accounted for. At the same time, there is no conclusive evidence that adopting such disciplines will help attract FDI.

ii. There are long-term systemic implications when utilizing the route of Article X.9 of the Marrakesh Agreement to incorporate the IF framework as a WTO Annex 4 agreement. As noted above, this

exercise will be precedent-setting and will involve the need to clarify multiple legal requirements under Article X.9, and thus should be undertaken with caution and not be rushed. Moreover, given that the negotiations on IF were not mandated multilaterally by the WTO Members, such a precedent would imply that any non-mandated issue that is of interest to some number of WTO Members could eventually find a way under the WTO acquis through the door of Article X.9. Clearly, this is not the intended intention of this Article because such an approach could effectively change plurilateral Annex 4 agreements from an exception to become more of a norm under the WTO. This in turn will run counter to the clear objective stipulated in the preamble of the Marrakesh Agreement of developing 'an integrated, more viable and durable multilateral trading system'.

iii. In practical terms, the only difference between bringing the IF framework under the umbrella of the WTO versus leaving it outside would be in relation to enforcing the framework under the WTO dispute settlement mechanism. Yet, there are no convincing arguments for enforcing the IF disciplines through an adversarial and punitive enforcement mechanism such as the WTO dispute settlement mechanism, especially since the disciplines are intended to help countries enhance their practices to better attract investment for sustainable development rather than punish them for failing to do so when they face institutional and other limitations resulting from their levels of development.

iv. There are alternative ways to benefit from the IF disciplines for States interested in doing so, such as through unilateral adoption, or through adopting them in the form of multilateral guidance outside the WTO, which countries could select to adopt in their domestic practices in accordance with their national and developmental needs.

Kinda Mohamadieh *is a legal advisor and senior researcher with the Third World Network.*