COMMENTARY ON THE INVESTMENT FACILITATION TEXT

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This is a commentary on the text announced as the outcome of the negotiations on investment facilitation among participants in the plurilateral joint-statement initiative on the subject matter (see WTO documents INF/IFD/RD/136 and INF/IFD/W/52).

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INTRODUCTORY POINTS

- While 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' (Article 1.1), the way the disciplines have been designed does not effectively serve this projected objective. This is explored in more detail in this note.
- The disciplines, as shown below, would expose the policy and regulatory space of governments vis-a-vis foreign investments to international scrutiny, at a time when more policy and regulatory tools are needed for governments to be able to align investment with sustainable transformations in the economy.
- The proposed disciplines cover a much broader scope of measures and regulatory authorities in comparison to the Trade Facilitation Agreement (TFA). States that faced challenges in implementing their obligations under the TFA could expect to face compounded challenges in regard to implementing the proposed IF disciplines.
- The burden of implementation will primarily fall on developing countries and least developed countries (LDCs). The institutional and administrative approaches that are required by the proposed disciplines are based on practices in developed countries. At the same time, special and differential treatment provided for under the disciplines does not guarantee access to financial and technical assistance in the process of implementation.
- While signing up to the proposed disciplines is presented as potentially enhancing a country's ability to attract foreign direct investment (FDI), studies show no conclusive evidence that signing up to such disciplines would help attract additional FDI. Instead, studies show that issues of primary concern to investors include size and growth potential of markets, infrastructure development, and availability of resources (natural resources and abundant labour).[1]
- While the IF initiative was presented as open and transparent, it was evident that developing countries taking part in the initiative 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.

I. COMMENTARY ON ISSUES OF SCOPE AND INTERACTION WITH OTHER INVESTMENT LEGAL REGIMES

i. The broad approach to scope

The scope is very broad, impacting the burdensomeness of implementation and the potential impact on regulatory space.

Scope of measures and levels of government covered: 'measures adopted or maintained by a Member/Party relating to investment activities of investors of another Member/Party' (Article 2.1), including those 'adopted or maintained by: its central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities' (Article 2.3).

[1] Paulo Elicha Tembe and Kangning Xu (2012), 'Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies: A Comparative Study between Mozambique and China', https://ideas.repec.org/a/jfr/ijfr11/v3y2012i4p69-81.html. See also: US Agency for International Development (2005), *Foreign Direct Investment: Putting It to Work in Developing Countries*. Washington, DC: USAID; UNCTAD (1999), *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development*. Geneva: United Nations Conference on Trade and Development. In the latter report, it was reported that a survey of investment determinants across 30 African countries identified the regulatory and legal framework as having a negative impact on investment decisions in under 5% of cases. Literature reviews and interviews and surveys of government officials, investors, risk insurers, risk rating agencies etc show they do not generally check whether there is an investment treaty before deciding whether to invest/give a risk rating/provide political risk insurance (source: http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887).

This approach, which is similar to the one under the WTO General Agreement on Trade in Services (GATS), means that obligations will fall on multiple levels of government, including central, regional and local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Such language requires that WTO Members take active steps to ensure compliance by different levels of covered government, governmental authorities, and non-governmental bodies.[2]

The definition of 'measure' under the IF text is taken from GATS Article XXVIII, which makes the scope of the measures to be covered by the IF text very broad, including laws, policies, regulations, administrative action and at multiple levels of government:

- It has been argued that the open list in GATS Article XXVIII, providing that '"measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form', implies that 'none of the various regulatory instruments is a priori excluded from the scope of the GATS'.[3]
- There is no indication in this language that only legislative or administrative actions should qualify as measures.[4]
- The inclusion of administrative activities in the definition indicates that the measure need not have legal quality; it can also be a mere factual activity, whereby '[e]ven promotional or information activities of the government can be considered measures'.[5]

The use of the term 'relating to' in 'measures … relating to investment activities' (Article 2.1) indicates that the scope will not necessarily be restricted to those measures directly dealing with investment facilitation. The types of measures that would be covered under such an approach could vary from investment codes and public-private partnership laws to licensing procedures and requirements, technical standards, central bank regulations, and administrative measures and proceedings, among others. Measures indirectly dealing with investment facilitation, such as an environmental policy that could potentially affect investments or a health policy that affects the way licences and technical standards are designed for investments in the pharmaceutical or medical sectors, could potentially be caught under such a scope.

The burdensomeness of these obligations is higher in comparison to the GATS obligations given that the scope of measures covered under the IF text is much broader than those covered by the GATS. The IF text covers 'measures related to investment activities' 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 (Article 3.1), rather than just the supply of a service as under the GATS.

Lack of a definition of 'investment': Members negotiating the IF text chose not to include a definition of 'investment' in the text, after lack of agreement on the approach to such a definition. While some developed countries were asking for an 'asset-based definition', some developing countries were insisting that an 'enterprise-based' definition is more fit for a framework that seeks to enhance investments that add value to the sustainable development of host States. Leaving the text with no definition of such

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[2] This text provides limited safeguard language from the GATS by reference to 'such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory' (Article 2.4). Without such a safeguard, the obligation will be strictly binding on all levels of government. For example, the investment chapters in free trade agreements with the United States are usually strictly binding on all levels of government because they do not include this GATS safeguard.

[3] Rüdiger Wolfrum and Peter-Tobias Stoll (eds), *WTO: Trade in Services*, Max Planck Commentaries on International Trade Law, page 54, referencing: P.M. Michaelis, 'Dienstleistungshandel (GATS)', in: M. Hilf and S. Oeter (eds), *WTO-Recht, Rechtsordnung des Welthandels*, 2005, 375, 391, and Krajewski, *National Regulation and Trade Liberalization in Services*, 2003.

[4] Rüdiger Wolfrum and Peter-Tobias Stoll (eds), op. cit., referencing GATT Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, para 106.

[5] Rüdiger Wolfrum and Peter-Tobias Stoll (eds), supra n. 3.

a fundamental term would allow the adjudicators that eventually deal with disputes pertaining to the application of these disciplines to potentially adopt an expansive approach to defining 'investment', one that is not necessarily in line with sustainable development concerns. The adopted IF text does not provide legal grounds to allow Members accepting these disciplines to argue that they can differentiate in the measures relating to investments depending on the implications on sustainable development. Under the disciplines, States' attempts to privilege investments that add value to their development and transformation towards more sustainability or industrialization, could potentially be challenged.

ii. The effect of the MFN clause

The most-favoured nation (MFN) clause adopted under the IF text extends to treatment with respect to any measure covered by the IF text. The approach would imply that any measures that fall under the scope of the IF text, if not covered by the carve-out provided for under Article 5.2 (i.e., measures provided for under other investment agreements and measures providing for recognition), could be multilateralized through the MFN provision. This includes treatment provided under various domestic laws and regulations covered by the broad scope of the IF text.

The MFN clause does not clarify the term 'like circumstances' under this provision. Clarifying 'likeness' is important in order to avoid expansive application of an MFN clause across investors and sectors that are different including in relation to their implications on development of the host country. For example, the notion of 'like services and service suppliers of any other country' is included in the GATS MFN provision although not clarified, which causes a lot of challenges. Similarly, the lack of clarificatory language of 'likeness' under investment agreements has caused challenges pertaining to expansive interpretations. In recent investment treaty practice, States had opted to clarify this language and the grounds for assessing 'likeness'.[6]

It is still to be decided whether the MFN treatment will be extended to all WTO Members or only to Members who will be party to the IF framework. Yet, it is important to note that, considering the nature of the proposed disciplines, where a Member adopts the disciplines and reflects them in domestic practices, it is hard for this implementing Member to discriminate in how other States get to benefit from these practices. Attempting to differentiate in the practices offered vis-a-vis other Members will add to the costs of the implementing Member.

For example, where a Member undertakes transparency measures, expedition of applications, or measures to ensure independence of its competent authorities, it will not be efficient for that implementing Member to attempt to differentiate how these administrative processes apply to other Members based on whether they signed up or not to the IF framework. Attempts to differentiate will add to the costs of the implementing Member.

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[6] For example, the TPP includes the following footnote: 'For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.' Clarification of 'likeness' also appears in multiple investment agreements or models such as the Slovakia-Iran IIA approach, Nigeria-Morocco IIA, and India model BIT, and often includes references to the following elements:
a. the actual and potential impact of the investment or investor on third persons;
b. the local community, or the environment;
c. the effect of the investment or investor on environment and health conditions in local, regional or national context, including effects that relate to the cumulative impact of all investments within a jurisdiction;
d. the sector in which the investment or investor operates;
e. the level of government at which the investment or investor operates;
f. the goods or services consumed or produced by the investment;
g. whether the investment is public, private, or state-owned or controlled;
h. the character of the measure concerned, including its nature, purpose, duration and rationale;
i. the regulations that apply to the investment or investor and the practical challenges of regulating the investment or investor.

That the disciplines are of such an erga omnes nature was acknowledged by the Members negotiating the IF framework. For example, when the MFN provision was discussed in the context of the negotiations on the IF text, it was acknowledged that these disciplines are generally applied in a non-discriminatory manner (see INF/IFD/RD/125/Rev.1).

iii. The potential market access effect

The IF text provides that 'Nothing in this Agreement shall be construed to create new or modify existing commitments relating to market access…' (Article 2.2). Yet, a market access effect could still result from the way the measures of Members could be questioned under the multilateral disciplines contained in the text, such as those under Section III (discussed below). For example, if questioned for non-compliance under multilateral disciplines proposed under Section III, such as those under Article 14 on 'general principles for authorization procedures', a Member would be eventually asked to change the criteria used in measures related to authorizations. If the criteria would have to be changed, that would potentially imply that an investment that would not have been allowed under the existing criteria will have to be authorized under the revised criteria. Would that carry market access implications?

It is also unclear how the proposed multilateral standards applicable to authorizations and related measures and procedures under Section III of the IF text would relate to the judicial review usually carried out at the national level and how they would interact with the levels of discretion of the regulator. For example, in some countries, it is written in the law that a decision to reject an investment can be taken based on a level of discretion allowed to the institution in charge based on 'what it deems fit' (a subjective test) – which would fall in tension with the standard of 'objectivity' under Article 14.2 for example.

iv. The interaction with investment protection agreements

In Article 4 of the IF text, negotiators attempted to provide for what they called 'a firewall' to delimit between commitments to be undertaken under the IF framework and those undertaken under international investment agreements (IIAs). They were primarily trying to deal with the problem that commitments under the IF framework could potentially be absorbed under IIAs and investor-state dispute settlement (ISDS), especially where countries are party to IIAs that include umbrella clauses, broad 'fair and equitable treatment' clauses, or broad MFN clauses. Through such clauses, future undertakings on investment facilitation could be brought under the protective 'umbrella' of the IIA, meaning that their breach becomes a violation of the IIA.[7] This would potentially make those commitments arbitrable through ISDS. If an investment tribunal is established under an IIA for the breach of an obligation under the future IF framework, the tribunal will be reviewing this breach against the applicable investment treaty.

Given the way IIAs are worded and the way in which ISDS arbitral tribunals approach their jurisdiction, it might not be possible to achieve an insulation as suggested under Article 4 (particularly the ability to stop IF being imported into IIAs) through the mere inclusion of language under the IF text. Limiting the possible importation of IF commitments under the umbrella of an IIA might require that countries change

[7] *UNCTAD's Reform Package for the International Investment Regime* (2018 edition), page 46, available at: https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-

the content of the IIAs themselves and revise the subject-matter jurisdiction of the ISDS arbitral tribunals established under the IIAs.[8]

Potential exposure to liability in this context is higher for developing countries, particularly because they are the ones expected to do more to align their practices with the requirements under the IF framework.

II. IMPLICATIONS FOR POLICY AND REGULATORY SPACE

i. Multilateral scrutiny of investment-related measures

The proposed disciplines would expose the institutional and regulatory conduct pertaining to authorizing foreign investments (this could in effect cover licensing, environmental and other impact assessments, and screenings to the extent applicable at the establishment level, among other measures), at all levels of government, to scrutiny under a complex set of broad multilateral standards (see Section III of the text, particularly Articles 13 and 14). These standards (such as reasonable, objective and impartial, objective and transparent criteria, adequate for applicants to demonstrate whether they meet the requirements) could be used to challenge regulation that is based on subjective balancing of different policy objectives, which may be required when there are multiple criteria for assessing an investment, such as the environmental, economic and community impacts of a proposed oil drilling platform, power plant, mining investment, pharmaceutical project etc.

The effect of such standards on policy and regulatory space will only be fully revealed if and when they are utilized as a basis to challenge any of the measures that the proposed disciplines cover. An adjudicator confronting such a case will undertake the exercise of weighing public interest and policies against private interests of investors. This could undermine the authority and restrict the regulatory space of national regulatory authorities concerned with foreign investment.

Where a provision refers to 'administration' of measures affecting authorization (such as Article 13 of the IF text), the provision will not be about the content of the measure itself, but about its administration. Some WTO jurisprudence considered that even the conduct of an official, not only institutions, could be deemed administrative in nature, which would potentially subject such conduct to question under the proposed disciplines. For example, in the case *US – Certain Country of Origin Labelling (COOL)*, the WTO panel provided that: 'The term "administer" in Article X:3(a) refers to "putting into practical effect or applying" a legal instrument of the kind described in Article X:1. (Appellate Body Report, *EC – Selected Customs Matters*, para. 224).' The panel found that, despite the absence of any specific instance of application, the context in which the letter in question was issued by Secretary Vilsack to industry in general showed a sufficient basis for the letter to constitute an act of administering the COOL measure.

[8] See: N. Jansen Calamita (2020), 'Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value', *Journal of International Economic Law*, 23, 1–16, page 8. The author provides that: 'Negotiating and concluding investment facilitation disciplines at the WTO is not a cost- or risk-free exercise. As it is being developed, the Framework will entail binding disciplines, likely enforceable under the DSU. As such, a new Framework will carry with it a risk of litigation at the WTO for those countries which adopt it. Moreover, notwithstanding the intentions of negotiators, there is significant uncertainty as to how a WTO Framework will interact with existing international investment agreements (IIAs), especially in the context of ISDS. At risk here is the real possibility that investors and/or arbitrators in ISDS may be able to rely upon disciplines contained in the Framework to add elements to the content of IIAs through the fair-and-equitable treatment standard, umbrella clause provisions, or via most-favoured-nation clauses. While elsewhere, I and others have suggested ways in which it may be possible to reduce these risks through careful drafting of the Framework, such risks cannot be eliminated absent the amendment of the IIAs themselves' (footnotes omitted). The author concludes: 'To date, the arguments in favour of a WTO Framework are not compelling. Not only are there potential costs to creating new international commitments which may be subject to the DSU and have unintended consequences in ISDS, but it does not appear that the Framework as presently contemplated would add value to the ongoing efforts of states and other international organizations. As expressed by developing states, the principal need these states face is capacity building and technical assistance. Potential donor states, however, have made clear that technical assistance and capacity building will not be a core focus of a new WTO Framework. The question for developing states to ask, therefore, is what benefit they will receive for agreeing to a set of binding WTO disciplines which are subject to the DSU. In the absence of firm commitments by donors to fund and support technical assistance and capacity building, the benefit of a WTO Framework to these states is far from clear' (footnotes omitted).

ii. Undermining the discretion in administering the fee system pertaining to authorizing investments

The disciplines under Article 17 on 'Authorization Fees' could encroach on the administration of fee systems related to investment authorizations. These systems would be subjected to a set of multilateral disciplines (including: reasonableness, transparency, being based on authority set out in a measure, and do not in themselves restrict investment activities of investors of another Member). Limiting the ability of Members to administer such fee systems could impede their reliance on such fees as a source of revenue to support different policy objectives or regulatory functions, including cross-subsidization of public services. Developing countries in particular may need these revenues where they have limited capacity to levy income tax or want to limit regressive taxes.

iii. Intrusive transparency regime

The framework sets a hard obligation on a government to publish in advance all 'laws and regulations of general application, or changes thereto, it proposes to adopt in relation to matters falling within the scope of this Agreement'. Otherwise, the Member is required to publish documents that provide sufficient details about such a possible new law or regulation or changes to an existing one (see Article 10 of the IF text). The framework also sets an obligation to provide investors, other interested persons and other Members the opportunity to comment on such proposed measures, and show evidence that the government has considered the comments received (see Article 10.3).

This, in effect, will set in place an intrusive regime giving broad rights to investors to lobby, interfere and influence domestic regulatory and legislative processes pertaining to regulating investments. This would impose excessive compliance burdens on developing countries, while largely affirming arrangements that already exist in richer countries.[9]

Qualifying language in these provisions, such as 'to the extent practicable and in a manner consistent with its legal system', does not give discretion to Members not to implement the provisions. Any margin of appreciation available to the concerned Member will be subject to review by the adjudicators in case of a dispute. The provision clearly includes obligations that Members will have to demonstrate progress in fulfilment, and thus Members could be questioned in that regard.

III. LIMITED EXCEPTIONS AND CARVE-OUTS

The IF text includes limited carve-outs for:
- 'government procurement' (under Article 2.5.a), although it is not defined, which means this term could possibly be defined narrowly, thus limiting the value of this carve-out;
- 'subsidies or grants of a Member/Party, which under that Member's/Party's laws and regulations are not available to an investor of another [Member]' (under Article 2.5.b).

Previous versions of the text considered 'other possible exclusions' and carve-outs for portfolio investments, taxation measures, and investments made with funds or assets linked to activities of illicit origin. Yet, these have been removed.

[9] The African, Caribbean and Pacific Group of States (ACP) had opposed similar provisions that would allow foreign companies to comment on proposed new measures and stated that 'any future disciplines must not contain prior comment requirements either in a legally binding or best endeavour form. This is also supported by the fact that such requirements may be contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty'. WTO, Communication from the African, Caribbean and Pacific Group of States (ACP), 'Pro-Development Principles for GATS Article VI:4 Negotiations', JOB(06)/136/Rev.1.

The text includes:

- general and security exceptions from the General Agreement on Tariffs and Trade (GATT) and the GATS (Article 41). However, these exceptions at the WTO have proven to be difficult to use, particularly because of the multiple tests, including the necessity test, that should be fulfilled under these exceptions.[10] For these reasons, a number of governments concerned that these exceptions may be inadequate have been crafting in their free trade agreements (FTAs) better-than-WTO exceptions which are easier to use.[11]
- a financial exception for prudential measures (Article 42), but which also provides that 'Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Member's/Party's commitments or obligations under the Agreement'. This wording is problematic and potentially has a self-cancelling effect that undermines the effectiveness and utility of the exception.[12]

It is worth noting that unlike a carve-out that excludes certain issues from the scope of the disciplines, an exception requires that the burden of proof that a certain measure is covered under an exception/defence fall on the country undertaking the measure.

The IF text does not provide for other mechanisms that would allow developing countries to carve out certain measures or sectors, exempt certain sectors or measures, selected provisions (such as MFN or others) or levels of government from the disciplines, or opt out of subjecting certain sections of the disciplines to dispute settlement.[13] This is despite the fact that there are ample instances of such practice under the WTO to show how such exemptions would operate and be reviewed and monitored (for example, exemptions under the GATS from Article II on MFN).

The provision on monetary and exchange rate policies (Article 43) is not a carve-out for these policies from the scope of the IF framework. It merely acknowledges that States signing up to the disciplines are not prevented from 'adopting or maintaining measures of general application taken in pursuit of monetary policy, exchange rate policy or related measures'. This does not preclude the possibility that these measures can be questioned and scrutinized under the disciplines and standards set by the IF framework.

IV. LIMITED SPECIAL AND DIFFERENTIAL TREATMENT (SDT)

An approach similar to that under the Trade Facilitation Agreement (TFA) has been adopted for SDT under the IF text (see Section V). From studying the potential implications of the disciplines under the IF text, it is clear that the proposed SDT approach is not enough to address the potential challenges, including pertaining to implementation and implications on regulatory space, that developing countries and LDCs might face under the IF framework.

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[10] For example, a 2022 study found that governments have tried to use these exceptions at the WTO 48 times and only succeeded twice. https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper_.pdf

[11] A detailed brief on this issue can be provided by TWN upon request.

[12] A number of countries including Canada, the EU and the US appear to have been concerned that the WTO's prudential defence may be inadequate, so they have deleted the potentially self-cancelling second sentence or added additional (more effective) exceptions for prudential reasons in their FTAs; see the Canada-EU Comprehensive Economic and Trade Agreement, and EU FTAs such as the EU-CARIFORUM EPA (signed in 2008).

[13] Even US FTAs like the TPP have negative-list exceptions (including to MFN) in the services and investment chapters that exclude all existing measures of local government (without even listing them); see, for example, Articles 9.12 and 10.7 of the TPP, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. US and Canadian model BITs and the EU-China BIT also have negative-list sectoral exceptions which can be scheduled (including to MFN), https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america, https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237

The disciplines under the IF text will have much deeper and broader impact on the regulatory and institutional processes of countries accepting these disciplines in comparison to the TFA, which is focused on customs procedures and customs authorities. Yet, SDT under the adopted approach boils down only to transition periods. This does not help deal with the potentially intrusive implications of the disciplines on regulatory space. This is why TFA-style SDT will not be enough to attend to the immense regulatory and institutional challenges that developing countries and LDCs would face if they join as Parties to the IF framework.

The disciplines include vague promises of technical assistance and capacity building (TACB), based on 'mutually agreed terms' (Article 35.1). Since 'mutually agreed terms' requires agreement by developed/donor countries, such language provides no guarantees that developing countries and LDCs would be able to access the TACB they require. There is also no indication in the text that TACB would include financial assistance to aid with the costs that developing countries and LDCs will incur in the implementation of the IF disciplines. This means developing countries are expected to shoulder significant implementation costs without adequate financial or other assistance and capacity building.

V. OVERALL IMBALANCE OF THE OUTCOME TEXT

The disciplines set obligations on host States of investors while not adequately setting obligations for home States of investors and investors themselves.

In regard to home-State obligations, Article 6.5 (on 'Publication and Availability of Measures and Information')[14] and Article 39.11 (on 'WTO Committee on Investment Facilitation')[15] do not set any hard obligations, but only encourage home States to meet certain transparency practices or share experiences in the proposed Committee in case they adopt or maintain measures to facilitate outward investments.

There is nothing in the text that would require home States 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. Section VI on 'sustainable investment' does not address the obligations of investors and investments. This section does not extend beyond what has already been achieved in other fora in regard to the recognition that States have already given to due diligence for responsible business conduct (such as the consensus achieved since 2011 on the Guiding Principles on Business and Human Rights which integrate human rights due diligence by businesses). More importantly, while this section attempts to give the IF text a progressive flavour in regard to addressing business conduct, it does not contribute to balancing out the challenging implications of the text, particularly the imbalance between the burdens that will rest on host States and those that fall on home States and on investors themselves.

VI. THE RELATION WITH THE WTO ACQUIS: LEGALITY ISSUES PERTAINING TO THE PROPOSITION TO INCORPORATE THE IF FRAMEWORK INTO THE WTO LEGAL ARCHITECTURE

<u>Under the current WTO rules, there is no legal avenue to bring the IF framework under the umbrella of the WTO,</u> as long as there is no consensus on this issue among WTO Members.

[14] Article 6.5: 'Members that adopt or maintain measures of general application to facilitate outward foreign direct investment are encouraged to publish them or otherwise make them publicly available, including through electronic means.'

[15] Article 39.11: 'Members that adopt or maintain measures of general application to facilitate outward foreign direct investment are encouraged to share experiences and information in the Committee.'

Proponents of the IF initiative considered two main scenarios for this issue: (1) seeking to adopt the IF text as a standalone multilateral agreement under Annex 1 of the Marrakesh Agreement Establishing the WTO, or (2) a standalone plurilateral agreement under Annex 4 of the Marrakesh Agreement (which would be the first since the establishment of the WTO). As of October 2023, it was reported that the negotiating countries 'agreed to pursue the plurilateral pathway'.[16]

Below is a review of some of the legal and systemic challenges associated with this route.

Adopting the IF disciplines as an Annex 4 agreement requires fulfilment of the conditions of Article X.9 of the Marrakesh Agreement, which provides that: 'The [WTO] Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4.'

Thus, a decision to add such an agreement to Annex 4 is to be done exclusively by consensus, and a vote is not possible. This is one of the safeguards built into the Marrakesh Agreement to ensure that plurilateral agreements remain an exception and do not become a norm, and to ensure that the WTO Members continue 'to develop an integrated, more viable and durable multilateral trading system' as agreed in the preamble to the Marrakesh Agreement.

There is no precedent for adopting Annex 4 agreements through the Article X.9 route; the existing Annex 4 agreements were carried forward from the Uruguay Round negotiations. Several conditions under Article X.9 ought to be clarified:

- What qualifies as a 'trade agreement' and does the IF agreement fulfil these characteristics?
- The IF agreement must be signed in advance of the request, but what numbers are needed or if there is any minimum is unclear.
    - 'Parties to a trade agreement' means they must do more than sign. The Vienna Convention on the Law of Treaties (Article 2.g) defines 'party' as '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, in addition, for which the agreement has entered into force.
    - According to the latest text of the agreement, it 'shall enter into force, for those Members of the WTO which have accepted it, on the 30th day following the deposit of the 75th instrument of acceptance'.

Furthermore, adding an Annex 4 agreement to Annex 2 of the WTO Dispute Settlement Understanding also requires an amendment that requires consensus.

Developing countries, including those that had participated in the IF negotiations, have a collective interest in paying attention to the systemic implications that could arise from the mode of adopting the IF framework and the attempts to bring the framework under the WTO despite lack of consensus. This is because, as Jane Kelsey points out, it must not be assumed that developing countries that participated in the IF negotiations, on the promise of benefits to them, have endorsed the adoption of an outcome through mechanisms that violate the WTO's rules and circumvent consensus decision-making.

[16] See: https://www.wto.org/english/news_e/news23_e/infac_13oct23_e.htm