

Investment Facilitation – Another Plurilateral Initiative at the WTO and Its Potential Implications

by **Kinda Mohamadieh**

I. **BACKGROUND: NO MULTI-LATERAL MANDATE TO DISCUSS INVESTMENT AT THE WTO**

The Joint Initiative on Investment Facilitation (IF) emerges from a ministerial statement adopted by a subset of WTO Members at the 11th Ministerial Conference (MC11) of the World Trade Organisation (WTO) (See extracts from the statement in the annex). No consensus was reached on this proposal, and thus no multilateral mandate exists for these discussions.

WTO Member States opposing the initiative pointed out that the establishment of an investment facilitation working group runs against and would violate Article 1(g) of the July Framework (2004) in which the General Council declared that no work would take place towards negotiations on trade and investment within the WTO¹.

It has also been pointed out that the argument in support of IF at the WTO 'is being used to expand

1 See for example: South Africa Statement during the 11th WTO Ministerial Conference (10 December 2017).

the scope of the WTO rule-making directly into the heart of national investment law, by disciplining government decision-making on investment for sustainable development'².

The WTO membership already had a difficult experience with proposals to develop international rules on investment (i.e. Working Group on the relationship between trade and investment), including because these could limit the scope of governments' policy space to guide investment in a strategic manner to support domestic priorities.

At the same time, there are already very useful discussions and work on investment facilitation that have been taking place over many years in other multilateral organisations, such as the United Nations Conference on Trade and Development (UNCTAD).

2 Howard Mann and Martin Dietrich Brauch, 'Investment Facilitation For Sustainable Development: Getting it Right for Developing Countries', FDI Perspectives, Columbia Center on Sustainable Development.

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II. THE PROCESS THUS FAR AND THEMATIC ISSUES UNDER DISCUSSION

Post MC11, several meetings were held during 2018 among the signatories to the joint ministerial statement on IF, resulting in a checklist of possible elements of a framework for facilitating foreign direct investments. During 2019, textual proposals pertaining to the elements identified in the checklist were submitted by some countries participating in the joint initiative.

Structured discussions over these textual proposals were undertaken over multiple meetings, with a focus on developing elements of a multilateral framework on investment facilitation (MFIF) for development. Some participating Member States aim towards harvesting a multilateral framework on investment facilitation (MFIF) at the 12th WTO Ministerial Conference (MC 12, June 2020).

Based on these textual proposals, the Coordinator of the process prepared -under his responsibility- a compendium of the text-based examples submitted by participating Member States (June 2019). Issues under discussion are organised in seven sections including: scope and general principles, transparency and predictability of investment measures³, streamlining and speeding up administrative procedures and requirements⁴, contact/focal point/ombudsperson types of mechanisms and arrangements to enhance domestic coordination and cross-border cooperation, special and differential treatment for developing countries and least-developed countries, cross-cutting issues pertaining to micro, small and medium enterprises, corruption and corporate social responsibility, and institutional arrangements⁵.

According to statements heard during the WTO Public Forum 2019, a mainstreamed text for an investment facilitation framework has been prepared by the Chair of the plurilateral joint initiative process, based on the compendium mentioned

3 Including: publication and availability of information, notifications to WTO, enquiry points, specific exceptions applicable to transparency requirements, and other transparency-related issues.

4 Including: administrative procedures and documentation requirements, time limits and timeframes for administrative procedures, treatment of incomplete and rejection of applications, fees and charges, use of ICT (e-government), one-stop shop/single-window types of mechanisms, other issues related to streamlining and speeding up administrative procedures and requirements.

5 See proposed schedule of meetings for September-December 2019 period (INF/IFD/W/8).

above, and with a view towards facilitating the negotiations in the run-up towards MC12. This document is not made public by the States participating in this joint initiative.

III. ISSUES TO CONSIDER WHEN ASSESSING THE POTENTIAL IMPLICATIONS OF THIS INITIATIVE

i. The proposed rules overlap with rules proposed under the discussions on services' domestic regulations disciplines

There seems to be a significant overlap between what is proposed under the IF initiative and the proposed disciplines on domestic regulations that were discussed under the WTO Working Party on Domestic Regulation⁶, and currently being discussed under the joint initiative on domestic regulations in services.

However, while the latter focuses on regulations in sectors committed by Member States under the positive list approach of scheduling under GATS, the propositions under the joint initiative on IF would cover all investments in all sectors, which would potentially have much broader implications.

Furthermore, the proposed disciplines could potentially extend to various stages in the investment cycle, including admission, establishment, acquisition and expansion of investments. It could potentially cover various types of measures, directly and indirectly, related to investment facilitation, such as investment codes, licensing procedures and requirements, technical standards, public-private partnership laws, central bank regulations, among others.

Standards for administering measures related to investment, such as consistency, reasonableness, objectivity and impartiality, are considered in the discussion⁷.

Subjecting such measures to standards such as 'objectivity' could be potentially used as grounds to challenge regulation that is based on a 'public interest' consideration or on the subjective balancing required when there are multiple criteria for assessment, such as the environmental, economic or community impact of a proposed oil-drilling platform, power plant, mining investment, etc.

6 Under the negotiation mandate of Article VI.4 GATS.

7 See Job/GC/169 Communication from Brazil. See INF/IFC/W/8 Proposed Schedule of Meetings.

Standards such as ‘objectivity’ could also be taken to mean ‘not biased’, meaning that the interests of specific groups or communities (e.g. via affirmative action) could not be favoured. This could undermine the authority and restrict the regulatory space of national regulatory authorities. For example, if a country promotes environmental and sustainability aspects of investment, it would be important to preserve the regulatory space that allows for screening criteria for the admission, establishment, acquisition and expansion of investments that account for environmental concerns.

ii. The concept of ‘investment facilitation’ remains unclear and fluid, especially when focused on development

Generally, there is no one-size-fits-all approach to IF and there is no clarity as to what the concept of ‘investment facilitation’ encompasses. Before the joint initiative at the WTO, the discussion on investment facilitation had been taking place in various fora and contexts. Multilateral institutions such as UNCTAD, the Organisation for Economic Cooperation and Development (OECD) and the World Bank have been engaged in this discussion. Investment facilitation has been on the agenda of the G20 as well. At the regional level, some country blocs, like the Asia-Pacific Economic Cooperation (APEC), have developed their Investment Facilitation Action Plan. Moreover, selected countries have chosen to address this issue bilaterally, such as through investment treaties. For example, Brazil adopted the ‘Investment Co-operation and Facilitation Model’.

The term ‘investment facilitation’, as used in different fora, remains broad and unspecific. Research by UNCTAD and the OECD reflects a recognition that ‘little conceptual research has been undertaken on the topic’⁸.

Generally, the term has been considered to encompass a broad set of regulatory actions, institutional roles and administrative procedures. For example, in its ‘Policy Framework for Investment’, the OECD includes under investment promotion and facilitation issues pertaining to the business environment and investment promotion, the role of investment promotion agencies (IPA)

⁸ Mann and Brauch, referencing: Ana Novik and Alexandre de Crombrughe, ‘Towards an International Framework for Investment Facilitation’, OECD Investment Insights, page 1, April 2018.

and its performance and dialogue mechanisms, among other elements. Investment facilitation could overlap with investment promotion. APEC’s Investment Facilitation Action Plan considered ‘an investment promotion agency, or similar body, and mak(ing) its existence widely known’ as an investment facilitation measure. UNCTAD differentiates between the two, pointing out that investment promotion is about ‘promoting a location as an investment destination’⁹, thus about building image and marketing locations and targeting certain types of foreign direct investment (FDI) or projects and providing incentives.

Moreover, the dominant experiences pertaining to ‘investment facilitation’ thus far rest in developing voluntary principles and guidance that leave their adoption and application to the discretion of national authorities. Cases where investment facilitation is imbedded in treaties show that the focus has been on a ‘best endeavour’ approach that dynamically caters to the objectives of each State party to the treaty¹⁰.

iii. A multilateral framework on investment facilitation will not be a sister agreement to the trade facilitation agreement (TFA)

Proponents of a multilateral framework on IF have often compared it to the trade facilitation agreement. However, there are a few fundamental differences between the two that should be considered.

While the TFA focused on customs-related measures and was primarily focused on the movement, release and clearance of goods, the proposed IF framework would have a much broader reach, involving multiple authorities and policy considerations. For example, while the main authorities involved in procedures pertaining to the TFA are customs authorities, authorities involved in an investment vary from the investment promotion authorities to regulatory authorities concerned with environmental, health and other public policy considerations, competition and tax authorities,

⁹ James, X Zhan, presentation entitled: ‘Investment Facilitation: UNCTAD’s Perspective’, 10 July 2017, available at https://www.wto.org/english/tratop_e/invest_e/05_session_3_james_zhan_unctad.pdf, presented at Workshop on Investment Facilitation for Development ‘What Investment can do for Trade Connectivity and Development – Investment Needs and Bottlenecks’ held at the WTO.

¹⁰ Kinda Mohamadieh (2017), ‘Reflections on the Discussion of Investment Facilitation’, South Centre Investment Policy Brief.

local authorities responsible for land and other resources governed locally, among others.

A traded good may have environmental impacts that need to be regulated after entry at the border, but a factory making that product has land allocation, zoning, labour, financial, currency, taxation, environmental, health and safety, possibly indigenous law issues, competition, and other regulatory implications before and after it is established¹¹. Thus, the approach to designing international rules on investment facilitation cannot be approached in the same way as that of trade facilitation rules¹².

Besides, unlike the movement of goods, an investment is an ongoing project that extends over a period of time and the regulation usually extends over the whole cycle of the investment. Designing rules pertaining to investment facilitation ought to specify the stage of investment being targeted, whether it is facilitating the entry of FDI, the establishment of FDI or the whole cycle of the investment.

Consultations with developing countries, outside the WTO negotiations' dynamics, in regard to their IF needs, revealed that what they seek is mainly 'technical assistance for assessing applications and enhancing informed decision-making processes, benchmarking best practices, ...and better collaborative processes to understand investments and investors...[including] the capacity of governments to properly analyze investment proposals, the character of potential investors... and the sources of investment funding'¹³. These require a 'sophisticated mix of national, regional and multilateral actions' rather than negotiating obligations at the international level, according to the referenced consultations¹⁴.

11 Remarks made by Howard Mann, International Institute for Sustainable Development.

12 Howard Mann and Martin Dietrich Brauch, 'Investment Facilitation For Sustainable Development: Getting it Right for Developing Countries', FDI Perspectives, Columbia Center on Sustainable Development

13 Ibid, Mann and Brauch, referencing outcomes of a discussion held with Southern African Development Community Member States on investment facilitation (August 2018). The Report of the meeting could be found at: <https://www.iisd.org/sites/default/files/publications/sadc-iisd-investment-facilitation-workshop.pdf>

14 Ibid.

iv. While the proposed framework focuses on 'investment for development', it is unclear how the linkage with development could be addressed under multilateral rules

The ministerial statement and subsequent structured discussions speak explicitly of 'investment facilitation for development'. If this is to be reflected in the negotiations, then the scope of the rules to be designed ought to focus on specific foreign direct investments and not any, particularly those which contribute to development. Such an objective would require moving towards defining rules that address the quality of investments and their contribution towards the host states. In this regard, there is a need to define what is an investment and what is sustainable investment.

Recent work has attended to the sustainability characteristics of investments¹⁵. These projects reveal the layers involved in identifying sustainability and consequently the complex web of national institutions and regulators that could potentially be involved in screening an FDI to determine whether it qualifies as sustainable or not.

When posing the question: What qualities can make an investment 'sustainable', Mann and Sauviant note that '[a]n approximation of a definition is "commercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms". This definition goes beyond "do no harm" and calls for efforts on the part of foreign affiliates to make an active contribution to sustainable development'¹⁶.

Building linkages of added value between FDI and sustainable development processes is not a 'laissez faire' endeavour, but requires active policy interventions by governments. States should be cautious that an 'investment facilitation' model that is intrusive on regulatory and policy space would run counter to efforts directed towards building linkages between FDI and sustainable development processes.

15 See for example: Karl P Sauviant and Howard Mann (2017), 'Towards an Indicative List of FDI Sustainability Characteristics'; OECD Secretariat 'FDI qualities project' (2018).

16 Karl P Sauviant and Howard Mann (2017), 'Towards an Indicative List of FDI Sustainability Characteristics', Executive summary.

v. The proposed rules could carry deep implications on regulatory space

Regulations related to investment are a very broad category of measures that are closely intertwined with the development levels of a country as well as the sector concerned. Addressing such a broad category of regulations through rules that are designed on the multilateral level to fit various countries and sectors under a 'one-size-fits-all' approach could be intrusive on regulatory space.

Not recognising the need for differentiated approaches in the regulatory processes among countries and the dynamism that may be required in the regulatory process in order to attend to changes at the national, regional and global levels, could result in restraining countries' abilities to respond to the regulatory needs posed by a highly globalised and dynamically changing economic context. Particularly in an era of digital transformation, where countries are in the process of developing and testing digital policies and regulation, regulatory space and tools are essential.

Furthermore, the scope and reach of any multilateral framework is a determinant factor in assessing the potential implications it could leave on regulatory space. For example, while at the face of it 'transparency' is a useful principle, the extent of the implications and effects of any transparency model depends on its scope and depth of application. Indeed, one model of transparency could be more intrusive on regulatory space than another, depending on the scope of laws and regulations that would be covered and the level of openness of the regulatory process to influences from non-State actors.

vi. The focus is on host States' obligations, not that of investors and their home States

Naturally, facilitation of investments that adds a developmental value would require the cooperation of the three main actors involved (i.e. the home State, host State, and investor). Sauvant points out that a number of developed and developing home countries support their outward investors, including through financial support for outward investors' feasibility studies, or other forms¹⁷.

¹⁷ Karl P Sauvant 'Five key considerations for the WTO investment-facilitation discussions, going forward', *Columbia FDI Perspectives* No. 243 January 14, 2019.

Also, the responsibilities and obligations of multinational enterprises are a subject of discussion in multiple international fora, including under the Human Rights Council open-ended inter-governmental working group on TNCs, other business enterprises and human rights¹⁸.

These are elements that are garnering attention in the reform of international investment agreements and in advancing other areas of law such as international human rights law.

vii. The case for why multilateral disciplines on investment facilitation are needed has not been made yet

Generally, proponents have not made the case clear on why there is a need to negotiate a multilateral framework on investment facilitation, and what added value it provides in comparison to advancing investment facilitation through unilateral, bilateral and regional initiatives.

For example, if governments think that IF will help attract FDI, they can do it unilaterally immediately without being locked into the WTO IF rules, which might end up not suiting their regulatory objectives.

Generally, it is important to recall that the determinants of FDI are actually size and growth potential of markets, infrastructure development, and availability of resources (natural and abundant labour) etc.¹⁹

Investment experts have noted that a 'facilitation approach'²⁰, if structured right and in a solution-oriented cooperative approach, could reshape

¹⁸ <https://www.ohchr.org/EN/HRBodies/HRC/WG-TransCorp/Session5/Pages/Session5.aspx>

¹⁹ For example, see: Joseph Battat, and Peter Kusek (2011) 'Attracting FDI; How Much Does Investment Climate Matter?', published as World Bank Group - View Point: Public Policy for the Private Sector, available at: <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/327-Attracting-FDI.pdf>; Paulo Eliche Tembe & Kangning Xu (2012) 'Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies - A Comparative Study between Mozambique and China'. See also: US Agency for International Development (2005) Foreign Direct Investment: Putting It to Work in Developing Countries. Washington, DC: USAID; Page 38 <https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=743>

²⁰ See: <https://www.iisd.org/library/risky-tango-investment-facilitation-and-wto-ministerial-conference-buenos-aires>

global investment law frameworks for the better. However, they opined that the WTO is not the forum where such an approach could be nurtured. They point out that UNCTAD already has an extensive body of work on investment facilitation and investment for sustainable development.

viii. The interaction with the existing body of international investment rules could get complicated

FDI benefits from extensive protections under a complex set of investment protection rules established through a web of international investment agreement (IIAs)²¹. These include rules pertaining to investor-state dispute settlement (ISDS). Some IIAs also extend to cover investment facilitation measures as well as dispute prevention measures. If a new international framework on investment facilitation is agreed, it will be an addition to this corpus of international investment law. It will not replace or amend those rules. Yet, given that some IIAs do include investment facilitation and dispute prevention measures, it will be important to clarify the interaction between these existing commitments under IIAs and potential commitments under a multilateral framework on IF for those members that have undertaken overlapping commitments under both.

It is also important to consider that some old investment treaties include the ‘umbrella clause’²², which obliges the host State to observe specific undertakings towards its foreign investors (i.e. to comply with all its obligations in any treaty), bringing any obligations or commitments that the host State entered into in connection with a foreign investment under the protective ‘umbrella’ of the international investment treaty. Thus, this clause makes a breach of these commitments in other treaties potentially arbitrable through the ISDS mechanism built into the IIA²³. So, could the commitments undertaken under a multilateral framework on IF become potentially arbitrable

through the problematic ISDS mechanism built into IIAs?

ANNEX: Extracts from the Joint Ministerial Statement on Investment Facilitation for Development

The statement (WT/MIN(17)/59 dated 13 December 2017), adopted by 43 Member States of the WTO, provided the following:

‘...call for beginning structured discussions with the aim of developing a multilateral framework on investment facilitation.

These discussions shall seek to *identify and develop the elements of a framework for facilitating foreign direct investments* that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention.

These discussions shall also seek to *clarify the framework’s relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organizations.*

These discussions *shall not address market access, investment protection, and Investor-State Dispute Settlement...*

We further agree that the right of Members to regulate in order to meet their policy objectives shall be an integral part of the framework’.

21 UNCTAD Investment Navigator.

22 An umbrella clause can have wording such as ‘Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting State’. Investment tribunals tended to interpret this obligation expansively to mean that the host State is bound by the IIA to observe all its legal obligations. See: http://www.iisd.org/pdf/2009/best_practices_bulletin_4.pdf.

23 See more on the umbrella clause at: [https://uk.practicallaw.thomsonreuters.com/8-519-0939?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-519-0939?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

Kinda Mohamadieh is legal advisor and senior researcher with the Third World Network’s office in Geneva. She follows WTO processes and negotiations, with a focus on services, investment facilitation, and special and differential treatment. She also works on issues pertaining to international investment governance and the role and accountability of business enterprises with respect to human rights.