

The Plurilateral Joint-Statement Initiative on Investment Facilitation: Its developmental promise hangs in thin air

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Background

Negotiations on a “multilateral framework on investment facilitation for development” have been intensely pursued during 2020 and 2021, involving around 105 countries (although the number of countries actively submitting proposals is much lower). The negotiations on this framework stem from a ministerial declaration adopted by 16 World Trade Organization (WTO) Members that launched a joint-statement plurilateral initiative on the topic at the time of the 11th WTO Ministerial Conference. Negotiating investment facilitation rules under the WTO have not garnered multilateral consensus among WTO Members. In fact, WTO Members had agreed in 2004 that no work towards negotiations on investment will be undertaken during the Doha Round,¹ which at the time of writing this brief has not been declared closed.

In February 2021, a submission by India, South Africa and Namibia challenged the legality of joint-statement initiatives and the attempts to introduce their outcomes into the WTO (WT/GC/W/819). In their submission, they rejected the proposition that, if the negotiated outcomes are offered on a most-favoured-nation (MFN) basis, no multilateral consensus is required for bringing the resulting framework under the umbrella of the WTO. They stressed that such a proposition would be contrary to fundamental principles and objectives of the multilateral system, enshrined in the Marrakesh Agreement Articles II.1 and III.2.² They also stressed that any attempt to introduce such new rules into the WTO without the consensus of the whole WTO membership will be detrimental to the functioning of the rules-based multilateral trading system, erode its integrity by subverting established rules and foundational principles, bypass the collective oversight of Members and result in the disregard of existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates.³

¹ WT/L/579, para. 1(g), 2 August 2004, https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

² Article II.1 provides that “The WTO shall provide the common institutional framework for the conduct of trade relations among its Members ...”, and Article III.2 provides that “The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations”.

³ Submission by India, South Africa and Namibia (WT/GC/W/819/Rev.1), “The Legal Status of Joint Statement Initiatives and their Negotiated Outcome”, March 2021

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The proposed investment facilitation framework (IFF) has been compared to the Trade Facilitation Agreement (TFA). However, the subject that is to be governed by the IFF (i.e. all and any foreign investment) is very different from that of the TFA. The assumption that one can govern long-term investments with the same considerations and principles that could govern the passage of goods across borders is a problematic starting point and reflects the problematic assumptions underpinning the proposed IFF.

Questions pertaining to the developmental promise of the initiative

The initiative has been consistently cast by its proponents as beneficial for facilitating investment for development. However, the real impacts of the proposed disciplines could actually hinder the ability of States to leverage investment for sustainable development. Crucial sections of the current proposed draft⁴ are not aligned with developmental considerations or could be used as a basis to challenge regulatory interventions by the State in pursuit of developmental objectives.

For example:

- The proposed scope is very broad, covering all investments in all sectors, services and non-services, over the whole cycle of the investment⁵. The breadth and depth of the scope will be a determining factor of the burdensomeness of the disciplines and requirements imposed by the framework. Some participating States suggested extending the scope to phases preceding the making of the investment (pre-establishment phases). It is proposed that the scope covers all measures directly or indirectly relating to or affecting an investment, rather than those directly governing the investment. The breadth of the scope will shape the burdensomeness of the proposed disciplines. And while the definition of investment is still open, one proposition is based on an “asset-based” definition taken from old-style international investment agreements. That will fundamentally contradict the claim that the framework is to focus on investments that add value, since such a definition would extend coverage of the framework to assets that may not have any economic benefit to the host economy.
- The overall premise that can be depicted from the proposed scope and other proposed disciplines is that all investors are to be treated the same, irrespective of their impact on the host country and effect on the host communities. Under the disciplines, States’ attempts to privilege investments that add value to their development and national transformation objectives could be potentially challenged as lacking “objectivity”.⁶
- The proposed disciplines could expose the institutional and regulatory conduct pertaining to authorizing foreign investments, at all levels of government, to scrutiny under a set of broad multilateral standards.⁷ These standards could be used to challenge regulation that is based on subjective balancing which can be required when there are multiple criteria for assessing an investment, such as the environmental, economic or community impact of a proposed oil drilling platform, power plant, mining investment, etc. 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).
- The proposed disciplines could be highly intrusive on the administration of fees systems related to investment authorizations. It could impede the ability of developing countries to rely on such fees as a source of revenue to support different policy objectives or regulatory functions, although these countries may need these revenues where they have limited capacity to levy income tax or want to limit regressive taxes.

⁴ INF/IFD/RD/74/Rev.1 available at: https://www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf . The latest text INF/IFD/RD/74/Rev.3 is not publicly available.

⁵ See Kinda Mohamadieh (July 2020), “Scope of an Investment Facilitation Framework: Implications for its Developmental Claim”, Third World Network, available at: https://www.twn.my/title2/briefing_papers/investment_facilitation_series/Scope%20of%20IFF%20TWNIF%20Jul%202020%20Mohamadieh.pdf

⁶ INF/IFD/RD/74/Rev.1 available at: https://www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf, see provision 13.2.

⁷ Ibid, see section III.

- The proposed section on transparency requires advance publication of laws and regulations of general application, or any changes to them, that a Member to the future IF framework proposes to adopt in relation to matters falling under the scope of the disciplines (i.e. measures related to investment at all levels of government). 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. The proposed disciplines also require providing investors, other interested persons and other Members with a reasonable opportunity to comment on these measures and to consider received comments. These along with other “transparency” requirements will 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.
- All this is coupled with weak special and differential treatment that boils down to transition periods, which are not enough to address the impact on regulatory space that could emerge out of the proposed disciplines. LDCs are not exempted from the implementation under the proposed IF framework. The proposed draft includes vague promises of technical assistance and capacity-building, based on mutually agreed terms. Those do not cover financial assistance and do not set any obligations on developed countries to contribute in this regard. Thus, it does not provide developing countries and LDCs with any guarantees to access such assistance.
- The draft includes weak corporate social responsibility proposals, which re-enforces a voluntary approach to responsible business conduct. It also does not give enough attention to the responsibilities of the Home States of investors and investments in, for example, requiring Home States to properly regulate the conduct of their nationals abroad so as not to cause harm through their investments and if they did, then to ensure that they are held to account.

Two major systemic challenges facing the IF initiative

(1) The interaction of the proposed IFF with international investment agreements (IIAs) particularly ISDS is a major challenge that proponents of the IFF have been grappling with. Many of these countries have been facing tremendous challenges as a result of ISDS and want to limit, rather than increase, their potential exposure to liability under ISDS. The commitments under the proposed IFF could potentially filter into the world of IIAs and ISDS in cases where Parties to the IFF are party to IIAs that include umbrella clauses, broad “fair and equitable treatment” clauses or broad MFN clauses, meaning that their breach becomes a violation of the IIA. Proponents of the IFF have been trying to design what they refer to as a “firewall” to avoid this challenge. This includes designing legal language under the IFF sections on scope, MFN, and dispute settlement. However, given how jurisdictional issues are decided by investment arbitration tribunals, it is not evident that such language inserted in the IFF would guarantee that a country does not get questioned about its IFF commitments through ISDS.

(2) Some participants in negotiating the IFF have been advocating the incorporation of the proposed framework under the WTO despite the lack of consensus among the WTO membership on this matter. Some of the ideas considered for those purposes are inscribing the outcome in schedules under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), or adopting the IFF as a new agreement under the WTO. Yet, it is increasingly evident, after tackling this issue in different meetings by the IFF proponents and also among expert academics, that there is no legal avenue available to bring the IFF under the umbrella of the WTO as long as there is no consensus on this issue among WTO Members.⁸ Soft law approaches, whereby the IFF could be approached as stand-alone guidance (not as part of the WTO acquis) that could help inform countries’ practices in accordance with their national needs, could be another approach.

⁸ Jane Kelsey (September 2021), “Investment Facilitation Joint Statement Initiative: No Home in the WTO”, Third World Network briefing paper, available at: https://www.twn.my/title2/briefing_papers/twn/Investment%20facilitation%20TWNBP%20Sep%202021%20Kelsey.pdf

What is expected for the IFF at the time of the 12th WTO Ministerial Conference?

A revised cleaner text⁹ with fewer brackets is being eyed by the participants in the IF negotiations and a ministerial declaration is prepared by them to underline their resolve to continue negotiations, aiming to conclude the text negotiations by the end of 2022.

Developing countries and LDCs, including those participating in the IFF negotiations, have a collective interest in paying attention to the systemic implications that could arise from the mode for adoption of the proposed IFF and the attempts to bring the framework under the WTO despite the lack of consensus. This is because, as Jane Kelsey points out, it must not be assumed that developing countries that participated in the IF joint-statement initiative 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.¹⁰

It is crucial that WTO Members attend to the points concerning illegality of the propositions to bring the outcome of plurilateral joint-statement initiatives under the WTO without consensus of its membership (including those raised by South Africa, India, and Namibia in WT/GC/W/819) and request the proponents of the IFF to fulfil the obligations under the rules of the WTO Marrakesh Agreement and relevant WTO agreements, including on consensus requirements pertaining to commencing WTO negotiations and harvesting their results¹¹. The rules of the WTO Marrakesh Agreement setting the scope and boundaries of the WTO negotiating function (Articles II.1 and III.2), in the context of the objective of the WTO as articulated in its Preamble, which is to develop “an integrated, more viable multilateral trading system”, require that the WTO provide the forum for further negotiations among its Members concerning their multilateral trade negotiations as may be decided by the Ministerial Conference, and not as may be decided among a subset of WTO Members.

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⁹ See INF/IFD/RD/74/Rev.3 at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx, not publicly available.

¹⁰ Jane Kelsey (September 2021), “Investment Facilitation Joint Statement Initiative: No Home in the WTO”, Third World Network briefing paper, available at: https://www.twn.my/title2/briefing_papers/twn/Investment%20facilitation%20TWNBP%20Sep%202021%20Kelsey.pdf

¹¹ Jane Kelsey (June 2021), “Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO”, Auckland Law School, available at: https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf