The Proposed Multilateral Framework on Investment Facilitation:

An analysis of its relationship to international trade and investment agreements

August 2020

Nathalie Bernasconi-Osterwalder
Soledad Leal Campos
Colette van der Ven

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IISD HEAD OFFICE

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700
Website: www.iisd.org
Twitter: @IISD_news

CUTS INTERNATIONAL, GENEVA

37-39, Rue de Vermont
1202 Geneva, Switzerland

Tel: +41 (0) 22 734 60 80
Fax:+41 (0) 22 734 39 14
Email: geneva@cuts.org
Website: cuts-geneva.org

Executive Summary

The issue of investment facilitation has developed an increasingly high profile among policy-makers, academics, and international governmental organizations over the past five years. Along with being addressed in various ways by the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD), and the G20, it has now become the subject of a Joint Statement Initiative (JSI) on a proposed multilateral framework on investment facilitation (MFIF) among various World Trade Organization (WTO) Members. This JSI has spent over two years engaged in "structured discussions" aimed at identifying and developing "the elements of a framework for facilitating foreign direct investments" and clarifying "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."[1] This effort has led to the development of various working documents, the most recent being the *Informal Consolidated Text*, circulated to Members at the end of April 2020 (INF/IFD/RD/50).

The group of WTO Members involved in the JSI is now looking to launch negotiations, though the timing depends partly on the COVID-19 restrictions in Switzerland, where the talks are held. Since its launch, the structured discussions have drawn the attention of trade and investment watchers while prompting a range of questions among participants, the wider WTO membership, and outside the organization. On the one hand, some specific questions pertain to issues in connection to the current text, such as the scope and coverage of a potential MFIF; its potential relationship with provisions contained in the WTO agreements and the prospects of complementarity or incoherence; and how the MFIF would interact with the wide web of existing international investment agreements (IIAs). On the other hand, some developing countries have also raised questions concerning the extent to which an MFIF addresses their priorities and interests and could contribute to achieving their sustainable development objectives.

This paper addresses some of these issues above and aims to facilitate a greater understanding of some technical issues under consideration in the structured discussions. It builds on a seminar held in January 2020, where participants identified issues for further research and analysis.

In **Part 1**, the paper places the structured discussions on investment facilitation into a broader context, including how investment facilitation has been addressed in forums such as UNCTAD, the OECD, and the G20. This includes the 2016 UNCTAD Global Action Menu for Investment Facilitation, which considers facilitating investment to be "crucial for sustainable development and inclusive growth" and also highlights that "any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda."[2] It also refers

[1] WTO. (2017, December 13). *Joint Ministerial Statement on Investment Facilitation for Development* (WT/MIN(17)/59). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870

[2] UNCTAD. (2016, September). *Global action menu for investment facilitation.* https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf

to a 2018 OECD policy brief,[3] which explores three "options" for a multilateral approach to investment facilitation. These options ranged from the voluntary adoption by host states of "national principles and actions for investment facilitation" to the adoption of "principles, policies, and actions at the global level" by host states that could be supplemented by additional commitments by home countries "and potentially other parties (e.g. the private sector, civil society)." The policy brief also suggested "potential elements of an international framework for investment facilitation."

Against this background, Part 1 conveys some of the broad range of views on the negotiations of an investment framework. For instance, it explains that Members participating in the JSI have stressed that transparency and the predictability of "investment measures" are at the core of any investment facilitation framework. It further notes that some of them have also emphasized the need for such a framework to help "developing countries, and particularly [least developed country, or LDC] Members, to put in place the appropriate institutional and regulatory framework for attracting and expanding investments."[4] In connection with this, the paper also points to the concerns raised by some experts and by representatives from some developing countries in the sense that the "development" dimension of these negotiations is currently addressed mainly through the provisions on special and differential treatment.

Furthermore, this part of the paper conveys the range of views expressed on the issue of obligations for home states, as well as on the MFIF's potential contribution to sustainable development. It explains that the text does not contain any obligations for home states to facilitate outward investment by supporting and promoting investment into developing country Members or LDCs. It also notes that the sustainable development dimension is mentioned in the preamble and in a provision concerning corporate social responsibility (CSR), based on which WTO Members would encourage enterprises to incorporate CSR practices on a voluntary basis, and explains the rationale given.

In relation to the above, the paper notes the concerns raised by some experts and some developing country Members over the discussions' emphasis on efforts to reform administrative domestic processes to facilitate foreign investment without including concrete ways to advance investment for sustainable development in a manner that is line with the host state's objectives. The paper mentions the research conducted on measures aimed at facilitating the flow of higher-quality investment as well as on the identification of "sustainability characteristics" (divided into two categories: "common" and "emerging")[5] established by host states as they seek to attract and retain foreign direct investment (FDI). It also notes that, with the exception of a provision on

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[3] OECD. (2018). *Towards an international framework for investment facilitation* (OECD Investment Insights). https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf

[4] WTO. (2019, December 11). *Structured discussions on investment facilitation for development, meeting of 25 November 2019. Summary of discussions by the Coordinator* (INF/IFD/R/9). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R9.pdf

[5] A detailed list of "common" and "emerging characteristics" can be found in: http://ccsi.columbia.edu/files/2020/02/KPS-and-Howard-Mann-Making-FDI-more-sustainable-Towards-an-indicative-list-of-FDI-sustainability.pdf

anti-corruption and on CSR, the considerations set out in the FDI sustainability characteristics are not included in the substantive provisions in the *Informal Consolidated Text.*

The introduction further provides an overview of the work done over the past two and a half years in the context of the structured discussions, breaking it down into its various phases and corresponding working texts. The paper mentions that co-sponsors of the Joint Statement had agreed to move into negotiating mode as of March 2020 in the lead-up to the Twelfth Ministerial Conference (MC12), scheduled in June 2020, though since then all WTO activities have been suspended due to the COVID-19 pandemic. It also notes the beginning of open-ended informal virtual meetings on June 5, 2020.

Part 1 also contains an overview of the *Informal Consolidated Text* (which currently contains a preamble and nine sections), as well as of some of its draft provisions (otherwise known as items) indicating some areas where new proposals have been submitted by Members since the circulation of the *Streamlined Text* in January 2020. The entire paper is based on an overall remark contained in the text stating that "the whole document is in between double brackets" to reflect the fact that it does not prejudge "the position or views of any delegation on the issues under negotiation." Given the focus of this issue paper, it places emphasis on the proposals concerning the scope and coverage of the MFIF and notes the different approaches to this issue, which are analyzed in Part 2.

Part 2 is entitled "Scope of Application and Coverage of a Potential Multilateral Framework on Investment Facilitation" and looks into the scope of the MFIF, pursuant to Articles 1.1 and 1.2 (Scope). It also examines the scope of the MFIF as derived from the MFIF substantive provisions, for instance, Articles 3.1 (Publication and availability of measures) and 7.1 (Consistent, reasonable, objective and impartial administration of measures).

As a result of this analysis, the paper finds that the MFIF's scope is currently unclear, given the different approaches used in the various relevant provisions. The coverage seems very broad, though how broad remains to be further defined. Based on this observation, it notes the importance of (i) agreeing on the desired scope of disciplines and adapting the language set out in Article 3.1 accordingly and (ii) reconciling the scope definition in Article 1.1 with the actual scope of the framework.

The analysis highlights the need to understand the types of measures that "affect" FDI, given that this formulation could implicate a very broad array of measures. It also points to the critical need to clarify the MFIF's scope in order to better understand areas of overlap between the MFIF- and the WTO-covered agreements (an issue that is examined in Part 3 of this paper). This discussion on overlap is done through an analysis of some MFIF formulations, as well as of some proposed working definitions. The former includes wording such as "foreign direct investments"; "across the whole investment life-cycle"; in "services and non-services sectors"; and "measures … for facilitating foreign direct investments." The latter encompasses different definitions of "investment" used in other contexts, as well as in the *Informal Consolidated Text* (which includes an "asset-based" definition, as well as an "enterprise-based" definition).

In terms of the potential implications of formulations contained in Article 1.1, the analysis finds that "across the whole investment life-cycle" could be interpreted to cover measures that affect FDI other than pre- and post-establishment. In turn, the wording "in services and non-services sectors" would broaden the scope of the MFIF, which would mean that the coverage of the MFIF would go significantly beyond what is currently covered under the General Agreement on Trade in Services (GATS), and thus would create obligations vis-à-vis measures that would go well beyond Members' commitments under the WTO.

In this regard, the paper also addresses the ongoing work under the JSI on "Services Domestic Regulation" (SDR), where a group of WTO Members is working on negotiating a "reference paper" that would set out disciplines for regulations affecting trade in services "downstream" in the investment cycle. It notes that the broad scope of the MFIF would mean it would apply to the FDI measures to which the SDR reference paper would also apply, thus creating overlap, duplication, and possible incongruity. It notes that a way to deal with this scenario would be that, at a minimum, Members consider integrating the ongoing work on the MFIF and the JSI on SDR.

Concerning specific provisions, the findings point to a substantial overlap in the obligations under the MFIF and the existing obligations under the WTO agreements and/or the ongoing negotiations on the JSI on SDR. It analyzes, in particular, some of the publication and transparency provisions under the MFIF and the GATS, as well as the potential for overlap between the MFIF and the JSI on SDR. For a significant number of other provisions, the research finds that the MFIF obligations would go beyond Members' commitments under existing WTO agreements. This point is further elaborated upon in Part 3.

The paper considers that, from a legal perspective, the findings above would be a cause of concern insofar as the MFIF creates conflicting or contradictory obligations vis-à-vis existing WTO agreements, for instance, with respect to the issue of most-favoured nation (MFN) exceptions under the GATS/MFIF and the proposed special and differential treatment provisions under the MFIF and JSI on SDR.

The paper states that, in addition, non-conflicting overlapping obligations could also be problematic from a practical perspective. This is the case where obligations are framed and defined differently or where MFIF obligations go beyond the obligations set out in existing WTO agreements. Here, the obligations could create implementation challenges because they would require Members to engage in a complex provision-by-provision comparison to establish the universe of obligations applicable to different measures, due to the imperfect scope overlap between the MFIF- and the WTO-covered agreements. The paper's analysis points to the complexity that Members would face, given that the MFIF would go well beyond the types of commitments under the WTO's Trade Facilitation Agreement, which was also built around select articles from the General Agreement on Tariffs and Trade (GATT).

The paper also addresses the scope implications derived from the MFN clause contained in Article 2 in the *Informal Consolidated Text*, as well as from the absence in the text of a national treatment clause.

Concerning **MFN**, the paper indicates that, while the language and approach of Article 2 are common in the WTO agreements (i.e., that Members shall treat investments and investors of any other Member no less favourably than like investments and investors of any other country), such a clause merits further analysis, particularly because it is unlikely that the MFIF will be adopted and ratified by all WTO Members. In such a situation, participants would have to decide whether the MFN clause would extend the benefits of the MFIF to all WTO Members, including those Members that have not adopted and ratified the framework, even though only those who have ratified it would be subject to its terms, in an approach similar to the Information Technology Agreement and its revision.

The paper observes that, if Members decide to follow such approach, they will need to consider the potential multilateralization effect of the MFN clause, which under GATS has been interpreted to quasi-automatically multilateralize certain obligations under bilateral investment treaties (BITs) that are broader in sectoral coverage and more liberal in content than those in WTO Members' schedules. It further states that, in a similar way, the MFN clause in the MFIF would have the effect of multilateralizing "any measure covered by this framework," that is to say, investment facilitation measures affecting FDI in services and non-services sectors.

Concerning **national treatment**, the paper highlights the fact that the text does not contain a national treatment provision, which means, for instance, that a Member could apply more favourable processes and procedures that affect FDI for domestic investors compared to like foreign investors. This, in turn, could potentially undermine any benefits that come from the MFN clause. It notes, however, that the actual impact of the absence of a national treatment clause would depend on the likelihood that a government would put in place an investment facilitation regime under the MFIF but deviate from the processes and procedures put in place when dealing with domestic investors. It points out that governments may be more prone to apply the relevant processes and procedures across the board, even in the absence of a national treatment clause. The paper mentions that the national treatment issue may become more relevant as Members further define the scope of the MFIF.

Part 3's analysis of the relationship between the proposed MFIF commitments, the WTO architecture, and the existing commitments contained in the WTO agreements consists of two parts: first, a focus on WTO agreements that could apply to investment measures and, thus, could create scope overlap with the MFIF; second, a comparison of the substantive provisions of the MFIF with existing obligations under the WTO agreements, particularly the GATS.

The paper finds that the MFIF builds upon, and in various places goes significantly beyond, the transparency and administrative obligations contained within the GATS – either by extending the scope or adding requirements or both. The MFIF also contains several "GATS-extra" obligations that are not present in the GATS. Thus, with respect to investment measures that fall within the purview of the GATS, Members will assume additional obligations compared to what they have committed to under that agreement.

The paper notes that the extent to which the MFIF would go beyond a Member's GATS obligations would, in part, depend on a Member's specific commitments. For instance, for those with fewer commitments, including many developing country and LDC Members, the gap between existing GATS obligations and the MFIF will be larger than for those Members that have made a larger number of commitments under the GATS, even where they have some additional time to bring their measures into compliance.

In this context, the paper notes that implementation issues could arise, highlighting the importance of ensuring alignment in areas where possible discrepancies could arise, such as the exceptions, as well as for Members to have a clear understanding of the way in which MFIF provisions relate to existing obligations they have undertaken under the WTO. The paper looks into specific provisions, such as transparency and related obligations, flexibilities, temporary entry for investment persons, and transfers and subrogation.

Transparency and related obligations. The paper analyzes different obligations under the MFIF and the GATS. It finds that some provisions in the GATS cover obligations that overlap with the *Informal Consolidated Text* (specifically, Article III of the GATS, which contains provisions on transparency, and Article VI, which addresses domestic regulation). The paper further states that most of the MFIF provisions on transparency elaborate on and expand the scope of existing transparency obligations ("GATS+"); examples of this include Articles 3.1 to 3.6, as well as 5.1 to 5.3, which are elaborated on in the paper. Unlike the GATS, the *Informal Consolidated Text* also contains separate provisions on publication requirements for situations when an authorization is required to invest in a country (Articles 3.7 to 3.9, described in the paper in further detail).

On administrative procedures, the paper notes that the *Informal Consolidated Text* elaborates on and complements what is contained in the GATS. Among other examples, it refers to GATS Article VI, which requires Members "for sectors in which specific commitments are undertaken, to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner"). The *Informal Consolidated Text* contains a similar obligation but expands the scope to "all measures of general application [covered by this framework]" (Article 7.1). Furthermore, unlike the GATS, the MFIF contains specific obligations related to proceedings that directly affect investors of another Member (Article 7.2).

In terms of appeal and review, the paper observes that Article 17 of the MFIF contains an obligation that is largely similar to the one contained in GATS Article VI:2(a), to put in place "judicial, arbitral, or administrative tribunals or procedures which provide, at the request of the service provider, for prompt review and appropriate remedies of administrative decisions affecting trade in services," but applies to decisions "affecting the investment." Article 17.2 adds layers to that obligation, requiring that parties to the proceedings are entitled to "a reasonable opportunity to support or defend their respective positions"; and "a decision based on the evidence and arguments submitted or… on the record compiled by the administrative authority." It further requires that "procedures for appeal and review are carried out in a non-discriminatory manner." Compared to the GATS, the paper finds that the MFIF goes beyond providing more extensive protection to the party seeking appeal and review of administrative decisions affecting investment.

Concerning **streamlining and speeding up administrative requirements**, the paper finds that the *Informal Consolidated Text* contains various additional provisions that do not have corresponding GATS obligations, although they have been discussed in the context of the Working Party on Domestic Regulation and the JSI on SDR. Many of these provisions reflect obligations set out in the TFA (*Informal Consolidated Text* Articles, 8, 9, 11, 12, 13, 14, and 15, which are elaborated on in the paper). It also observes that Section IV of the *Informal Consolidated Text* contains several provisions on issues such as good regulatory practices and international regulatory cooperation that go well beyond GATS obligations and reflect recent developments in regional trade agreements. These provisions can be considered "GATS-extra."

Flexibilities and exceptions. The analysis points to important differences between the GATS and the *Informal Consolidated Text*. In the GATS, special and differential treatment is, in part, captured by the flexibility that Members have in the negotiation of specific commitments. Since the GATS follows an opt-in ("bottom-up") approach, it means that Members have the flexibility to make commitments in the sectors and sub-sectors of their choice. Many developing country and LDC Members have opted to make very few, if any, commitments. This, in turn, has limited their obligations relevant to administration (domestic regulation), as most of these apply only with respect to measures that affect services sectors in which countries have made specific commitments. The paper highlights the fact that the MFIF follows a different approach since its obligations, including with respect to services, would apply across all sectors, not only where WTO Members have made specific commitments.

In terms of **exceptions**, the paper notes that, given the scope overlap that exists between the MFIF and the GATS, it is important to ensure as little incongruity as possible in these areas. This would avoid a situation in which a measure may be justified under the GATS but not under the MFIF, thus diminishing the rights and obligations of Members under the Marrakesh Agreement.

Temporary entry for investment persons. The paper analyzes the proposals made by two delegations and notes that, since these proposals concern the entry of people, they implicate Mode 4 of the GATS. The extent to which these provisions will interact with, or add to, existing obligations for Members with respect to Mode 4 obligations would, for most provisions, depend on the extent to which Members have made specific obligations under Mode 4. Moreover, both proposals, and especially one of them, also contain provisions that go beyond what is currently required under the GATS. For instance, it contains a long list of additional requirements that Members must abide by when processing applications for temporary business visas. The paper observes that, even without specific provisions concerning the entry and temporary stay of business persons, the MFIF would likely still apply to measures concerning the entry and temporary stay of business persons.

Transfers and subrogation. The paper mentions a proposal submitted by one delegation that requires Members to ensure "that all transfers relating to investments may be made freely in and out of that Member without delay." The proposal also contains a subrogation clause, requiring that if a Member makes "a payment to any investor of that Member under an indemnity, guarantee, insurance contract pertaining to an investment of such Member in another Member,"

then that other Member shall recognize the subrogation. The paper observes that these provisions are of a very different nature than provisions requiring that Members publish measures that affect FDI, and there are no equivalent requirements under the WTO agreements. It observes that they would impose significant additional requirements on the Members.

JSI on SDR. The paper analyzes the JSI on SDR, which involves the negotiation of a reference paper, with binding disciplines that the participants would apply to their GATS services schedules, either as new or improved commitments. Participants would also notify draft indicative schedules that they will eventually aim to finalize and certify. Meanwhile, the MFIF would apply to FDI measures, including those covered by domestic regulation under GATS Article VI. However, unlike the December 2019 draft *Reference Paper on Services Domestic Regulation* (December 2019), the MFIF is not limited to sectors in which Members have made specific commitments.

Based on the December 2019 draft *Reference Paper*, this research identifies broad substantive overlap with the MFIF. This includes, for instance, overlap on authorization procedures, treatment of incomplete applications, rejection of applications, fees and charges, independence of competent authorities, publication and information available in situations where authorization is required, enquiry points, and the opportunity to comment. With respect to many of these issues covered by both processes, provisions in the draft *Reference Paper* and the *Informal Consolidated Text* are largely similar and, at times, verbatim. Yet there are also various differences, with the Informal Consolidated Text containing requirements that go beyond the draft *Reference Paper,* and the latter containing additional detail that has not been included in the *Informal Consolidated Text.* The *Informal Consolidated Text* contains various provisions that are not present in the *Reference Paper,* such as provisions on notifications; streamlining and speeding up administrative procedures and requirements; establishing contact/focal points/ombudsman types of mechanisms; arrangements to enhance domestic coordination; and cross-border cooperation on investment facilitation. These provisions would also apply to the FDI measures covered by the draft *Reference Paper*.

The paper states that, given the substantial overlap between the draft *Reference Paper* and the *Informal Consolidated Text,* Members involved in either or both must be aware of the disciplines being negotiated in the other and consider these to avoid creating duplication, incongruity, or outright incoherence. This is especially important where disciplines agreed in one are contradicted in the other, including in their implications for developing country and LDC Member flexibilities.

In terms of **other WTO agreements**, the paper notes that those would also apply to investment measures that fall under the purview of the MFIF. These agreements typically contain provisions on transparency and the publication of information. For those measures that are covered by existing WTO agreements that also fall under the purview of the MFIF, Members would be subject to additional obligations, for instance, in the case of the Agreement on Trade-Related Investment Measures (TRIMS Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). In addition to these agreements, the MFIF could also overlap with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Technical Barriers to Trade (TBT) Agreement, and the General Agreement on

Tariffs and Trade (GATT) 1994, in situations where standards and requirements have an impact on investment.

The paper observes that, from a legal point of view, issues arise in situations where there is an incongruity between the provisions of the MFIF and Members' existing obligations under the WTO agreements. While areas of potential legal inconsistency are not numerous, the fact that the focus on investment in the MFIF does not neatly overlap with the existing structure of the WTO agreements creates a complicated dynamic with respect to implementation. This means that, for certain types of services commitments and certain types of measures covered by the GATS, the TRIMS Agreement, and the SCM Agreement, Members would have more stringent reporting and transparency obligations than others. This would require governments to "merge" the obligations that do overlap, for instance, in areas of transparency or administration, to consolidate the obligations under the respective agreements.

At the end of Part 3, the paper notes that the prospect of the proposed MFIF disciplines eventually being invoked in legal challenges is an important one, both in the context of the WTO's Dispute Settlement Understanding (DSU) and in the context of the lessons already learned from the world of international investment governance. While WTO agreements are rarely, if ever, invoked in investor–state arbitration under IIAs, the prospect of a new agreement devoted specifically to investment facilitation and potentially within the WTO architecture could change that significantly going forward. This is especially so given the scope and definition questions raised, as well as the structure of those IIAs already in place. These questions are analyzed in Part 4.

In **Part 4**, the paper examines the relationship between the proposed provisions in the MFIF and the international investment regime (which includes approximately 2,600 IIAs currently in force). Building upon this analysis, it also considers the potential implications that this relationship may have for the interpretation of treaty-based investor–state dispute settlement (ISDS) obligations, based on examples from investment-related jurisprudence to date and common provisions in IIAs that could be used to bring MFIF commitments into the arena of investor–state arbitration.

Part 4 refers to the concern voiced by some WTO Members about the prospect of investment protection issues being brought into the structured discussions for the MFIF, either explicitly or implicitly. It notes that this concern was raised in the 2017 *Joint Statement* that launched these discussions, and is currently reflected in the *Informal Consolidated Text,* which clarifies that the "framework shall not cover: investment protection rules; and, investor–state dispute settlement." In connection with these issues, it also refers to related submissions that have been made on the subject.

The paper observes that, despite the current MFIF language, the relationship and interaction between the proposed MFIF and IIAs remain unclear. The analysis finds a significant overlap of scope and coverage. The scope of IIAs is typically and primarily defined through "investor" and "investment," which define the coverage of protected persons and assets or enterprises under the IIA. "Investment" is most often defined in investment treaties to be "any kind of asset" in the host country, though recently, some states have moved away from an asset-based approach toward

an enterprise-based definition. Under the latter approach, the investment definition is limited to direct investments or investments made through a locally established enterprise.

The analysis also finds that all of the options currently proposed in the *Informal Consolidated Text* in terms of scope would lead to an overlap of coverage with IIAs. Although not yet clear, the MFIF would cover at least FDI across an investment's life cycle and possibly go beyond to cover portfolio investments. The paper mentions that a question that WTO Members are particularly interested in clarifying is whether the enforcement mechanisms under IIAs could be used to enforce any new disciplines on investment facilitation, even if these disciplines are adopted in the WTO context and even if the proposed MFIF explicitly excludes investment protection rules and ISDS.

The paper notes that there is a general expectation that disputes arising under the WTO agreements must be resolved under the WTO's DSU. However, if an investor–state tribunal is established under an IIA for the breach of a WTO obligation (or another trade obligation), the tribunal will be reviewing this breach against the applicable investment treaty based on which the tribunal will determine is its jurisdiction. The question will then be how the breach of a WTO obligation relates to the underlying IIA and how the application of the IIA will be impacted by the WTO obligation.

The paper highlights that the vast majority of investment agreements focus on the protection of investments and investors. Among other obligations, they require states to compensate investors in case of direct and indirect expropriation; to treat investors fairly and equitably; to not treat national investors more favourably than foreign investors; and to not treat some foreign investors more favourably than others. A proportion of IIAs also includes "umbrella" clauses. These stipulate that states are not only required to fulfill the treaty's obligations regarding expropriation, fair and equitable treatment (FET), non-discrimination, and so forth but must also respect other commitments that the government has undertaken elsewhere.

The paper indicates that, in addition to these substantive standards, almost all IIAs contain a clause providing for a private right of action for resolving disputes. The ISDS clause allows investors to challenge measures taken by the host states allegedly in breach of the IIA directly before investor–state tribunals. The inclusion of ISDS provisions in IIAs makes it particularly important to understand the relationship between the proposed MFIF and IIAs since new disciplines on investment facilitation in the WTO context could still end up being scrutinized by an investor–state tribunal. The paper explains that a foreign investor could decide to bring an ISDS claim under an IIA to challenge a government measure through the umbrella clause, the FET clause, and possibly the MFN clause, alleging a violation of MFIF disciplines. In such a case, the foreign investor could request compensation for harm caused. The compensation would be calculated at the time of the measure, in contrast to the legal remedies available under the WTO or trade agreements, which aim at compliance and are prospective, rather than focusing on how long the inconsistent measures have been in place.

The paper notes that, while the WTO dispute settlement system is state–state and aims at getting Members to comply with their obligations, ISDS is between a private actor and the state and

is built around monetary compensation. When the WTO Dispute Settlement Body finds that a Member has acted in violation of WTO rules, the Member has the opportunity to bring those WTO-inconsistent measures into compliance within a "reasonable period of time." Only if that compliance fails to occur can the Dispute Settlement Body authorize the complaining Member to suspend concessions or other obligations, as provided for in the DSU. By contrast, if a breach of the IIA is found in ISDS, the damages will be calculated with interest from the day the measure at issue was taken, and the damages award will be in favour of the investors, not the state. The paper further analyzes the potential implications of umbrella clauses, FET, and MFN provisions in IIAs.

Umbrella Clause. The paper explains that 43% of IIAs contain clauses that extend the treaty's reach beyond the rights and obligations that it explicitly spells out. It analyzes jurisprudence on this clause and highlights its broad interpretations made by tribunals. In terms of **umbrella clauses and WTO commitments**, the paper notes that, to date, investor–state tribunals have addressed questions relating to the scope of umbrella clauses and how they relate to different types of contracts to which the state is a party, as well as commitments under national legislation. While no conclusive jurisprudence is available to date on whether international commitments in international agreements, including under the WTO, can be considered as falling under the purview of an umbrella clause, the language of many clauses and the tendency of tribunals to interpret the clauses broadly indicate that umbrella clauses extend to international commitments. The paper notes that case law indicates that broadly phrased umbrella clauses can cover contractual, unilateral, and other commitments that the host state has made with respect to investments. These commitments need not be made with respect to "specific" investments, just investments in general. It observes that commitments made by WTO Members in a new investment facilitation framework would very likely fulfill this requirement since all the measures covered will relate to investment. Unless explicitly excluded in the relevant BIT, a broad umbrella clause could be interpreted to extend to commitments made with respect to investments.

Fair and equitable treatment (FET). The paper explains that, with the exception of some investment treaties and investment chapters in free trade agreements, IIAs typically contain a requirement for the host state to treat investors of the state party "fairly and equitably." According to a database maintained by UNCTAD, FET provisions are included in nearly 95% of all international investment treaties and constitute the most litigated standard in treaty-based investor–state arbitration: around 83% of all treaty-based investor–state arbitration has involved claims based on a FET provision. The paper finds that new MFIF disciplines could potentially significantly influence investor–state tribunals' interpretation of the FET clause. When interpreting the FET standard, investor–state tribunals will likely consider the commitments that states, in their capacity as WTO Members, have made under the MFIF to determine whether the host state has violated the FET standard. A breach of an MFIF commitment could then be seen as a violation of the FET clause. Commitments made under the MFIF could also be seen by investor–state tribunals as creating "legitimate expectations" of the investor, which, if frustrated through state conduct, would lead to a compensable violation of the FET standard.

Based on an analysis of the jurisprudence, the paper finds that the unqualified FET standard, still present in most IIAs today, would pose the most significant risks to states in this respect. Meanwhile, FET standards that have incorporated a customary international law standard of treatment or FET clauses that follow a listing approach might be less prone to form the basis of an FET violation.

Some treaties include a clarification that "a breach of a separate international agreement does not establish a breach" of the FET clause. This language was added over time precisely out of concern on behalf of the treaty parties that the FET clause could be used to challenge trade rules. Whether this type of clarification will, in practice, effectively safeguard a state from breaching the FET standard by breaching the MFIF has not yet been tested.

MFN provisions. The paper explains that the wording of MFN clauses in BITs and investment chapters can vary. Older treaties—still in the majority today—typically direct contracting parties to treat investments by investors of the other party no less favourably than they treat the investments of investors of a third state. Some treaties explicitly set out the phases of the investment covered by the standards. Most often, the clauses refer to the operation and management of investments. Such clauses are referred to as post-establishment MFN clauses. Some treaties and investment chapters go beyond the post-establishment phases to include the "establishment" or "expansion" phases. While still in the minority in investment treaties, most investment chapters in free trade agreements include such pre-establishment language, thereby introducing liberalization elements.

The paper also notes the types of exemptions or restrictions included in the MFN clauses of IIAs, such as those that ensure that regional integration agreements and double taxation treaties are not covered by the MFN clause or that refer to the application of general exceptions. It then examines the jurisprudence in IIAs involving the MFN clause, noting the various examples where the MFN clause allowed for the importation of rights and obligations included in other IIAs. The paper highlights recent instances of newer IIAs attempting to preclude this possibility while noting that much of this work has focused on the importation of procedural rights rather than substantive rights.

While the paper notes that investor–state tribunals have not, to date, ruled in favour of incorporating WTO rights and obligations through the MFN provision in IIAs, the paper also notes that this is largely the result of the WTO agreements and IIAs having different subject matter coverage, given that most BIT parties are also WTO Members. The analysis finds that, in principle, the MFN clause in IIAs could allow for the importation of substantive or procedural standards under the MFIF, especially given that there would be significant overlap in subject matter coverage. However, this would really only be relevant if the MFIF is not applied on an MFN basis to all WTO Members.

Part 5 then offers a recap of the main takeaways and questions that have emerged from this analysis.

Table of Contents

Acronyms and Abbreviations

BIT	bilateral investment treaty
CSR	corporate social responsibility
DSU	Dispute Settlement Understanding
FDI	foreign direct investment
FET	fair and equitable treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
IIA	international investment agreements
ISDS	investor–state dispute settlement
ITA	Information Technology Agreement
JSI	Joint Statement Initiative
LDC	least-developed country
MC	Ministerial Conference (WTO)
MFIF	multilateral framework on investment facilitation
MFN	most-favoured nation
MSME	micro, small and medium enterprises
NT	national treatment
OECD	Organisation for Economic Co-operation and Development
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDR	Services Domestic Regulation
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TFA	Agreement on Trade Facilitation
TRIMS Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Part 1. Investment Facilitation: An introduction and brief overview

The issue of investment facilitation has taken a prominent place within the global economic agenda in recent years, sparking discussions across a number of forums. Examples of this include activities conducted in the context of the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD), and the World Trade Organization (WTO), as well as the G20. Since late 2017, this discussion has grown in profile with the launch of an initiative for a proposed multilateral framework on investment facilitation (MFIF) among a group of WTO Members. This has, in turn, prompted questions over how such a framework would interact with the WTO agreements and how it relates to other areas of international investment governance.

In the WTO context, the process leading to this initiative began in early 2017, with the organization of a first informal workshop on investment facilitation by five WTO Members referred to as the MIKTA group.[6] Subsequent informal workshops were organized by the Friends of Investment Facilitation for Development that year.[7] At the time of the WTO's Eleventh Ministerial Conference (MC11) in Buenos Aires, Argentina, in December 2017, 70 WTO Members adopted a Joint Statement Initiative (JSI) on Investment Facilitation for Development, where they announced plans for "structured discussions" aimed at developing a multilateral framework on investment facilitation (WT/MIN(1)/59).

Over the past two years, WTO Members participating in the JSI[8] have engaged in those "structured discussions," which have led to the development of: (a) a compendium of text-based examples, which contains investment facilitation elements that could be included in a potential MFIF (INF/IFD/RD/5/Rev.3); (b) a *Working Document,* which builds on the compendium and focuses on areas of convergence emerging from those discussions (INF/IFD/RD/39); (c) a Streamlined Text, which is based on the *Working Document* and aims "to help Members further develop the elements and specific provisions" of an MFIF (INF/IFD/RD/45);[9] and (d) an

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6 This informal partnership includes Mexico, Indonesia, Korea, Turkey, and Australia.

7 The initial members of this group included Argentina; Brazil; Chile; China; Colombia; Hong Kong, China; Kazakhstan; Korea; Mexico; Nigeria; and Pakistan. The group's membership has since expanded. The Friends of Investment Facilitation for Development members also co-sponsored a workshop in Abuja, Nigeria, in November 2017.

8 A detailed account of this process can be found in Baliño, S., Brauch, M.D., & Jose, R. (2020). *Investment facilitation: History and the latest developments in the structured discussions.* International Institute for Sustainable Development & CUTS International. https://www.iisd.org/sites/default/files/publications/investment-facilitation.pdf

9 According to a summary of discussions (INF/IFD/R/1), this text was introduced to participants at the organizational meeting held on February 27, 2020, where they approved the working methodology for the negotiating phase of the discussions. The latter is contained in document INF/IFD/W/16. A schedule of meetings for the period January to May 2020 (contained in document INF/IFD/W/15/Rev.1) had also been approved by participants.

Informal Consolidated Text, circulated to Members at the end of April 2020 and prepared on the basis of the *Streamlined Text* and of proposals by Members (INF/IFD/RD/50).[10]

The structured discussions have prompted a range of questions among participants, the wider WTO Membership, and outside the organization. Some specific questions pertain to issues in connection to the current text, such as the scope and coverage of a potential MFIF; its potential relationship with provisions contained in the WTO agreements and the prospects of complementarity or incoherence; and how the MFIF would interact with the wide web of existing international investment agreements (IIAs). Some developing countries have also raised questions concerning the extent to which an MFIF could contribute to achieving their sustainable development objectives.

This paper addresses some of the issues above and aims to contribute to the understanding of some technical issues under consideration in the structured discussions. It is organized as follows: the introductory part places the issue of investment facilitation in a broader context, with a brief reference to the sustainable development considerations.[11] It also provides information on recent developments in the structured discussions, as well as an overview of the *Informal Consolidated Text*. Part 2 explores the scope of application and coverage of a potential MFIF. Part 3 analyzes the relationship between new commitments under the MFIF and the existing commitments contained in the WTO agreements, with a particular focus on the General Agreement on Trade in Services (GATS).[12] Part 4 looks into the relationship between provisions in the MFIF and the international investment regime, including the potential enforcement of MFIF disciplines through treaty-based investor–state arbitration. The paper then features brief conclusions in Part 5, recapping the main takeaways and questions that have emerged from this analysis.

1.1 Evolution of Investment Facilitation Work in International Forums

Prior to the launch of the structured discussions, work on investment facilitation at the international level had been conducted by international organizations such as UNCTAD and the OECD, and through international political platforms such as the G20. In 2015, the OECD released its updated Policy Framework for Investment, which provides guidance on improving 12 investment policy-related areas, with the aim of enhancing "a country's enabling environment for investment."[13] In 2016, UNCTAD presented its Global Action Menu for Investment Facilitation, which contains 10 "Action Lines" for countries to consider, which they can "implement unilaterally" and which can also serve in their negotiations for IIAs and work with other partners. This document considers facilitating investment to be "crucial for sustainable development

[10] These documents have been circulated by the coordinator of the structured discussions under his responsibility.

[11] The paper provides a brief description of views shared on this topic.

[12] See the text of the GATS here: https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm

[13] UNCTAD, 2016, p. 4 (n. 2). See also Baliño et al., 2020 (n. 8).

and inclusive growth" and also highlights that "any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda."[14] In the context of the G20, Members endorsed the G20 Guiding Principles for Global Investment Policymaking in 2016. These principles "are closely aligned with the PFI [Policy Framework for Investment] and highlight, among others, the key role played by investment facilitation," though they have not been referred to in subsequent G20 declarations or other G20 documents, with the exception of a recent communiqué from May 2020 that was issued by trade and investment ministers in response to the COVID-19 crisis.[15,16]

In 2018, an OECD policy brief[17] explored three "options" for a multilateral approach to investment facilitation. Depending on the level of ambition and political will, the possible options ranged from the voluntary adoption by the host states of "national principles and actions for investment facilitation," to the adoption of "principles, policies, and actions at the global level" by host states[18] that could be supplemented by additional commitments by home countries "and potentially other parties (e.g. the private sector, civil society)." The policy brief also suggested "potential elements of an international framework for investment facilitation."

Since the launch of the JSI on investment facilitation, the WTO Members involved have stressed that transparency and predictability of investment measures are at the core of any investment facilitation framework.[19] Some of them have also emphasized "the importance of an investment facilitation framework for helping developing countries, and particularly [least-developed country, or LDC] Members, to put in place the appropriate institutional and regulatory framework for attracting and expanding investments."[20]

As explained below, the Informal Consolidated Text from April 2020 contains proposed disciplines under which WTO Members would commit to improving the investment climate for incoming investment through a range of administrative reforms. The "development" dimension is currently addressed mainly through provisions on special and differential treatment, where developing and LDC Members would be able to notify which administrative reforms they can implement upon the MFIF's entry into force and which would require transition periods and

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14 UNCTAD, 2016, p. 4 (n. 2).

15 OECD, 2018 (n. 3).

16 G20. (2020, May 14). *G20 Trade and Investment Ministerial Meeting: Ministerial Statement.* https://g20.org/en/media/Documents/G20SS_Statement_G20%20Second%20Trade%20&%20Investment%20Ministerial%20Meeting_EN.pdf

17 OECD, 2018 (n. 3).

18 Either through a "soft" way, as in OECD principles, or in a "hard" way, under the form of an agreement under the WTO, where every host country would commit to putting them in place, although with a certain degree of flexibility.

19 WTO. (2019, October 17). *Structured discussions on investment facilitation for development, meeting of October 17, 2019. Summary of discussions by the Coordinator* (INF/IFD/R/7). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R7.pdf

20 WTO. (2019, November 25). *Structured discussions on investment facilitation for development, meeting of November 25, 2019. Summary of discussions by the Coordinator* (INF/IFD/R/9). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R9.pdf

possibly capacity-building support and technical assistance. This approach is modelled after that used in the WTO's Agreement on Trade Facilitation (TFA).[21]

The text does not contain any obligations for home states to facilitate outward investment by supporting and promoting investment into developing country Members or LDCs. The sustainable development dimension is mentioned in the preamble and in a provision concerning corporate social responsibility (CSR), which would have WTO Members encourage enterprises to incorporate CSR practices on a voluntary basis.[22] According to a summary report of discussions held in November 2019,[23] Members "reiterated that provisions on CSR and anti-corruption should not create an obligation on investors, since the framework's applicability is between states. Consequently, best endeavour provisions, and flexibility-based language would be the most well-suited for such provisions."

Some experts and some developing country Members have raised concerns over the discussions' emphasis on efforts to reform administrative domestic processes to facilitate foreign investment, without including concrete ways to advance investments for sustainable development in line with the host state's objectives. In this context, some experts have explored ways to include measures with the aim of facilitating the flow of higher-quality investment. An example of such measures would be the creation of an "Authorized Sustainable Investor" category,[24] modelled on the provision on Authorized Economic Operators in the WTO TFA, which would give additional investment facilitation benefits to investors who have met specific criteria. Another research avenue has identified "sustainability characteristics" established by host states as they seek to attract and retain foreign direct investment (FDI). Based on the analysis of 150 instruments, this research classifies these FDI "sustainability characteristics" into two groups: "common" and "emerging common."[25]

Currently, the considerations on the specific host state priorities, as set out in the FDI sustainability characteristics, are not included in the substantive provisions in the *Informal Consolidated Text,* except for a provision on anti-corruption, which is considered an "emerging characteristic," and on CSR, as mentioned above. The latter contains a reference to instruments such as the United Nations Global Compact, the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises.[26] While the *Informal Consolidated Text* contains

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21 See the text of the TFA here: https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm

22 Details on CSR are addressed in subsequent parts of this paper.

23 WTO, 2019, INF/IFD/R/9 (n. 19).

24 Gabor, E., & Sauvant, K. P. (2019, July 15). *Incentivizing sustainable FDI: The Authorized Sustainable Investor* (Columbia FDI Perspectives no. 256). Columbia Center on Sustainable Investment. Developmenthttp://ccsi.columbia.edu/files/2018/10/No-256-Gabor-and-Sauvant-FINAL.pdf

25 A detailed list of "common" and "emerging characteristics" can be found here: http://ccsi.columbia.edu/files/2020/02/KPS-and-Howard-Mann-Making-FDI-more-sustainable-Towards-an-indicative-list-of-FDI-sustainability.pdf

26 A proposal submitted by one delegation also refers to the UN Guiding Principles on Business and Human Rights.

preambular language on "the importance of investment in the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and trade," there is no specific reference in the text to considerations pertaining to gender equality and social inclusion (GESI).

Gender issues are considered an "emerging sustainability characteristic" in investment-related instruments and have grown in prominence in other WTO-related discussions, including through the establishment of a gender focal point at the WTO and the Joint Declaration on Trade and Women's Economic Empowerment issued by a group of 118 WTO Members and Observers at MC11.[27] The declaration highlights, among other aspects, "the key role that gender-responsive policies can play in achieving sustainable socioeconomic development." In connection to this, recent research highlights that, "while the development effects of FDI are debated, the literature on FDI and economic development has generally been gender blind."[28] This research also mentions that there is a "small but growing" body of literature addressing the gender dimensions of FDI, aiming to better understand the gender-differentiated impacts of economic policies and patterns. Even though these issues have not been dealt with in the structured discussions, the developments emerging from this field could contribute to identifying potential questions for further analysis.

1.2 State of Play of the JSI Structured Discussions on Investment Facilitation

As mentioned in the introduction, since early 2018, those WTO Members participating in the JSI have engaged in "structured discussions," as called for in the JSI. During its first year, the group's work was mainly focused on identifying the basic elements or building blocks that could form the basis of an MFIF. Inputs from Members were consolidated into a "checklist of possible issues" document, prepared by the coordinator of the structured discussions.

In early 2019, the group moved onto the "example-based" phase of the discussions. Members were encouraged to submit concrete text-based examples and suggestions of how the basic elements could be further elaborated. A total of 40 written submissions were introduced, with examples drawn from Members' experience with investment provisions, services and domestic regulation chapters of regional trade agreements, domestic investment facilitation measures, and existing WTO agreements, notably the WTO TFA. Some examples were also introduced by the coordinator, under his own responsibility. The coordinator consolidated these examples into a compendium,[29] which participating Members considered a useful basis for identifying areas

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[27] https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

[28] Braunstein, E. (2019). Foreign direct investment and development from a gender perspective (Ch. 10). In J. Michie (Ed.), *The handbook of globalisation* (3rd ed.) (pp. 178–187). Edward Elgar Publishing.

[29] WTO. (2019). *WTO Structured Discussions on Investment Facilitation for Development. Compendium of text-based examples – Revision* (INF/IFD/RD/5/Rev.2). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=255867

of convergence, thus facilitating efforts to move the discussions toward being more outcome oriented.[30] In the second half of 2019, participants discussed a working document prepared and circulated in July of that year, as mentioned in the introductory part of this paper.[31] The document is based on the compendium of text-based examples and aims to gather the inputs to date into a "coherent framework" so that, moving forward, Members could see which had shown common interest and convergence and which may need further examination, as well as to help assess the potential implications of the various elements.[32] During the stocktaking meeting at the end of the year, it was agreed that the coordinator would prepare a *Streamlined Text,* building on the *Working Document.* The group also agreed to move into a "negotiating mode" as of March 2020.[33]

That *Streamlined Text* was circulated in January 2020, maintaining the same structure as the July *Working Document* (i.e., seven sections plus a preamble). While the *Working Document* provided "alternatives" for some elements, the *Streamlined Text* signalled "language options" through square brackets. The text also contained square brackets to indicate provisions on which further discussions were needed, as well as "provisions that might need to be developed in the future."

Following the circulation of the Streamlined Text, participants held an organizational meeting on February 27, 2020.[34] According to the summary of discussions,[35] the coordinator introduced the text, as well as the working methodology and the schedule of meetings,[36] in the run-up to the Twelfth Ministerial Conference (MC12), which at the time was planned for June 2020 in Nur-Sultan, Kazakhstan. Each substantive meeting was expected to provide participating Members with an opportunity to review all the elements of the *Streamlined Text,* as well as the other text proposal submissions. Certain topics that some Members were expecting to address in those

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30 WTO. (2019). *WTO Structured Discussions on Investment Facilitation for Development. Meeting of July 18, 2019. Stock-taking and next steps – Summary of discussions by the Coordinator* (INF/IFD/R/5). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=255867

31 Detailed analysis of this can be found in Baliño et al., 2020 (n. 8).

32 WTO, 2019 (INF/IFD/R/5) (n. 28).

33 WTO. (2019). *WTO Structured Discussions on Investment Facilitation for Development. Meeting held on December 12, 2019. Summary of discussions by the Coordinator* (INF/IFD/R/10). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=260850,260575,260600,259659,259660,259472,259063,259060,258904,258408&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=True

34 At the time of that meeting, the number of signatories had reached 100.

35 WTO. (2020, March 9). *WTO Structured Discussions on Investment Facilitation for Development. Meeting held on February 27, 2020. Summary of discussions by the Coordinator* (INF/IFD/R/11). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261943&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

36 WTO. (2020). *WTO Structured discussions on investment facilitation for development. Proposed schedule of meetings – January–May 2020 – Revision* (INF/IFD/W/15/Rev.1). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261092,260923,260929,260850,260575,260600,259659,259660,259472,259063&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

meetings included the scope and coverage of the MFIF, as well as its "legal architecture," in particular the relationship between its potential provisions and commitments under the WTO agreements, as well as with obligations under IIAs.

Due to the COVID-19 crisis, the substantive meetings scheduled for March and April, as well as the Nur-Sultan meeting, have been cancelled. As Members await resumption, the coordinator has circulated an *Informal Consolidated Text,* as mentioned above, and suggested holding virtual meetings in June and July (the first scheduled to be held on June 5, 2020). At the time of this writing, reports had indicated that a likely date for MC12 could be June 2021, though this is still pending the decision of the General Council and the evolution of the pandemic.

Table 1. The evolution of the JSI on Investment Facilitation

	Main Focus	Key Document
December 13, 2017	Launch of the JSI on Investment Facilitation at MC11	Joint Ministerial Statement on Investment Facilitation for Development
2018	Identification of elements/ building blocks that could form the basis of a multilateral framework	Checklist of issues
January–July 2019	Example-based phase: Discussion of text-based examples showcasing how the checklist of elements could potentially be developed	Compendium of text-based examples
August–December 2019	Preparation and discussion of a document with text "alternatives" Identification of possible areas of convergence	Working Document
March–May 2020 (suspended)	Negotiating mode based on the *Streamlined Text*, as well as on other submissions	*Streamlined Text* (January 2020); *Consolidated Text* (April 2020)

1.3 Overview of the April 2020 *Informal Consolidated Text*

The April 2020 *Informal Consolidated Text*[37] is based on the *Streamlined Text* of January 17, 2020.[38] It intends to facilitate work among Members in the negotiating phase of the Structured Discussions, where Members aim to further develop the elements and specific provisions of a multilateral framework. The text is a restricted document for WTO Members only. The analysis in this paper is based on the version of the *Informal Consolidated Text* seen by the authors, as well as on information available as of mid-May 2020.

In the *Informal Consolidated Text,* the coordinator has kept the structure of the *Streamlined Text.* The recent proposals have been added in blue font[39] under each relevant section or provision in square brackets. New Sections III Bis and III Ter have been added in square brackets, as explained below. The *Informal Consolidated Text* indicates that "the whole document is in between double brackets" to reflect the fact that it does not prejudge "the position or views of any delegation on the issues under negotiation." This paper is based on this overall remark. For ease of reading, our paper does not include brackets within our quotations of the text.

The *Informal Consolidated Text* is organized into nine sections, as follows: I) Scope and General Principles; II. Transparency of Investment Measures; III. Streamlining and Speeding Up Administrative Procedures and Requirements; [III BIS. Temporary Entry for Investment Persons/ Facilitation of Movement of Business Persons for Investment Purposes]; [III TER. Transfers and Subrogation]; IV. Contact Point/Focal Point/Ombudsperson Types of Mechanism, Arrangements to Enhance Domestic Coordination and Cross-border Cooperation on Investment Facilitation; V. Special and Differential Treatment for Developing and Least-developed Country Members; VI. Cross-Cutting Issues; VII. Institutional Arrangements and Final Provisions.

Table 2. Structure of the Informal Consolidated Text

Preamble	
Section I	**Scope and General Principles**
Article 1	Scope
Article 2	MFN
Section II	**Transparency of Investment Measures**
Article 3	Publication and availability of measures and information [including by electronic means]
Article 4	Notification to the WTO

[37] WTO. (2020). *WTO Structured Discussions on Investment Facilitation for Development. Informal consolidated text.* (INF/IFD/RD/50).

[38] WTO. (2020). *WTO Structured Discussions on Investment Facilitation for Development. Streamlined text.* (INF/IFD/RD/45).

[39] In this paper, these proposals are referred to as "a proposal by one delegation," "a proposal."

Article 5	Enquiry points
Article 6	Specific exceptions applicable to transparency requirements
Section III	**Streamlining and Speeding Up Administrative Procedures and Requirements**
Article 7	Consistent, reasonable, objective and impartial administration of measures
Article 8	Reduction and simplification of administrative procedures and documentation requirements
Article 9	Clear criteria for administrative procedures
Article 10	Authorisation procedures
Article 11	Treatment of incomplete and rejection of applications
Article 12	Fees and charges
Article 13	Periodic review of administrative procedures and requirements
Article 14	Use of ICT/e-government including electronic applications
Article 15	One-stop shop/single window-types of mechanisms
Article 16	Independence of competent authorities
Article 17	Appeal and review
[Section III BIS	**Temporary Entry for Investment Persons/Facilitation of Movement of Business Persons for Investment Purposes]**
[Temporary Entry for Investment Persons]	
[Section III TER	**Transfers and Subrogation]**
[Transfers]	
[Subrogation]	
Section IV	**Contact/Focal Point/Ombudsperson Types of Mechanisms, Arrangements to Enhance Domestic Coordination and Cross-Border Cooperation on Investment Facilitation**
Article 18	Contact/focal point/ombudsperson types of mechanism
Article 19	Domestic regulatory coherence
Article 20	Cross-border cooperation on investment facilitation

Section V	**Special and Differential Treatment for Developing and LDC Members**
Article 21	General principles
Article 22	Implementation
Article 23	Notification of dates for implementation of Categories B and C
Article 24	Grace period for the application of the dispute settlement understanding
Article 25	Technical assistance and capacity building
Section VI	**Cross-Cutting Issues**
Article 26	Corporate social responsibility
Article 27	Measures against corruption
Section VII	**Institutional Arrangements and Final Provisions**
Article 28	WTO Committee on Investment Facilitation
Article 29	General exceptions
Article 30	Security exceptions
Article 31	Dispute settlement
Article 32	Final provisions

The paragraphs below present an overview of each section of the *Informal Consolidated Text*. Some of these draft provisions and proposals are analyzed and elaborated upon in Parts 2, 3, and 4 of this paper.

The **Preamble** text is entirely bracketed and is similar to the one in the Streamlined Text. It also contains new proposals on the objectives of this framework. A proposal submitted by one delegation states that "the purpose of this Framework is to ensure [the] facilitation of procedures to increase the direct investment flows between the Members through creating a better environment for doing business in the territory of each Member." Another proposal states that the purpose is "to create a better investment climate between" Members, and hereby they "lay down the necessary arrangements for the facilitation of foreign direct investment." The preamble also contains two formulations on CSR within (additional) square brackets. In the first formulation, Members acknowledge "the importance of good corporate governance and corporate social responsibility for sustainable development" and affirm "their aim to encourage enterprises to observe and adhere to internationally recognized guidelines and principles in this respect, such as the UN Global Compact." In the second formulation, Members recognize "the importance of voluntary corporate social responsibility principles and standards for investors."

1.3.1 Section I: Scope and General Principles

This section contains two provisions: **Article 1** (Scope) and **Article 2** (MFN treatment).

Article 1 (Scope). This provision includes the formulation in the *Streamlined Text,* while also noting the proposals introduced under this item since the circulation of such text, which reflects different approaches to the scope.

Similar to the *Streamlined Text,* **Article 1.1** contains a proposal for the framework to apply to "measures adopted or maintained by Members for facilitating foreign direct investments [ ] across the whole investment life-cycle [, including the admission, establishment, acquisition and expansion of investments] in services and non-services sectors." A footnote indicates that the framework "does not apply to portfolio investment."

Since the circulation of the *Streamlined Text,* three proposals on scope have been submitted, as follows:

- A proposal for the "framework" to apply "to measures affecting foreign direct investment adopted or maintained by Members, including the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."
- A proposal for the "agreement" to apply to "measures adopted or maintained by Members affecting the establishment and operation of foreign direct investments." "Measures by Members include those of general and sector-specific application that affect foreign investors and their investment."
- A proposal for the framework to apply "to the administration of measures by a Member affecting the authorization of investment activities in its territory of an investor of another Member."

Article 1.2 provides that the framework "shall not apply" to government procurement, public concessions (under certain conditions), market access, and the right to establish.

Three proposals have been submitted on the following:

- A proposal excludes "market access, including a decision by [a competent authority of a Member] on whether or not to approve or admit a foreign investment application."
- A proposal states that "Nothing in this Framework shall be construed to confer any rights for market access and establishment."
- A proposal excludes "subsidies or grants provided by a Member, including government-supported loans, guarantees, and insurance."

Article 1.3 provides that the framework "shall not cover" investment protection rules and investor–state dispute settlement. This provision contains a placeholder for discussions on "specific exclusions of specific sectors or activities." It also contains a placeholder for

"possible working definitions," such as "foreign direct investment," "investment," "investor," "authorization," and "measure."

Two proposals have been introduced to state that:

- "For greater certainty, this framework does not create new or modify existing commitments relating to the liberalisation of *investment,* nor does it create new or modify existing rules on the protection of *investment* or investor-state dispute settlement" (emphasis added).
- "For greater certainty, this agreement does not create new or modify existing commitments relating to the liberalisation of *investments,* nor does it create new or modify existing rules on the protection of *international investments* or investor-state dispute settlement" (emphasis added).

Article 1.4 provides that the Member's obligations under the framework "shall apply to measures adopted or maintained by: a. central, regional or local governments and authorities; and b. non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities." A proposal has been submitted to replace "exercise of powers" by "exercise of government authority."

Under **Article 1.5**, each Member shall take measures to ensure the observance of the obligations under the framework by regional and local governments and authorities and non-governmental bodies within its territory. This provision has placeholders for specific exclusions of specific sectors or activities, as well as for "possible working definitions" in square brackets.

Concerning **specific exclusions of specific sectors or activities**, a proposal states that the framework "is without prejudice to the terms, limitations, conditions and qualifications set out in each Party's Schedule of Specific Commitments and List of MFN Exemptions under the GATS for investment activities in services sectors and the List of Reservations of each Member specified in Annex XX of this Framework for investment activities in non-services sectors."

Concerning **possible working definitions**, which are all bracketed, the text provides that, for the purposes of this framework, investment means FDI, defined as "ownership of 10 per cent of the ordinary shares or voting stock is considered as the criterion for determining the existence of a direct investment relationship."

- One proposal contains an **asset-based definition** of investment: "every kind of asset owned or controlled, directly or indirectly, by an investor."[40]
- Another proposal contains an **enterprise-based** definition: "investment means an enterprise, a branch of an enterprise or a representative office."

Concerning a possible definition of **"investor,"** the text includes the following: "Investor: means a natural person or a [juridical person][41] of a Member, that *attempts to make, is making, or has made* an FDI in the territory of another Member" (emphasis added). The text contains placeholders for definitions of "authorisation" and of "measure."

The potential implications of some of these proposals are analyzed in Parts 2 and 3 of this paper.

Article 2 (MFN) provides that, "with respect to any measure covered by this framework, each Member shall accord immediately and unconditionally to investments and investors of any other Member treatment no less favourable than that it accords to like investments and investors of any other country." It nevertheless provides for an exception to MFN treatment for any Member to confer or accord "advantages to investors of any other Member and their investments in the context of a free trade area, a customs union, a common market or an economic union." As mentioned below, **Article 32.3** contains bracketed text in connection to the MFN provision, as follows: "[The MFN provision in paragraph 2.1 of this framework shall not apply to the treatment accorded by a Member under a bilateral or plurilateral agreement in force or signed prior to [XX]]." The potential implications of the MFN principle are analyzed in detail in Parts 2.2.1 and 4.1.2.3.

1.3.2 Section II: Transparency of Investment Measures

This section includes provisions on "publication and availability of measures and information" [including by electronic means] (**Article 3**), notification to the WTO (**Article 4**), enquiry points (**Article 5**), and specific exceptions applicable to transparency requirements (**Article 6**). While some of the proposed obligations in this section refer to best endeavour commitments,

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[40] Under this proposal, this includes "(i) an enterprise and a branch of an enterprise; (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom; (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (v) claims to money and to any performance under contract having a financial value; (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information; (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations, and permits, including those for the exploration and exploitation of natural resources; and (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges." This proposal further states that: "An investment includes the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investment."

[41] See as a reference the definition of "juridical person" in Article XXVIII(l) of the GATS.

Article 3.1 contains a binding provision concerning the publication and availability of measures. The **scope** of such measures remains in square brackets, and includes the following: "[laws, regulations, procedures, judicial decision and administrative rulings of general application] [measures of general application] [that pertain to or affect the operation of this framework] [covered by this framework]." The term "measures" includes a footnote referring to the definition of measure in GATS Article XXVIII(a).[42]

- A proposal submitted by one delegation provides for the publication of "all relevant measures of general application with respect to any matter covered by this Agreement."
- Another proposal includes a binding obligation on Members to publish information via electronic means and, "where practicable," through a single portal.

1.3.3 Section III: Streamlining and Speeding Up Administrative Procedures and Requirements

This section includes provisions on a range of topics, set out as follows: the "consistent, reasonable, objective and impartial administration of measures" (**Article 7**), the "reduction and simplification of administrative procedures and documentation requirements" (**Article 8**), "clear criteria for administrative procedures" (**Article 9**), "authorization procedures" (**Article 10**), "treatment of incomplete and rejection of applications" (**Article 11**), "fees and charges" (**Article 12**), "periodic review of administrative procedures and requirements" (**Article 13**), "use of ICT/e-government including electronic applications" (**Article 14**), "one-stop shop/single window-types of mechanisms" (**Article 15**), "independence of competent authorities" (**Article 16**); and "appeal and review" (**Article 17**).

Article 7.1 contains an obligation for each Member to ensure the administration of measures "in a reasonable, objective and impartial manner." The scope of the measures covered by this provision has two different formulations: "measures of general application" versus measures "covered by this framework." Similar formulations are reflected in **Article 7.2**, which pertains to administrative proceedings.

Based on **Article 8.3**, "if a Member requires authorisation to invest in its territory, it shall [in accordance with its legal system] ensure that authorisation procedures it adopts or maintains [do not act as barriers to the ability to invest] [do not unduly complicate or delay the investment]." The provision contains a footnote to indicate that the provision is to be seen in connection to 1.1 (Scope), "which states that this framework applies to measures adopted or maintained by Members across the whole investment life-cycle."

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[42] The text of that article is as follows: "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form." Further details are available on the page on Article XXVIII in the WTO's Analytical Index. https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art28_oth.pdf

Article 9 "Clear criteria for administrative procedures" contains proposals that address the conditions to be met by a Member if it establishes criteria to invest in its territory. **Article 9.1** provides that each Member "may establish criteria to invest in its territory," whereas **Article 9.2** sets out the parameters for those criteria (which "shall be clear, transparent, objective and published beforehand"), as well as for the assessment of an application to invest.[43] While this section refers to "criteria for administrative procedures," **Article 9.3** contains a bracketed provision that sets out the criteria to be met by a Member to ensure that "measures of general application covered by … (the) … framework … do not unduly complicate or delay investment." Each Member shall ensure that criteria "are based on objective and transparent criteria, such as competence and the ability to engage in the activity, [and are relevant to the *[investment sector/activity]* to which they apply]" (emphasis original).[44]

Based on **Article 17**, each Member shall "establish or maintain tribunals or judicial, quasi-judicial or administrative procedures, which provide [, on request of an affected investor,]" for "the prompt review of and, where justified, appropriate remedies for, administrative decisions affecting the investment…."

1.3.4 Section III Bis: Temporary Entry for Investment Persons/ Facilitation of Movement of Business Persons for Investment Purposes

This bracketed section contains a proposal by one delegation on "Temporary Entry for Investment Persons" and by another delegation on "Facilitation of Movement of Business Persons for Investment Purposes."

Temporary Entry for Investment Persons

Based on this proposal, the provision "shall apply to measures that affect the temporary entry of investment person of a Member, engaging in the conduct of investment activities" (sic). The provision also states that "Each Member shall expeditiously process application concerning temporary entry under this provision within a reasonable timeframe, including extension

[43] This provision contains bracketed text stating that the "assessment of an application based upon those criteria or the conclusion reached by the relevant competent authorities regarding the application is not subject to the WTO Dispute Settlement Understanding."

[44] The July 2019 text contained two alternatives for 9.1: Alternative 1 on "[measures relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures]" and Alternative 2 on "criteria for the admission, establishment, acquisition and expansion of investments in services and non-services sectors." Some elements of both alternatives have been merged into 9.3.

application thereof" (sic). The proposal contains definitions of "Investment person"; "Temporary entry"; and "Immigration formality."[45]

Facilitation of Movement of Business Persons for Investment Purposes

Based on this proposal, "(t)his Section applies to measures affecting the entry and temporary stay of business persons of a Member who engages or seeks to engage in the conduct of investment activities in the territory of another Member." Under this provision,

> Members recognize the importance of temporary movement of business persons for investment purposes to facilitate investment activities and ensure that all measures of general application affecting entry and temporary stay of business persons for investment purposes are administered in a reasonable, objective and impartial manner.

The proposal sets out an obligation for Members to publish by electronic means "available information on the requirements and procedures for entry and temporary stay including relevant forms and documents." It also outlines requirements for Members regarding, among other aspects, the processing of applications, the issuing of multiple entry visas when entry and temporary stay have been granted, and the "opportunity to apply for renewal or extension of authorisation for temporary stay."

The potential legal implications of these two proposals are analyzed in Part 3.1.1.1 of this paper.

1.3.5 Section III Ter: Transfers and Subrogation

This bracketed section contains a new proposal by one delegation on transfers and subrogation.

Transfers

Based on this proposal, "(e)ach Member shall ensure that all transfers[46] relating to investments in that Member of an investor of other Members may be freely made into and out of that Member without delay." The proposal sets out an obligation on each Member to "ensure that

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[45] According to this proposal, "(i)nvestment person means: a. a natural person who has the nationality of a Member; or b. a permanent resident of a Member that, prior to the date of entry into force of this framework, has made a notification consistent with Article XXVIII(k)(ii)(2) of GATS that that Member accords substantially the same treatment to its permanent residents as it does to its nationals,
Who is responsible for setting up, developing or administering an investment for which a substantial amount of capital has been or will be committed by the investment person in a supervisory or executive capacity, or involves essential skills" (sic).

[46] According to the proposal, "(s)uch transfers shall include, in particular, though not exclusively: a. the initial capital and additional amounts to maintain or increase investments; b. profits, interest, capital gains, dividends, royalties, fees and other current incomes accruing from investments; c. payments made under a contract including loan payments in connection with investments; d. proceeds of the total or partial sale or liquidation of investments; and e. earnings and remuneration of personnel from those other Members engaged in activities in connection with investments in that Member."

such transfers may be made without delay in freely usable currencies at the market exchange rate prevailing on the date of the transfer."

Subrogation

This proposal provides for the subrogation of any right or claim "(i)f a Member or its designated agency makes a payment to any investor of that Member under an indemnity, guarantee or insurance contract, pertaining to an investment of such investor in another Member…." The provision on transfers "shall apply *mutatis mutandi* to the transfer of such payment."

1.3.6 Section IV: Contact Point/Focal Point/Ombudsperson Types of Mechanism, Arrangements to Enhance Domestic Coordination and Cross-border Cooperation on Investment Facilitation

This section contains provisions on the Contact/Focal Point/Ombudsperson Types of Mechanism (**Article 18**), Domestic Regulatory Coherence (**Article 19**); and Cross-border Cooperation on Investment Facilitation (**Article 20**).

Article 18 sets out the responsibilities of the contact/focal point or "appropriate mechanism," including bracketed text concerning the facilitation of "the settling of grievances" aimed at preventing disputes. **Article 19** contains a definition of regulatory coherence[47] and envisages situations where a Member "may encourage relevant competent authorities … to conduct regulatory impact assessments when developing covered [regulatory] measures that exceed a threshold of economic impact …." A proposal by one delegation encourages each Member "to carry out … an impact assessment of major regulatory measures within the scope of this Agreement, it is preparing." Under this proposal, the regulatory authority of the Member may "take into consideration the potential impact of the proposed regulation on micro, small and medium enterprises (MSMEs)."

1.3.7 Section V: Special and Differential Treatment for Developing and Least-developed Country Members

This section contains provisions on General Principles (**Article 21**), Implementation (**Article 22**), and Technical Assistance and Capacity Building (**Article 25**) in relation to special and differential treatment. It contains placeholders for provisions on Notification of Dates for Implementation of Categories B and C (**Article 23**) and for a Grace Period for the Application of the Dispute Settlement Understanding (**Article 24**).

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[47] "For the purposes of this framework, regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of policy objectives, and to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment."

Article 21 states that "(a)ssistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of this framework, in accordance with their nature and scope." It further states that "(t)he extent and the timing of implementation of the provisions of this framework shall be related to the implementation capacities of developing and least-developed country Members."

Article 22 contains an implementation mechanism for WTO developing country and LDC Members. The framework establishes three categories of provisions and no longer envisages the possibility of a transitional period of [three] years after entry into force for the implementation of provisions, as proposed in Article 23.3 (Alternative 1) of the July 2019 *Working Document*. Rather, it employs the same "category" approach used in the WTO's TFA, where Categories A, B, and C refer to those measures that a developing country or LDC Member notifies they can apply upon the framework's entry into force; those measures that will require a transition period; and those measures that will require a transition period, technical assistance, and capacity-building support.

1.3.8 Section VI: Cross-Cutting Issues

This section contains two provisions: **Article 26** on Corporate Social Responsibility (CSR) and **Article 27** on Measures against Corruption. The current text no longer contains a separate provision on MSMEs, which featured in the July 2019 Working Document.[48] As mentioned above, a proposal by one delegation introduces a reference to MSMEs in Section IV.

Article 26.1 contains bracketed text concerning the nature of the commitment to be undertaken by each Member (binding versus voluntary) and the goal of CSR practices, as follows: "… each Member [shall] [should] encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate in their internal policies corporate social responsibility practices, [that are beneficial to the environment and contribute to sustainable development in its economic, environmental and social dimension] [to strengthen coherence between economic, social and environmental objectives]…." Under **Article 26.2**, "each Member should take into account relevant internationally agreed instruments that have been endorsed or are supported by that Member…."[49]

Two different proposals refer to the importance of enterprises]/[investors "implementing due diligence in order to identify and address adverse impacts … in their operations, their supply chains and other business relationships …." Based on these proposals, Members "shall promote

[48] According to a summary report of the discussions (INF/IFD/R/9), "many participating Members" shared the view that there was no need for such separate provision and that "the elements found in the working document ... were relevant to business in general, regardless of their size" and some of them could be incorporated in other sections. The report notes that "other delegations were of the view that the inclusion of specific elements on MSMEs in a multilateral context might require further consideration. Some Members called for taking into account the discussions under the joint initiative on MSMEs" (WTO, 2019, INF/IFD/R/9 [n. 19]).

[49] In an indicative way, Article 26.2 refers to the United Nations Global Compact, the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the OECD Guidelines for Multinational Enterprises.

the uptake" by companies/enterprises and investors "of corporate social responsibility or responsible business practices."

1.3.9 Section VII: Institutional Arrangements and Final Provisions

This last section establishes a WTO Committee on Investment Facilitation (**Article 28**) and has bracketed text for the Committee to "explore and discuss the possibility of establishing an Investment Facilitation Facility," presumably along the lines of the Trade Facilitation Agreement Facility established to support developing country and LDC Members in the TFA's implementation. The section has placeholders for provisions on general exceptions (**Article 29**), security exceptions (**Article 30**), and dispute settlement (**Article 31**).

Article 32 (Final Provisions) has bracketed text regarding the framework's implementation from the date of its entry into force (unless stated otherwise in the case of developing country Members and LDC Members). It also contains bracketed text on the following, signalling further discussions on the following provisions:

> **32.2** [Nothing in this framework shall be construed as diminishing the rights and obligations of Members under the Marrakesh Agreement Establishing the WTO.]
>
> **32.3** [The MFN provision in paragraph 2.1 of this framework shall not apply to the treatment accorded by a Member under a bilateral or plurilateral agreement in force or signed prior to [XX]].
>
> **32.4** [Nothing in this framework shall be construed as altering or affecting a Member's rights or obligations under bilateral or plurilateral agreements covering [FDI] [investments]].

Understanding the evolving nature of these provisions is important in its own right, particularly as participants in the JSI prepare to transition from structured discussions to negotiations once coronavirus restrictions are lifted. The prior part of this paper has attempted to provide a detailed overview of the current state of play, including in comparison to past analysis conducted under this project of earlier MFIF texts. It also sought to identify, where possible, what agreements or frameworks may have inspired those provisions.

As the MFIF discussions have progressed, a recurring question has been about the potential scope such an agreement will cover, which in turn affects the application of the various provisions enumerated in the prior part of this paper. It also has implications for how such a framework will integrate with the current WTO rulebook, where there is the potential for overlap. Part 2 of this paper turns to these considerations, setting out the subject of scope more broadly, and then turning to the relevant WTO agreements on services, technical barriers to trade, intellectual property rights, sanitary and phytosanitary measures, and trade in goods. The level of attention devoted to each of these agreements and their possible interaction with the MFIF is determined by how much each agreement does—or could—relate to investment and investors.

Part 2. Scope of Application and Coverage of a Potential Multilateral Framework on Investment Facilitation

In the Joint Ministerial Statement mentioned in the introduction, the WTO Members co-sponsoring the initiative said that the structured discussions should "seek to clarify the framework's relationship and interaction with existing WTO provisions."[50] As discussions on the proposed MFIF move to a negotiating phase, several Members consider this issue to be critical, especially if the MFIF is brought into the WTO at a later stage. As a first step, this requires understanding the scope of the MFIF: what types of measures would fall under its purview and what types would be excluded. As a second step, it involves analyzing, with respect to those measures that are covered by both the WTO agreements and the MFIF, the relevant substantive provisions and how they interact.

For some provisions, we find that there is substantial overlap in the obligations proposed under the MFIF and the existing obligations under the WTO agreements and/or the ongoing negotiations on the JSI on Services Domestic Regulation. In particular, we find a substantive overlap between some publication and transparency provisions under the MFIF and the GATS. Moreover, substantial duplication exists between the MFIF and the JSI on Services Domestic Regulation. For a significant number of other provisions, we find that the MFIF obligations go beyond what Members have committed to under the existing WTO agreements.

In theory, none of this should be a cause for concern, as long as the MFIF does not create conflicting or contradictory obligations vis-à-vis the existing WTO agreements. As elaborated upon below, this could be the case with respect to the issue of MFN exceptions under the GATS/MFIF and the proposed special and differential treatment provisions under the MFIF and JSI on Services Domestic Regulation.

In practice, however, non-conflicting, overlapping obligations that are framed differently, or MFIF obligations that go beyond the obligations set out in the existing WTO agreements, could create implementation challenges, as this situation would require Members to engage in a complex provision-by-provision comparison to establish the universe of obligations applicable to different measures. In any event, this may be unavoidable, due to the imperfect scope overlap between the MFIF- and WTO-covered agreements. Compared to the TFA, this is a very different, and much more complex, undertaking.

Part 2 of this paper analyzes the scope of the *Informal Consolidated Text*. Specifically, the scope analysis contains two parts: the first part focuses on interpreting key terms of the working definition of the scope of the MFIF provided in Article 1.1. of the *Informal Consolidated Text*. The

[50] WTO, 2017, WT/MIN(17)/59 (n. 1).

second part focuses on the types of measures that will fall within the purview of the MFIF, as derived from the substantive provisions.

2.1. Scope of the MFIF under Article 1.1

Article 1.1 of the Consolidated Text sets out the scope of the MFIF. Specifically, it provides:

> [t]his framework applies to measures adopted or maintained by Members for facilitating foreign direct investments across the whole investment life-cycle [, including the admission, establishment, acquisition and expansion of investments] in services and non-services sectors.

A footnote to the term "foreign direct investment" further clarifies that the framework does not apply to portfolio investments. Moreover, the MFIF explicitly excludes from the scope government procurement, public concessions, and market access and the right to establish.

There are several terms set out in the scope of the MFIF that warrant interpretation to understand what types of measures fall under its purview. These include: (i) FDI, excluding portfolio investment; (ii) investment "across the whole investment lifecycle"; (iii) "services and non-services sectors"; and (iv) "measures … for *facilitating* foreign direct investment" (emphasis added). This part of our paper will explain the scope of the MFIF, pursuant to Articles 1.1 and 1.2, starting by analyzing these key concepts.

2.1.1 Foreign Direct Investment

Article 1.1 limits the scope of the MFIF to FDI. In other words, the MFIF does not apply to all measures relevant to "investments" but only to those measures that affect "foreign direct investment." Indeed, the issue of how the term "foreign direct investment" is defined has proved crucial in the MFIF discussions: while "foreign direct investment" or FDI is a common term, what it encompasses or can encompass can have vastly different implications in theory and application.

Already the focus on FDI narrows the scope of the MFIF, especially compared to alternative options that have been proposed. For instance, under an earlier proposal by one delegation in 2018, which was subsequently adopted as an alternative definition in the July 2019 *Working Document,* the MFIF would apply to "investments" generally.[51] Even with the focus on FDI, how the term "investment" itself is defined is crucial. The proposal submitted recently by another

[51] WTO. (2019, July 24). *WTO Structured discussions on Investment Facilitation for Development* (INF/IFD/RD/39) (emphasis added).

delegation would broaden the MFIF scope by adding an "asset-based" definition of investment.[52] However, the fact that the scope of the proposed MFIF currently focuses on FDI as opposed to asset-based investment narrows the applicability of the MFIF.

Article 1.1 of the *Informal Consolidated Text* further reduces the scope of the MFIF by noting that portfolio investment is also excluded. It does not, however, provide a definition of portfolio investment. This raises the following questions: what is covered under *foreign direct investment,* and when is foreign direct investment portfolio investment?

With these questions in mind, we looked at the commonly used definitions of FDI developed in other forums. The OECD has adopted a benchmark definition of FDI. Specifically, it notes that "direct investment is a category of cross border investment made by a resident in one economy (the direct investor) that is resident in an economy other than that of the direct investor." It further highlights that a direct investor would have a lasting interest in the direct investment firm, which is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise.[53]

The OECD distinguishes FDI from portfolio investment on the basis of the investor's motivation. Specifically, it notes: "[t]he objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise."[54] The investor mostly focuses on earnings resulting from the acquisition and sales of shares and other securities, without an interest in controlling or influencing the management of the assets underlying these investments.[55]

Aligned with the OECD's definition of FDI, the MFIF *Informal Consolidated Text* makes "ownership of 10 percent of the ordinary shares or voting stock" the benchmark to establish the existence of a direct investment relationship. This means that, should this definition become part of the final MFIF text, whether a measure affecting investment would fall under the purview of the MFIF would depend on the percentage of ownership of shares and voting stock. Such a definition would avoid having to discern the "motivation" of each investment as a threshold question in order to determine whether the MFIF applies.

The GATS contains a different approach, which is important to consider against the proposed MFIF, given that all WTO Members are subject to the GATS. Instead of establishing a

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[52] In addition to "an enterprise and a branch of an enterprise," the list includes shares, stocks, or other forms of equity participation in an enterprise; bonds, debentures, loans; rights under contracts; claims to money and to any performance contract having a financial value; intellectual property rights; rights conferred pursuant to laws and regulations or contracts of concessions, licences, authorizations, and permits; any other tangible and intangible, movable and immovable property, and any related property rights such as leases, mortgages, liens, and pledges.

[53] OECD. (2008). *OECD benchmark definition of foreign direct investment* (4th ed.). https://www.oecd-ilibrary.org/docserver/9789264045743-en.pdf?expires=1597675420&id=id&accname=guest&checksum=3AC5145DE51012F5044782EAF9ED711A

[54] Ibid.

[55] Ibid.

percentage threshold, the GATS focuses on "commercial presence," which it defines as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service" (GATS Art. XXVIII (d)). Additionally, it defines "juridical person" as "any legal entity duly constituted or otherwise organized under the applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association."[56] To determine that a service that is being supplied through commercial presence is owned by a Member, the GATS requires either that the supply of a service is controlled by a natural person of that Member or a juridical person of that other Member, and where more than 50% of the equity interest is owned by persons of that Member.

However, the *Informal Consolidated Text* does not contain a "nationality" requirement. Indeed, the MFIF cross-references the GATS definition of "juridical person," but not the GATS definition of "juridical person of another Member." This means that, under the *Informal Consolidated Text,* the MFIF will apply to FDI in which an investor has a 10% equity interest, even if that does not meet the "juridical person of another Member" requirement (i.e., owning 50% or more of the equity).

In this regard, the proposal submitted by one delegation and included in the *Informal Consolidated Text* contains a slightly different approach. Specifically, it proposes an enterprise definition of investment. Instead of differentiating between FDI and portfolio investment through motivation or minimum ownership benchmarks, it defines investment as "an enterprise, a branch of an enterprise or a representative office." It further adopts the "juridical person" definition set out in GATS Article XXVIII(l). However, it has adopted a much broader definition of "investor of a Member," noting that it means "a natural person of a Member or an enterprise of a Member that seeks to make, is making or has made investments in the territory of another Member." Yet, similar to the proposal submitted by another delegation and included in the *Informal Consolidated Text,* "enterprise of a Member" remains undefined. Therefore, defining "enterprise of a Member" would enhance alignment with the GATS.

2.1.2 Investment "Across the Whole Investment Life-Cycle"

While the focus on FDI may "narrow" the scope of measures that will fall under the purview of the *Informal Consolidated Text,* other elements of Article 1.1 have the opposite effect, broadening such scope. For instance, Article 1.1 provides that the MFIF would apply to measures facilitating FDI "across the whole investment cycle [, including the admission, establishment, acquisition and expansion of investments]." This suggests, at a minimum, that the MFIF would apply broadly to both pre-establishment—encompassing the entry (admission) and establishment—and post-

[56] GATS Art. XXVIII(l).

establishment, which refers to expansion,[57] management, conduct, operation and sale/liquidation of existing investments.[58]

The bracketed language clarifies that the MFIF would, at least, apply to admission, establishment, acquisition, and expansion of investment. While the word "including" means that the list is not definitive, the *Informal Consolidated Text* excludes conduct, operation, and sale/liquidation, even though these are key elements of post-establishment. A proposal submitted by one delegation includes a more definitive list of the type of pre- and post-establishment that would be covered by the MFIF ("establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments").

Generally, the MFIF's focus on both pre and post-establishment aligns with the GATS' definition of "commercial presence," which, as set out above, covers the "constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office" (GATS Article XXVIII (d)). Here, "constitution," "acquisition," and "creation" refer to the pre-establishment stage of investment, whereas "maintenance" refers to the post-establishment stage.[59]

That said, the phrase "across the whole investment life-cycle" could also be interpreted to cover measures that affect FDI other than pre- and post-establishment investment. Indeed, investment "across the whole investment life-cycle" has been interpreted to include five phases: (i) vision and strategy; (ii) investment attraction; (iii) investment entry and establishment; (iv) retaining investment; and (v) fostering linkages and spillovers.[60] Thus, should the bracketed text not be included, the obligations in the MFIF would apply with respect to all these five phases, meaning that Members would have to implement the MFIF's substantive obligations—from transparency to cross-border cooperation provisions—throughout. Thus, focusing on "across the whole investment life-cycle" as opposed to pre- and post-establishment investment, may lead to unnecessary ambiguity.

Proposals submitted by other Members have removed the phrase "across the whole investment life-cycle" and instead include wording that establishes a more defined scope. A proposal submitted by one delegation on disciplines and commitments relating to investment facilitation for development refers to measures "affecting the *establishment and operation* of foreign direct investments" (emphasis added). Another proposal takes a slightly different approach,

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[57] The UNCTAD *World Investment Report 2015* considers the "expansion" of investments as part of the pre-establishment dimension. http://unctad.org/en/PublicationChapters/wir2015ch3_en.pdf

[58] South Centre. (2016, May). *Discussions in the Working Group on the relationship between Trade and Investment (2001–2003)* (Analytical note SC/AN/TDP/2016/3). https://www.southcentre.int/wp-content/uploads/2016/06/AN_MC10_2016_3_Trade-and-Investment_EN.pdf

[59] Ibid.

[60] World Bank Group. (n.d.). *Support Program for Investment Reform and Innovative Transformation.* http://pubdocs.worldbank.org/en/594381510251482638/SPIRIT-Toolkit.pdf; T20 Japan 2019 & Task Force on Trade, Investment and Globalization. (2019, March 13) *Towards G20 guiding principles on investment facilitation for sustainable development.* http://ccsi.columbia.edu/files/2019/03/T20-PB-Investment-Facilitation-14-March-2019.pdf

suggesting that the MFIF applies to "the administration of measures by a Member affecting the *authorization of investment activities"* (emphasis added). It further defines "authorization" as "the permission to pursue investment activities, resulting from the procedure an investor must adhere to in order to demonstrate compliance with the necessary requirements." In other words, Members would be required to comply with the substantive provisions vis-à-vis the process of authorizing investment activities, which would cover investment entry and establishment, and those post-establishment activities—such as applying for permits—that require authorization. Indeed, this proposal defines "investment activities" as "establishment, acquisition, expansion, operation, management, maintenance, use enjoyment and sale or other disposal of investments in services and non-services sectors."

Thus, while the structure proposed by this delegation to define the scope of the MFIF may appear to be different from some of the other proposals, it is in essence the same. For instance, one of the proposals mentioned earlier makes direct references to the various elements of pre- and post-establishment investment. The fact that none of these proposals has maintained the "across the whole investment life-cycle" language is, however, noteworthy.

2.1.3 Services and Non-Services Sectors

The reference to FDI in "services and non-services sectors" is another phrasing choice that broadens the scope of the MFIF. Concretely, it means that the coverage of the MFIF will go significantly beyond what is currently covered under the GATS and, thus, will create obligations vis-à-vis measures that would go well beyond Members' commitments under the WTO. The relationship between the GATS and the MFIF will be examined further in Part 2.2.1 of this paper, specifically in relation to the MFN clause and the potential multilateralization of the MFIF, as well as in Part 3.1.1.1 on the overlap between the GATS and the MFIF.

This expansion of WTO Members' commitments beyond what exists in the GATS will also be important with respect to the ongoing work under the JSI on "Services Domestic Regulation" (SDR), which aims to create disciplines for regulations affecting trade in services "downstream" in the investment cycle and which is a spin-off of a process that had taken place under the Working Party on Domestic Regulation. The broad scope of the MFIF would mean it will apply to the FDI measures also implicated by the JSI on SDR, thus creating overlap, duplication, and possible incongruity. This issue is further elaborated on in Part 3.1.1.2 below. This means that, at a minimum, that Members should seek to integrate the work that is being undertaken as part of the MFIF and the JSI on SDR.

2.1.4 Investment Facilitation

Another important part of the scope of the MFIF is the reference to investment facilitation measures. While the *Informal Consolidated Text* provides that the MFIF would apply only to "investment facilitation" measures, investment facilitation is not defined. This may suggest that the scope of the application of the MFIF is unclear and potentially unlimited, given that

investment facilitation can be an expansive notion that may be confused with the concepts of investment promotion and investment retention.[61]

Yet, a definition of investment facilitation would be warranted only if the term were to function as a jurisdictional threshold for the provisions of the MFIF to apply, i.e., if the provisions of the agreement would apply only if the measure in question is an "investment facilitation measure." This does not appear to be the case here.

To further illustrate this point, it is worth taking the example of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS). The SPS Agreement provides that "[t]his agreement applies to all sanitary and phytosanitary measures which may, directly and indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement." Subsequent provisions are all centred around SPS measures, with language such as "Members have the right to take SPS measures necessary for …"; "Members shall accept SPS measures from other Members …"; "To harmonize SPS measures …." Whether a measure constitutes an SPS measure is a threshold question as to whether the provisions of the SPS Agreement apply. Accordingly, the SPS Agreement contains a detailed annex that defines when a measure can be considered an SPS measure.[62]

The situation above seems to be different from the draft MFIF. Here, the term "investment facilitation" does not serve as a threshold question to determine whether the MFIF provisions apply. Rather, the function of the term "investment facilitation" seems to be to describe the objective of the MFIF and the types of provisions that this framework would cover. Indeed, none of the subsequent MFIF provisions actually references the term "investment facilitation measures." For instance, the provisions do not state: "Members have the right to take investment facilitation measures …"; or "Members shall ensure that their investment facilitation measures are published …." Rather, as elaborated upon below, many of the MFIF provisions apply to a much broader scope of measures, that is to say, "measures of general application [covered by this framework]." This suggests that "investment facilitation measures" are not the jurisdictional threshold of the MFIF. In this context, adding a definition of "investment facilitation" could create complexity. This would be the case especially in the current draft of the MFIF, as coverage of the MFIF is already defined in the negative by excluding investment protection rules and investor–state dispute settlement (ISDS).

This is similar to the TFA. The TFA does not "apply" to trade facilitation; rather, the objective of the TFA is to enhance trade facilitation. The provisions covered in the TFA reflect the drafters' understanding of what trade facilitation measures are, but "trade facilitation measures" are not

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[61] Polanco Lazo, R. (2018, October 12). *Towards a multilateral investment facilitation framework: Elements in international investment agreements.* The E15 Initiative. https://e15initiative.org/blogs/towards-a-multilateral-investment-facilitation-framework-elements-in-international-investment-agreements/

[62] Another approach is set out in the Agreement on Trade-Related Investment Measures (TRIMs Agreement). While TRIMs are the subject of the agreement, that text does not provide a detailed definition of TRIMS; it contains, by way of guidance, an illustrative list of TRIMs that are inconsistent with the General Agreement on Tariffs and Trade (GATT) 1994's Article III on national treatment or Article XI on quantitative restrictions.

referenced in these provisions like they are in the SPS Agreement.[63] Accordingly, the TFA does not contain a definition of trade facilitation.[64]

The proposals submitted by three separate delegations recognize this. Indeed, none of the proposed language for the scope of the MFIF refers to investment facilitation. Instead, one proposal focuses on "foreign direct investment measures"; a second proposal on "measures … affecting … foreign direct investment" or "measures … that affect foreign investors and their investment"; and a third proposal on "measures … affecting the authorization of investment activities …." As will be elaborated upon below, these references describe more accurately the actual scope of the MFIF.

2.1.5 Excluded Measures

The *Informal Consolidated Text* excludes government procurement, public concessions and the conditions thereby established, as well as market access and right to establish, from the application of the MFIF. This means that government procurement schemes[65] or public concessions and the conditions thereby established affecting FDI, as well as market access measures, do not need to comply with the provisions in the MFIF. One delegation proposes to further exempt from the scope of the MFIF "subsidies or grants provided by a Member, including government-supported loans, guarantees, and insurance." In other words, any measures affecting FDI that has been facilitated by government grants, subsidies, or loans would be exempt from the scope of the MFIF. This presumably covers a large number of investments, thus significantly expanding the scope of exempted measures.

As noted previously, the *Informal Consolidated Text* also explains that it does not cover investment protection rules and ISDS. In other words, nothing in the substantive provisions in the MFIF establishes rights and obligations with respect to either.

Two delegations propose clarifying language regarding the relationship between the MFIF and market access. Specifically, one delegation proposes language clarifying that "this framework does not create new or modifying commitments relating to the liberalisation of investment, nor does it create new or modify existing rules on the protection of investment or investor-state dispute settlement." Another delegation proposes adding the following language: "this agreement does not create new or modify existing commitments relating to the liberalisation of investments, nor does

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63 See *Agreement on Trade Facilitation.*

64 Moreover, defining the types of "trade facilitation measures" covered by the provisions of the TFA was unnecessary, as the agreement clearly notes that it "clarif[ies] and improve[s] relevant aspects of the GATT 1994 Articles V, VII, and X …."

65 Exempting government procurement is aligned with other WTO agreements. The exemptions are not always applicable to all provisions. For instance, GATS Article XIII provides that Articles II (MFN), XVI (market access), and XVII (national treatment) shall not apply to laws, regulations, or requirements regarding government procurement that meets certain conditions. Note that the exemption applies only to these three different provisions but not the other provisions in the agreement.

it create new or modify existing rules on the protection of international investments or investor-state dispute settlement."

The identical language proposed by those two delegations could provide clarification on the relationship between the MFIF and market access, and the relationship between the rules created in the MFIF and the existing rules on the protection of international investments and ISDS. In other words, while investment facilitation may improve existing market access opportunities, it may not result in creating new market access opportunities. This raises the question, however, as to whether, and how, a meaningful distinction can be made between investment facilitation, that is to say, procedures and processes tacked onto established investment and investor rights, as opposed to investment and investor's "access rights" (right to invest, entry/exit conditions, etc.). This is a key issue to consider.

2.2 Scope of MFIF as Derived From the MFIF Substantive Provisions

As noted in Part 1 of this paper, the MFIF seems to apply to a much broader set of measures than "measures adopted or maintained by Members for facilitating foreign direct investments." This can be derived from many of the substantive provisions in the *Informal Consolidated Text.* For instance, Article 3.1 requires Members to promptly publish "[laws, regulations, procedures, judicial decisions and administrative rulings of general application] [measures of general application] [that pertain to or affect the operation of this framework] [covered by this framework]." Additional proposals submitted by two delegations refer, respectively, to "all relevant measures of general application with respect to any matter covered in this Agreement" and "laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this framework."

Defining the scope under Article 3.1 is critical, and not just because of the publication requirement set out in Article 3.1. Indeed, subsequent transparency provisions and provisions in the MFIF's Section III on administrative procedures and requirements make reference to the unspecified description of scope set in Article 3.1.

For instance, Article 7.1 provides that "each Member shall ensure that all measures of general application [covered by this framework] are administered in a reasonable, objective and impartial manner." Section IV of the MFIF similarly extends the obligations related to establishing a focal point to respond to investors' enquiries related to measures of general application. It also contains the obligation for appeal and review of administrative decisions, which provide for the "prompt review of … administrative decisions *affecting the investment*" (Article 17.1, emphasis added).

Based on the elements above, a large number of substantive obligations in the MFIF do not apply to investment facilitation measures but rather to measures of general application. This fact suggests that the actual scope of the MFIF is not, as set out in Article 1.1, "measures adopted

or maintained by Members for facilitating FDI" but rather "measures of general application affecting FDI" or a variation of this.

The lack of clarity concerning this wording (i.e., "measures adopted or maintained by Members for facilitating FDI" versus "measures of general application affecting FDI") makes it difficult to understand precisely how broad the reach of the MFIF would be. Assuming, however, that negotiators ultimately decide on an approach referring to "measures of general application affecting FDI," then the framework could be expected to cover a wide range of measures. Indeed, the term "general application" comes from Article X.1 of the General Agreement on Tariffs and Trade (GATT)[66] and has been interpreted by panels to refer to measures that apply to a range of situations or cases, rather than being limited in their application to a specific economic operator, though it is worth noting that panel rulings are not meant to establish a precedent.[67]

Going forward, it would be crucial (i) to agree on the language set out in Article 3.1; and (ii) to reconcile the scope description of the MFIF in Article 1.1 with the actual scope of the framework. A proposal by one delegation provides an option for doing so. Specifically, for Article 1.1 on scope, it provides that "this Agreement applies to measures adopted or maintained by Members affecting the establishment and operation of foreign direct investments." The key, then, would be to further understand the types of measures that "affect" FDI. As noted above and as will be elaborated upon in the analysis below, without any further clarifications, this could implicate a very broad array of measures. To better understand areas of overlap between the MFIF- and WTO-covered agreements, it is critical to clarify the scope of the MFIF.

2.2.1 Scope Implications Derived From the MFN Clause

Another important provision that defines the scope of the *Informal Consolidated Text* is the MFN clause in Article 2. As explained previously, under this clause, Members shall treat investments and investors from any other Member no less favourably than like investments and investors of any other country. The language and approach of the proposed MFN clause, which is common in the WTO agreements, is worthy of deeper analysis.

It is unlikely that the MFIF will be adopted and ratified by all WTO Members. In such a situation, participants would have to decide whether the MFN clause would extend the benefits of the MFIF to all WTO Members—including those Members that have not adopted and ratified the framework—even though only those who have ratified it would be subject to its terms. In theory, they could pursue the approach used by the plurilateral Government Procurement Agreement (GPA) and its revisions, where its provision on non-discrimination extends only to GPA parties, though having such a "closed" plurilateral under the umbrella of the WTO would still require consensus from the full WTO Membership in order to incorporate such an accord

[66] See the text of the GATT here: https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm

[67] See, e.g., Panel Report, *US–Underwear,* para.7.65; Panel Report, *Japan–Film,* para. 10.385; Panel Report, *EC–Selected Customs Matters,* para. 7.116; Panel Report, *China–Raw Materials,* para. 7.1098.

under the Marrakesh Agreement's Annex 4. This will be difficult to obtain, given that the GPA was unique in that government procurement was exempted from MFN challenges.

Given the statements of past and present MFIF group coordinators that the participants are aiming for greater outreach to the rest of the WTO Membership, this paper will focus primarily on the first type of agreement— the type that would allow those WTO Members not involved in the MFIF to still receive the benefits of enhanced investment facilitation without being subject to its requirements. This would be similar to how the WTO's Information Technology Agreement and its revision are designed.[68]

If MFIF participants do go forward with this approach, they will need to consider the potential multilateralization effect of the MFN clause. The MFN clause under the GATS has been interpreted to quasi-automatically multilateralize certain obligations under bilateral investment treaties (BITs) that are broader in sectoral coverage and more liberal in content than those in WTO Members' schedules.[69] Similarly, the MFN clause in the MFIF would have the effect of multilateralizing "any measure covered by this framework," that is to say, investment facilitation measures affecting FDI in services and non-services sectors. For instance, if under a BIT one Member provides investors from another Member access to expedited application processing, the MFN clause in the MFIF would require the first Member to extend such access to "like" investors from all other Members. This issue could be addressed through language proposed under Article 32.3, which exempts the application of the MFN provision to "treatment accorded by a Member under a bilateral or plurilateral agreement in force or signed prior to [XX]."

Given the differences in scope between the GATS and the MFIF, the effects of the multilateralization caused by the MFN clause will be different. Specifically, the effects under the MFIF will be limited to commitments concerning investment facilitation measures, whereas the GATS also covers market access. Yet, the multilateralization effect under the MFIF will also cover FDI in non-services sectors, whereas the GATS only covers FDI in services sectors.

Despite these differences in scope, there will be overlap between the measures multilateralized by the MFN clause in the GATS and the MFN clause in the MFIF. In this context, it is important to ensure consistency between these agreements. A key issue that must be addressed is that, unlike the GATS, the MFN clause in the *Informal Consolidated Text* does not explicitly provide Members with the option to exempt measures other than BITs and plurilateral measures in force at the time of signing the agreement from MFN treatment. Yet the GATS MFN exception clause is not limited to BITs and plurilateral measures. Without incorporating the full scope of exceptions set out in the GATS, the MFN clause in the MFIF risks diminishing the rights and obligations

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[68] It is worth noting, however, that the ITA and ITA-II are tariff-cutting agreements and do not involve the establishment of new rules. Moreover, given the market access implications and the prospects of "free riders," both the ITA and ITA-II aimed for covering a critical mass of global trade in the products covered—at least 90% of such trade—in order to extend MFN treatment to non-ITA participants, a consideration that also came up in the Environmental Goods Agreement negotiations before those stalled.

[69] Adlung, R. (2016). International rules governing foreign direct investment in services: Investment treaties versus the GATS. *Journal of World Investment & Trade, 17,* 67–68.

that WTO Members have negotiated under the GATS—despite Article 32.2 of the MFIF.[70] Acknowledging this, a proposal by one delegation contains language, albeit in the context of "scope" of the agreement, that the provisions in the MFIF would be "without prejudice to the terms, limitations, conditions and qualifications set out in each Party's Schedule of Commitments *and List of MFN exemptions under GATS"* (emphasis added). Likewise, a proposal by one delegation notes that it is open to considering language on possible exceptions at a later stage. Should Members decide to keep the MFN provision in the MFIF, incorporating a reference to MFN exemptions under the GATS would enable Members to ensure consistency with Members' obligations under the GATS. This would be important to avoid creating contradictions between the MFIF and the GATS.

Members seem to be still undecided as to whether the MFIF should contain an MFN clause at all. Indeed, one delegation provides in its proposal that "it is not at this stage convinced of the necessity for the particular provision on the MFN treatment." While that delegation sees the value of the non-discriminatory application of the MFIF, it finds that this is ensured through Article 7 of the *Informal Consolidated Text,* which covers "the consistent, reasonable, objective and impartial administration of measures."

2.2.2 Scope Implications Derived From the Absence of a National Treatment Provision

It is worth highlighting that the *Informal Consolidated Text* does not contain a national treatment provision. In theory, this means that a Member could apply more favourable processes and procedures that affect FDI for domestic investors compared to like foreign investors. This, in turn, could potentially undermine any benefits that come from the MFN clause. However, the actual impact of the absence of a national treatment clause would depend on the likelihood that a government would put in place an investment facilitation regime under the MFIF, but deviate from the processes and procedures put in place when dealing with domestic investors. Indeed, since we are dealing with processes and procedures, governments may be more prone to apply the relevant processes and procedures across the board—with or without a national treatment clause. The national treatment clause may become more relevant as Members further define the scope of the MFIF.

[70] This could create a conflict with Article 32.3 of the *Informal Consolidated Text,* which provides that "Nothing in this framework shall be construed as diminishing the rights and obligations of Members under the Marrakesh Agreement establishing the WTO."

Part 3. The Relationship Between the Proposed MFIF Commitments, the WTO Architecture, and the Existing Commitments Contained in the WTO Agreements

Having established the scope of the MFIF—as well as the remaining areas of ambiguity—Part 3 analyzes the link between the MFIF and the existing WTO agreements. Specifically, Part 3 consists of two sub-parts. The first part focuses on the WTO agreements that could apply to investment measures, and thus, could create scope overlap with the MFIF.[71] The second compares the substantive provisions of the MFIF with existing obligations under the WTO agreements.

3.1 WTO Agreements That Apply to Investment Measures

While the MFIF has been partly inspired by the conclusion of the WTO's TFA, it is important to note from the outset that the relationship between the MFIF and existing WTO agreements is very different from the relationship that exists between the TFA and the existing WTO agreements. Indeed, the TFA preamble clearly establishes the link between the TFA and the WTO, explaining that the TFA aims to "clarify and improve relevant aspects of Articles V, VIII and X of GATT 1994." This is in line with the agreed mandate for the TFA negotiations and means that the TFA applies to the types of measures that are covered by the GATT 1994.

In contrast to the TFA, the relationship between the MFIF and existing WTO agreements is less clear. This is because the MFIF's focus on "investment" does not neatly overlap with the types of measures covered under the WTO. Rather, the WTO agreements are organized into three different categories: Trade in Goods (Annex 1A), Trade in Services (Annex 1B), and Trade-Related Aspects of Intellectual Property Rights (Annex 1C). Thus, to establish how the MFIF will interact with existing WTO agreements requires, as a first step, analyzing which WTO agreements/provisions apply to investment measures.

Some of these agreements have already been referred to in Part 2 of this text, from the perspective of the MFIF and its potential scope. However, Part 3 now views the scope question from the perspective of the existing WTO agreements, which is an important counterpart to the prior analysis.

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[71] There is a third category that is relevant when examining the linkages between the MFIF and the WTO agreements: this involves the WTO agreements that apply to measures of general application that could affect FDI. However, the MIFIF will interact with a larger number of existing WTO agreements. Many of the WTO agreements—even those that do not directly apply to investment—regulate measures that could affect investment. It would imply measures that fall under the scope of a large number of the WTO agreements, including the SPS Agreement, the Technical Barriers to Trade Agreement (TBT), the TRIPS Agreement, and the GATT. However, as this would significantly expand the analysis, this part of our paper focuses mostly on the WTO agreements that cover investment.

Table 3. Scope overlap between the WTO agreements and the MFIF

	Trade		Investment	
Goods	GATT Agriculture Agreement on Sanitary and Phytosanitary Measures (SPS) Textiles and Clothing Agreement on Technical Barriers to Trade (TBT) Agreement on Trade-Related Investment Measures (TRIMS) Agreement on Subsidies and Countervailing Measures (SCM) Rules of Origin (ROO) Licensing Safeguards Pre-shipment inspection	TFA	SCM (subsidies linked to investment) TRIMS	MFIF
Services	GATS (Modes 1, 2, 4)		GATS (Mode 3)	
Intellectual Property	Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)		Depends on definition	

Source: Authors' elaboration.

There are five WTO agreements that contain obligations that could apply to or affect investment measures:

- The GATS, including the JSI on SDR
- The SCM Agreement[72]
- The TRIMS Agreement[73]
- The TRIPS Agreement[74]
- The plurilateral GPA and its revision.

The GATS is the only covered agreement that directly applies to FDI measures. Specifically, the GATS establishes four "modes" of services supply, with "Mode 3" covering the supply

[72] See the text of the SCM Agreement here: https://www.wto.org/english/docs_e/legal_e/24-scm.pdf

[73] See the text of the TRIMS Agreement here: https://www.wto.org/english/tratop_e/invest_e/trims_e.htm

[74] See the text of the TRIPS Agreement here: https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

"by a service supplier of one Member through commercial presence in the territory of another Member." Commercial presence is further defined as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person; or (ii) the creation or maintenance of a branch or a representative office."[75] In other words, Mode 3 of the GATS applies to FDI in services, which overlaps with the MFIF. Moreover, and as will be further elaborated upon below, should the final MFIF text include provisions on the temporary entry for investment persons, it will implicate Mode 4 of the GATS, which covers "the supply of a service of one Member, through the presence of natural persons of a Member in the territory of another Member."

However, as the GATS is an agreement where market access and national treatment obligations are structured on the basis of a positive list (with a negative list approach to exemptions to sectors in which Members have made a commitment), the precise scope overlap between the GATS and the MFIF depends on the specific commitments Members have made. Indeed, under the GATS, Members are required to comply with a number of obligations only when they have made commitments in the relevant services sector. From a total of 160 services sectors, the Uruguay Round schedules of LDCs contain no more than 15% of commitments, on average, compared to 22% for developing country Members (excluding LDCs), and close to 60% for developed country Members. For 32 Members that acceded after the Uruguay Round, the schedules contained an average of 64% of commitments.[76] This means that, for those GATS provisions that are applicable only to services sectors in which Members have made commitments, such as domestic regulation, the scope overlap between the MFIF and the GATS with respect to both Modes 3 and 4 will vary for each Member, depending on the extent of their specific commitments.

Another variable that would have a bearing on the scope overlap between the GATS and the MFIF is the definition of FDI. As noted in Part 2.1.1 above, one proposed definition would require 10% of the ordinary shares or voting stock as criteria to determine "the existence of an investment relationship." By contrast, under the GATS, "commercial presence"—which is synonymous with FDI—requires establishing control or ownership requirements, which are met either if the service is owned and controlled by a natural person of that Member or by a juridical person of that Member, the latter of which requires that the Member owns more than 50% of the equity interests. Since the MFIF has not defined "a juridical person of another Member," it can be assumed that any "investment" is covered as long as the 10% equity requirement is met, as described earlier in this paper. This, in turn, means that the MFIF would apply to a broader scope of measures affecting FDI compared to those covered under the GATS.

In addition to the GATS, several other WTO agreements apply to investment measures. For instance, the TRIMS Agreement applies to investment measures that impact trade in goods, which overlaps in scope with the MFIF. As its main purpose is to ensure fair competition for trade in

[75] GATS Art. XXVIII (d).

[76] Adlung, 2016, p. 60 (n. 66)

goods, it only covers investment measures to the extent that these discriminate between imported and exported products and/or create import or export restrictions, that is to say, those that relate to GATT 1994 Article III on National Treatment and Article XI on quantitative restrictions. As a result, the TRIMS Agreement concerns predominantly performance requirements. To the extent performance requirements are considered a measure "affecting" FDI, they could be covered under the MFIF.

Another agreement relevant for the scope discussion is the SCM Agreement. This agreement seeks to ensure that subsidies do not adversely affect other Members. While the SCM Agreement does not explicitly refer to investment nor concern itself with investment measures per se, it applies to investment measures when they are linked to subsidies. For instance, in an attempt to attract FDI, governments may provide tax incentives to investors, provided that they export a minimum percentage of their goods, or may make tax incentives contingent on purchasing a minimum percentage of goods locally. These measures would be covered by the Consolidated Text and fall under the purview of the SCM Agreement. Thus, while not directly regulating investment, the SCM Agreement is relevant in analyzing the linkages between the MFIF and existing WTO obligations.

However, the SCM Agreement will only be relevant for the MFIF discussion as long it covers investment measures related to subsidies. Indeed, as noted above, one delegation has proposed to exclude from the scope of the MFIF "subsidies or grants provided by a Member, including government-supported loans, guarantees, and insurance." Under such a definition, any investment measures affecting FDI that have been facilitated by and/or been the recipient of government grants, subsidies, or loans—which would fall under the purview of the SCM Agreement—would be exempt from the scope of the MFIF. Should this definition be adopted, there would be no overlap between the SCM Agreement and the MFIF.

The TRIPS Agreement could also be applicable to investment. Indeed, as set out in more detail in Part 2.1.1, investment, when broadly defined, can include investments in intellectual property. However, it is unclear if the working definition of "investment" in the draft MFIF text would be sufficiently broad to cover intellectual property investments.

Finally, the plurilateral GPA and its revision could also cover investment measures. However, in the present case, government procurement is excluded from the scope of the MFIF. Thus, there is no need to further elaborate on possible interactions between the MFIF and the provisions of the GPA.

To summarize, there is some scope overlap between the MFIF and the existing WTO agreements, with the GATS covering FDI in services and the SCM Agreement and the TRIMS Agreement applying to a specific set of investment measures that relate to trade in goods. Scope overlap with the TRIPS Agreement is uncertain. In the case of the agreements where there is scope overlap, the analysis in the next section will cover the relationship between the substantive provisions set out in the MFIF and the provisions contained in those agreements to focus on potential overlaps or incongruities.

3.1.1 Substantive Overlap Between the MFIF and the WTO Agreements

Part 2 of this paper established that a number of WTO agreements could interact with the MFIF. The second step to understanding the exact interaction between the MFIF and the existing WTO agreements is a need to analyze whether the provisions in these agreements substantively overlap with the MFIF. While some provisions of the *Informal Consolidated Text* closely mirror WTO provisions, they mostly go beyond these provisions by expanding the scope of the obligation and by clarifying or complementing them (WTO+ provisions) or by covering entirely new aspects (WTO extra provisions).

To recall, in theory, overlap and duplication are problematic only where different agreements are inconsistent or contradictory, although implementation issues may arise. Similarly, no such issues arise because the MFIF goes further than existing obligations. It is, however, important for Members to have a clear understanding of the way in which MFIF provisions relate to existing obligations they have undertaken under the WTO.

3.1.1.1 GENERAL AGREEMENT ON TRADE IN SERVICES

1. Transparency and Related Obligations

A number of provisions in the GATS cover obligations that overlap with the *Informal Consolidated Text*. Specifically, Article III of the GATS contains provisions on transparency, and Article VI addresses domestic regulation. Most of the MFIF provisions on transparency elaborate on and expand the scope of existing transparency obligations (GATS+). For instance, the GATS requires that Members shall publish "all relevant measures of *general application which pertain to or affect the operation of the Agreement*" (Article III:1, emphasis added). The *Informal Consolidated Text* contains a similar obligation but goes beyond the GATS by stipulating a number of additional requirements to follow in the context of publication. This includes leaving a "reasonable period of time" between publication and entry into the force of a law, providing an explanation of the rationale/objective of the law, requiring publication in an official publication/online source, and requiring no imposition of a fee (Articles 3.1–3.6).

Likewise, the MFIF goes beyond the notification obligation in the GATS, which requires that Members inform the Council for Trade in Services when introducing "new, or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by *their specific commitments* under the GATS" (Article III:3, emphasis added). The *Informal Consolidated Text* expands the scope of this obligation by requiring notification to the Committee on Investment Facilitation of major changes to existing *"regulations of general application"* (Article 4.1.a, emphasis added).[77] Moreover, the MFIF requires Members to specify where the measure has been published, the URL of

[77] As a reminder, the MFIF provision setting out this WTO Committee on Investment Facilitation is Article 28 of the *Informal Consolidated Text*.

the website (if applicable), and provide the contact information of any relevant competent authorities. These are all set out in Article 4.1.

Unlike the GATS, the *Informal Consolidated Text* also contains separate provisions on the publication of information when an authorization is required to invest in a country.[78] This includes contact information, requirements and procedures, forms and documents, fees and charges, taxes, procedures for appeal or review of decisions concerning application, procedures for monitoring or enforcing compliance with the terms of conditions or licences, opportunities for public involvement, time frame for processing an application, and so forth (Articles. 3.7–3.9).

On administrative procedures, the *Informal Consolidated Text* likewise elaborates on and complements what is contained in the GATS. GATS Article VI requires Members *"for sectors in which specific commitments are undertaken,* to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner" (emphasis added). The MFIF draft contains a similar obligation but expands the scope to *"all measures of general application [covered by this framework]"* (Article 7.1, emphasis added). Furthermore, unlike the GATS, the MFIF contains specific obligations related to proceedings that directly affect investors of another Member (Article 7.2).

The GATS further requires Members to put in place "judicial, arbitral, or administrative tribunals or procedures which provide, at the request of the service provider, for prompt review and appropriate remedies of administrative decisions *affecting trade in services"* (Article VI:2(a), emphasis added). The MFIF (Article 17) contains a largely similar obligation but applies to decisions *"affecting the investment."* It also adds layers to the obligation, requiring that parties to the proceedings are entitled to "a reasonable opportunity to support or defend their respective positions" and "a decision based on the evidence and arguments submitted or… on the record compiled by the administrative authority." It further requires that "procedures for appeal and review are carried out in a non-discriminatory manner." Compared to the GATS, the MFIF provides enhanced protection to the party seeking appeal and review of administrative decisions affecting investment.

For situations in which "authorization is required for the supply of a service on which *a specific commitment has been made,"* the GATS requires that "the competent authorities shall inform the applicant of the decision within a *reasonable period of time* … [and] at the request of the applicant … provide information regarding the status of the application" (Article VI:3, emphasis added). The MFIF significantly expands upon these requirements. The scope of the obligation is larger, as it is not limited to situations relevant to specific commitments but rather applies generally. It also establishes a large number of additional

[78] While GATS Article VI contains a provision that is relevant for situations in which authorization is required for the supply of a service, this does not set out specific publication requirements for such a situation.

criteria to comply with, including on time frames of the application, copies versus original documents, the processing of applications, and authorization to enter into effect without delay (Articles 10.1–10.4). It also requires that the relevant competent authorities reach and administer their decision in an independent manner (Article 16.1). Thus, under the MFIF, Members will be bound by a significant number of additional obligations regarding authorization procedures. The *Informal Consolidated Text* contains various additional provisions concerning the streamlining and speeding up of administrative requirements that do not have corresponding GATS obligations, although they have been discussed in the context of the Working Party on Domestic Regulations and the JSI on SDR, as discussed in more detail below. Many of these provisions reflect obligations set out in the TFA. These include:

- Provisions to reduce and simplify administrative procedures and documentation requirements (Article 8)
- Provisions to ensure clear criteria for administrative procedures (Article 9)
- Treatment of incomplete applications and their rejection (Article 11)
- Fees and charges (Article 12)
- Period review of administrative procedures and requirements (Article 13)
- Use of information and communication technology/e-government, including electronic applications (Article 14)
- One-stop shop/single window-types of mechanisms (Article 15).

Moreover, Section IV of the *Informal Consolidated Text* contains several provisions on issues such as good regulatory practices and international regulatory cooperation that go beyond GATS obligations and reflect recent developments in regional trade agreements. These provisions can be considered GATS-extra.

2. Flexibilities

There are also a couple of other important differences between the GATS and the *Informal Consolidated Text,* specifically with respect to the issue of flexibilities. Special and differential treatment in the GATS is, in part, captured by the flexibility that Members have in the negotiation of specific commitments. Since the GATS follows an opt-in ("bottom-up") approach, it means that Members have the flexibility to make commitments in sectors and sub-sectors of their choice. Many developing country and LDC Members have opted to make very few, if any, commitments. This, in turn, has limited their obligations relevant to administration (domestic regulation), as most of these apply only with respect to measures that affect services sectors in which countries have made specific commitments.

The MFIF follows a different approach. Its obligations, including with respect to services, would apply across all sectors, not only where countries have made specific commitments.

Instead, similar to the TFA, it would enable developing country and LDC Members to make commitments on the basis of their ability to comply, including the option of seeking more time and support. Specifically, as explained in Part 1 above, developing countries and LDCs can decide whether to implement a provision upon the entry into force of the MFIF (Category A); after a transitional period of time from entry into force, with the length that time period left unspecified (Category B); or with both that transitional period and the acquisition of technical assistance and capacity-building support to implement that provision. This is set out in Article 22. Thus, while many of the MFIF obligations are GATS+ or GATS-extra and applicable across all sectors, under the current *Informal Consolidated Text,* developing country and LDC Members can choose to have more time to implement the additional requirements.

Another issue to highlight when comparing the MFIF and the GATS concerns the issue of exceptions. Article XIV of the GATS contains general exceptions, which allows Members, in certain circumstances, to adopt measures "necessary to protect public morals or maintain public order"; "necessary to protect human, animal or plant life or health"; "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement," including those related to deception, fraud, and privacy; and those inconsistent with Articles XVII or II that concern, respectively, the equitable imposition or collection of taxes and the avoidance of double taxation. While the *Informal Consolidated Text* includes a placeholder for provisions on General Exceptions (Article 29), one delegation has proposed incorporating parts of the General Exceptions provisions set out in GATS Article XIV, namely subcategories on (a) measures to "protect public morals or to maintain public order"; (b) measures necessary to "protect human, animal or plant life or health"; and (c) "measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the [GATS], including those related to the prevention of fraudulent practices … and the protection of privacy of individuals." That delegation did not propose to include the other two exceptions set out in GATS Article XIV related to (d) the imposition of direct taxes inconsistent with national treatment and (e) MFN violations that result from agreements to avoid double taxation. Indeed, these last two GATS exceptions are likely irrelevant under the MFIF. Given the scope overlap that exists between the MFIF and the GATS, it is important to ensure as little incongruity as possible with respect to areas of exceptions. This would avoid a situation in which a measure may be justified under the GATS, but not under the MFIF, thus diminishing the rights and obligations of Members under the Marrakesh Agreement.

3. Temporary Entry for Investment Persons

Two delegations have submitted proposals to apply the MFIF to temporary entry for investment persons. The rationale behind these proposals is that the temporary movement of investment persons, or business persons for investment purposes, is important to facilitate investment activities. As noted above, since these proposals concern entry of people, they implicate Mode 4 of the GATS. Similar to the analysis above, the extent to

which these provisions will interact with, or add to, existing obligations for Members with respect to Mode 4 obligations will, for most provisions, depend on the extent to which Members have made specific obligations under Mode 4.

As set out above, the GATS requires Members to publish "all relevant measures of *general application which pertain to or affect the operation of the Agreement*" (Article III:1, emphasis added). Since this includes measures relevant to Mode 4, publication requirements under the GATS encompass measures concerning temporary entry for investment persons. The publication requirements proposed by those two delegations are more detailed but would not significantly alter obligations. However, this would be different for various other proposed provisions in the context of temporary entry for investment persons. For instance, the same delegations propose that, at the request of an applicant, a Member that has received a completed application for an immigration formality shall "endeavour to inform the applicant of the status of the application." This would apply not only to immigration procedures with respect to which Members have made specific commitments but to all temporary immigration procedures.

Under the GATS, Members are required to establish at least one "enquiry point to provide specific information" about the measure (Article III:4); ensure they are administered in a "reasonable, objective and impartial manner" (Article VI:1); "inform the applicant of the decision" within a "reasonable period of time" and, upon request, update the applicant over the application's progress (Article VI:3). The proposals submitted by those delegations for the MFIF require the establishment of a mechanism for addressing questions related to the entry and temporary stay of business persons for investment purposes.

Moreover, both proposals, and especially one of them, also contain provisions that go beyond what is currently required under the GATS. For instance, as explained previously, one proposal contains a long list of additional requirements Members must abide by when processing applications for temporary business visas, including the types of documents and forms that must be published; a requirement to limit processing fees to the "approximate costs"; a provision that provides the applicant with the opportunity to provide further information in case of incomplete applications; a requirement for explaining, in writing, why an application is refused and allowing the chance for the applicant to appeal; the requirement to issue multiple entry visas once an application has been approved; a requirement to provide applicants with an opportunity to apply for renewal or extension for temporary stay, and so forth. Should these provisions be incorporated in the final MFIF text, they would create a number of new obligations with respect to measures concerning entry and temporary stay of business persons.

However, it is important to keep in mind that, even without specific provisions concerning the entry and temporary stay of business persons, the MFIF will likely still apply to measures concerning entry and temporary stay of business workers. Indeed, as set out in the previous analysis, the actual scope of the MFIF concerns measures that pertain

to or affect the operation of this framework, as set out under the bracketed language in Article 3.1 on "publication and availability of measures." As mentioned above, the new proposals submitted by three delegations reflect this, establishing the scope of the MFIF as "foreign direct investment measures" (proposal by one delegation); "measures … affecting …foreign direct investment" or "measures … that affect foreign investors and their investment" (proposal by a second delegation); and "measures … affecting the authorization of investment activities …" (proposal by a third delegation). Procedures related to the entry and temporary stay for investment purposes clearly affects FDI, and thus, absent any further clarification about the meaning of "affect," these procedures would presumably be covered under the MFIF. In this regard, the additional elements submitted by the second and third delegations referred to in this paragraph are likely redundant. This demonstrates the importance, as noted above, of clarifying what measures "affect" FDI, as it could potentially include a very large number of measures.

4. Transfers and Subrogation

As mentioned in Part 1 above, one delegation has submitted a new proposal requiring that Members ensure "that all transfers relating to investments may be made freely in and out of that Member without delay." It also contains a subrogation clause, requiring that if a Member makes "a payment to any investor of that Member under an indemnity, guarantee, insurance contract pertaining to an investment of such Member in another Member," then that other Member shall recognize the subrogation. These provisions are of a very different nature than the provisions requiring that Members publish measures that affect FDI, and there are no equivalent requirements under the WTO agreements. Should this be adopted in the final MFIF text, it would impose significant additional requirements on the Members.

In sum, the MFIF builds upon, and in various places goes significantly beyond, the transparency and administrative obligations contained within the GATS—either by extending the scope or adding further requirements or both. The MFIF also contains several GATS-extra obligations that are not present in the GATS. Thus, with respect to investment measures that fall within the purview of the GATS, Members will assume additional obligations compared to what they have committed to under that agreement.

As noted earlier, the extent to which the MFIF will go beyond a Member's GATS obligations will, in part, depend on a Member's specific commitments. Indeed, for those with fewer commitments—including many least-developed and developing country Members—the gap between existing GATS obligations and the MFIF will be larger than for those Members that have made a larger number of commitments under the GATS, even where they have some additional time to bring their measures into compliance.

Considering the analysis above, it is important that Members ensure alignment in areas where possible discrepancies could arise between the GATS and the MFIF, such as the exceptions.

3.1.1.2 JOINT STATEMENT INITIATIVE ON SERVICES DOMESTIC REGULATION

It would be incomplete to talk about the interaction between the GATS and the MFIF without taking into account ongoing work among a group of WTO Members under the JSI on SDR pursuant to GATS Article VI.[79] As noted previously, those discussions are a spin-off of past negotiations involving the full WTO Membership under the Working Party on Domestic Regulation. This JSI was also launched at the 2017 Buenos Aires Ministerial Conference.

This JSI on SDR involves the negotiation of a reference paper with binding disciplines that the participants involved would apply to their GATS services schedules either as new or improved commitments. Participants would notify draft indicative schedules that they would eventually aim to finalize and certify. Meanwhile, as noted above, the MFIF will apply to FDI measures, including those covered by domestic regulation under GATS Article VI. However, unlike the 2019 SDR reference paper, the MFIF is not limited to sectors in which Members have made specific commitments.

Based on a draft of the SDR reference paper dated December 12, 2019 ("2019 SDR reference paper"), it is possible to identify broad substantive overlap between both texts. Specifically, issues that are covered by both texts include authorization procedures, treatment of incomplete applications and their rejection, fees and charges, independence of competent authorities, publication and information available in situations where authorization is required, enquiry points, and opportunity to comment.

With respect to many of these issues covered by both processes, provisions in the 2019 SDR reference paper and the *Informal Consolidated Text* are largely similar and, at times, verbatim. Yet there are also various differences, with the MFIF containing requirements that go beyond the 2019 SDR reference paper, and the 2019 SDR reference paper containing additional detail that has not been included in the current version of the MFIF.

For instance, the MFIF requires that the relevant authorities explain [in writing and without undue delay] the reason for rejection of an application, the time frame for an appeal or review, and the procedures for resubmission of an application (11.2 MFIF). These requirements are not all set out in the 2019 SDR reference paper.[80]

Likewise, with respect to publication, the obligations in the proposed agreements are similar but not identical. For instance, the MFIF requires that, to the extent practicable, Members make information available electronically and in an official WTO language.[81] This is not a requirement contained in the 2019 SDR reference paper.[82] There are a number of additional differences.

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[79] The SDR negotiations were expected to be concluded prior to MC12, which was scheduled for July 2020, but as a result of COVID-19, has now been tentatively rescheduled for 2021.

[80] In situations where an application is rejected, the 2019 SDR reference paper has a requirement to "inform the applicant of the reasons for rejection and, if applicable, the procedures for resubmission of an application."

[81] MFIF, Article 3.5.

[82] 2019 SDR reference paper, Article 13.

For example, while the 2019 SDR text provides for the opportunity for public involvement, the MFIF is considering the option of providing for the opportunity for public involvement or the involvement of investors in policy- and rule-making.[83] While the 2019 SDR reference paper requires Members to publish "requirements and procedures,"[84] the MFIF requires Members to publish "requirements and procedures, *including forms and documents"* (Article 3.7.b, emphasis added.[85] Furthermore, whereas the 2019 SDR reference paper requires the publication of "fees,"[86] the MFIF requires the publication of "fees and charges" and is considering the option of adding "taxes collected during the procedure."

The two texts follow a similar pattern for "publication in advance and opportunity to comment," with large overlap but also differences. Moreover, the provisions under this heading are also structurally different. The *Informal Consolidated Text* contains one article for "publication and availability of measures"[87] and a separate article for "publication in advance and opportunity to comment on proposed measures."[88] The 2019 SDR reference paper, by contrast, has organized all these measures under the heading "Opportunity to Comment and Information Before Entry Into Force."

Differences that could lead to duplication and incongruity can also be found with respect to the enquiry provisions. Under the 2019 SDR reference paper, enquiries may be addressed through the enquiry and contact points established under Articles III and IV of the GATS.[89] The *Informal Consolidated Text* requires Members to establish or maintain an enquiry point without explicitly providing for the possibility of using the enquiry point established under the GATS.[90]

Furthermore, both the proposed MFIF and the 2019 SDR reference paper have well-developed provisions regarding transition periods for developing and least-developed country Members. However, the provisions are distinct. For instance, the 2019 SDR reference paper allows for developing countries to "designate specific provisions of the disciplines … for implementation on a date after a transitional period of no longer than [2][5][7] years following the entry into force of these disciplines"—with the possibility of requesting an extension. LDCs are exempt from compliance obligations under the SDR and, instead, are only "encouraged" to apply the disciplines. Only graduating LDCs are required to "inscribe the disciplines … in their schedules of specific commitments no later than 6 months in advance of their graduation from LDC status." At this time, they may "designate transitional periods" pursuant to the provisions that apply to developing countries.

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83 MFIF, Article 3.7 (g).

84 2019 SDR reference paper, Article 13 (a).

85 MFIF, Article 3.2 (b).

86 2019 SDR reference paper, Article 13 (c).

87 MFIF, Article 3.1.

88 MFIF, Article 3.3.

89 2019 SDR reference paper, Article 14.

90 MFIF, Article 5.

By contrast for the MFIF, as explained above, Members are considering a TFA-style category approach, including the option of transition periods and for requesting technical assistance and capacity-building support. Under this approach, developing countries and LDCs can indicate whether they will implement a provision upon entry into force of the framework and within one year for LDCs (Category A); "after a transitional period of time following the entry into force of the framework" (Category B); or "after a transitional period of time following the entry into force of the framework and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building" (Category C). In situations where a measure falls under the purview of both agreements, the different special and differential treatment approaches that are being considered by the 2019 SDR reference paper and the proposed MFIF could create significant discrepancies, especially with regards to LDCs.[91] Similarly, it would be important to align the technical assistance provisions in the *Informal Consolidated Text* and the 2019 SDR reference paper.

Finally, the *Informal Consolidated Text* contains various provisions that are not present in the 2019 SDR text. These include provisions on notifications, streamlining and speeding up administrative procedures and requirements, establishing contact/focal points/ombudsperson types of mechanisms, arrangements to enhance domestic coordination, and cross-border cooperation on investment facilitation. These provisions will also apply to the FDI measures covered by the 2019 draft SDR reference paper.

Given the substantial overlap between the 2019 draft SDR reference paper and the *Informal Consolidated Text,* it is imperative that Members involved in either or both are aware of the disciplines being negotiated in the other and consider these to avoid incongruity or outright incoherence. This is especially important where disciplines agreed in one are contradicted in the other, including in their implications for developing country and LDC Member flexibilities.

3.1.1.3 OTHER WTO AGREEMENTS

As explained above, other WTO agreements will also apply to investment measures that fall under the purview of the MFIF. These agreements typically contain provisions on transparency and the publication of information. For those measures that are covered by existing WTO agreements that also fall under the purview of the MFIF, Members will be subject to additional obligations, for instance, in the case of the TRIMS Agreement, the SCM Agreement, and the TRIPS Agreement, as explained below. In addition to these agreements, the MFIF could also overlap with the SPS Agreement, TBT Agreement, and the GATT, in situations where standards and requirements have an impact on investment.

TRIMS. The TRIMS Agreement covers measures that affect FDI, such as performance requirements. It contains a chapter on transparency, which makes reference to Members'

[91] Note that the only way for there not to be a direct conflict between LDCs' commitments under the MFIF and the 2019 SDR reference text would be if LDCs were to refrain from making any notifications in Category A under the MFIF. Even then, discrepancies will inevitably arise for graduating LDCs.

transparency and notification commitments under Article X of GATT 1994. Article X of the GATT requires prompt publication of relevant measures in such a way as "to enable governments and traders to become acquainted with them." It further notes that "no measure of general obligation" shall be enforced prior to publication. The TRIMS Agreement further requires Members to notify the WTO Secretariat of all publications in which TRIMS can be found and "accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation" on any matter arising out of the TRIMS Agreement (Article 6).

SCM Agreement. For investment measures linked to a subsidy covered under the SCM Agreement, Members are already obliged to comply with a number of notification requirements. Specifically, they are required to notify the subsidy in such a way that the content of the notification enables other Members to evaluate the trade effects and understand the operation of the measure. The notification must contain the subsidy's form, policy objective, purpose, duration, level of subsidy per unit/total amount, and any statistical data that is relevant. The SCM Agreement also requires that other Members can submit a written request for information on the subsidy and that Members supply such information as quickly as possible. Thus, on the one hand, the level of detail required on the notification of the subsidy is more specific than the publication requirements set out in the MFIF. On the other hand, the MFIF is much more expansive about publication obligations.

TRIPS Agreement. Article 63 of the TRIPS Agreement requires that "laws, regulations, and final judicial decisions and administrative rulings [pertaining to trade-related intellectual property rights] … shall be published, or where such publication is not practicable, made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them." Moreover, it requires Members to notify relevant laws and regulations to the TRIPS Council and that each Member supply information in response to a written request from another Member on issues that fall within the scope of the TRIPS Agreement.

In sum, these agreements all contain the obligation to publish and/or notify relevant laws, regulations, and final judicial decisions and administrative rulings pertaining to the agreement at issue. These agreements are not very descriptive about how to publish but focus on the objective: that it is done in a manner that enables interested parties to become acquainted with it. This overlaps with Article 3.1 of the MFIF. However, as explained in more detail in the context of the GATS discussion, the MFIF sets out a number of additional requirements on what should be in the publication, where Members should publish, and the timeline of the publication vis-à-vis the date of operation. To varying extents, some WTO agreements reflect parts of these additional requirements. What this means is that, for those investment measures that fall under the purview of the MFIF and that are likewise covered by one of these three other agreements (i.e., subsidies, performance requirements, or trade-related intellectual property measures affecting FDI in non-services sectors), the MFIF will add a large number of obligations to this transparency requirement, as explained in more detail in the analysis above.

Finally, as explained previously, various proposed MFIF provisions apply to measures of general application affecting investment. This will create an additional overlap with the SPS Agreement,

the TBT Agreement, and the GATT in situations where standards and technical requirements and other goods-related measures affect investment. All of these agreements contain transparency and publication provisions with varying degrees of elaboration. For instance, Annex B of the SPS Agreement sets out publication requirements for SPS regulations, including a specific provision for urgent circumstances; requires Members to establish an enquiry point and sets out a list of questions that such enquiry points must answer; and establishes notification procedures. The TBT Agreement requires, with respect to technical regulations that are not based on international standards, that Members publish and notify such measures, make available copies of the regulation and provide the opportunity from interested Members to comment. Under the GATT, relevant provisions that overlap with the MFIF are set out in Article VIII, which covers fees and formalities connected with importation and exportation, and Article X on the publication and administration of trade regulations. For Members that have also ratified the TFA, a large number of additional requirements apply, many of which are similar in nature but different in coverage to the MFIF.

For those SPS/TBT/GATT measures that affect FDI covered by the MFIF, Members must ensure that they comply not only with the relevant publication requirements set out in these agreements, but also any additional requirements in the MFIF. While looking at this in detail goes beyond the scope of this paper, it is important that Members keep in mind the potentially wide reach of the MFIF and the implications this may have with respect to ensuring consistency across agreements.

3.1.1.4 MFIF AND THE WTO IN REVIEW

In theory, issues arise in situations where incongruity exists between the provisions of the MFIF and Members' existing obligations under the WTO agreements. As set out in this section, areas of incongruity are rare. However, the fact that the MFIF's focus on investment does not neatly overlap with the existing structure of the WTO agreements creates a complicated dynamic with respect to implementation.

Indeed, it means that, for certain types of services commitments and certain types of measures covered by the GATS, the TRIMS Agreement, and the SCM Agreement, Members will have more stringent reporting and transparency obligations than others. This would require governments to "merge" the obligations that do overlap, for instance, in areas of transparency or administration, to consolidate the obligations under the respective agreements. Taking a closer look at these issues is vital, both in their own right and given that the JSI on SDR also has substantive overlap with MFIF and the GATS.

Indeed, the prospect of these proposed MFIF disciplines eventually being invoked in legal challenges is an important one, both in the context of the WTO's Dispute Settlement Understanding (DSU),[92] as well as in the context of the lessons already learned from the world of international investment governance. While WTO agreements are rarely, if ever, invoked

[92] See the text of the DSU here: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

in investor–state arbitration under IIAs, the prospect of a new agreement devoted specifically to investment facilitation and potentially within the WTO architecture could change that significantly going forward. This is especially so in light of the scope and definition questions raised above, as well as the structure of IIAs already in place. Part 4 of this paper examines this issue in detail, drawing from past jurisprudence as well as common provisions in IIAs that could be used to bring MFIF commitments into the arena of investor–state arbitration.

Part 4. The IIA Regime and the Proposed MFIF

Part 4 examines the relationship between the proposed provisions in the MFIF and the international investment regime, specifically the approximately 2,600 IIAs[93] currently in force. Building upon this analysis, it also considers the potential implications that this relationship may have for the interpretation of treaty-based investment protection obligations, enforced through ISDS obligations, supporting this analysis with examples from investment-related jurisprudence to date.

4.1 The Proposed MFIF and the IIA Regime: Issues of scope

As seen in previous parts of this paper, the WTO covers some elements of investment issues through the GATS and the TRIMS Agreement, creating some overlap between these WTO agreements and IIAs. But the MFIF, as currently proposed, would take this a step further and greatly increase the extent of overlap with IIAs in terms of its scope of application and the types of measures covered.

While the GATS sets out disciplines for WTO Members for the liberalization of trade in services, in particular through the establishment of commercial presence abroad (Mode 3), and the TRIMS Agreement prohibits certain investment measures that distort trade, IIAs contain rules and standards relating to the treatment and protection of investments. Usually, this protection applies to investments once established, but some IIAs grant rights of national treatment to investors in the "pre-establishment" phase. IIAs typically cover all sectors and include measures taken by the executive, the legislative, and the judiciary branches.[94]

Ever since the subject of "investment facilitation" was first floated by some WTO Members as an area for future work, several WTO Members have voiced their concerns about the prospect of investment protection issues being brought into the discussions, either explicitly or implicitly. This concern was raised in the 2017 Joint Statement from the Buenos Aires Ministerial Conference, where the investment facilitation initiative was first launched,[95] and is currently reflected in the *Informal Consolidated Text,* which clarifies that the "framework shall not cover: investment protection rules; and, investor-state dispute settlement," along with related alternative formulations, as described earlier in Part 1.4.[96]

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[93] This includes BITs, regional investment agreements and codes, and investment chapters of trade agreements.

[94] Dolzer, R. & Schreuer, C. (2012). *Principles of international investment law* (2nd ed.). Oxford University Press, pp. 12–27.

[95] WTO, 2017, WT/MIN(17)/59 (n. 1).

[96] WT), 2020, INF/IFD/RD/50 (n. 35), Article 1.3.

Despite these textual proposals, the relationship and interaction between the proposed MFIF and IIAs remain unclear, though it is clear that there is overlap in terms of scope and coverage. IIAs have broad coverage, and their scope is determined through the definition of the terms "investor" and "investment." These definitions determine which individuals and corporate entities, and the assets they own, are covered by the IIA. "Investment" is most often defined in IIAs to be "any kind of asset" in the host country.[97] More recently, some states have moved away from using an asset-based definition of "investment," preferring instead an enterprise-based definition.[98] Under the latter approach, the "investment" is defined to cover enterprises established or acquired in the host state and the assets they own.[99]

All options currently proposed in the MFIF process in terms of scope would lead to an overlap of coverage with IIAs. Although not yet clear, the MFIF would cover at least FDI (still to be defined) and possibly go beyond. One question that WTO Members are particularly interested in clarifying is whether the enforcement mechanisms under IIAs could be used to enforce any new disciplines on investment facilitation, even if these disciplines are adopted in the WTO context—and even if the proposed MFIF explicitly excludes investment protection rules and ISDS.

There is a general expectation that disputes arising under the WTO agreements must be resolved under the WTO's DSU.[100] However, if an investor–state tribunal is established under an IIA for breach of a WTO obligation (or another trade obligation), the tribunal will be reviewing this breach not against the wider WTO legal context but rather against the applicable IIA that the tribunal will determine is its jurisdiction. Therefore, it is important to understand the potential mechanisms that could allow MFIF obligations to be enforced through IIA-based ISDS, in spite of the clear mandate that the MFIF exclude ISDS.

4.2 IIAs: An overview

Currently, 3,285 IIAs have been concluded, of which 2,658 are in force, as of the figures available from UNCTAD on August 18, 2020.[101] The table below shows the number of IIAs signed on an annual basis for the past four decades.[102]

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97 Dolzer & Schreuer, 2012, pp. 60–78 (n. 87).

98 UNCTAD. (n.d.). *Mapping of IIA Content UNCTAD.* Investment Policy Hub. https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping; Ashiya, B. (2016). The shift towards an enterprise based definition of investment: The quagmire of the Salini Test and India's Model BIT. *Jindal Global Law Review 263*(7).

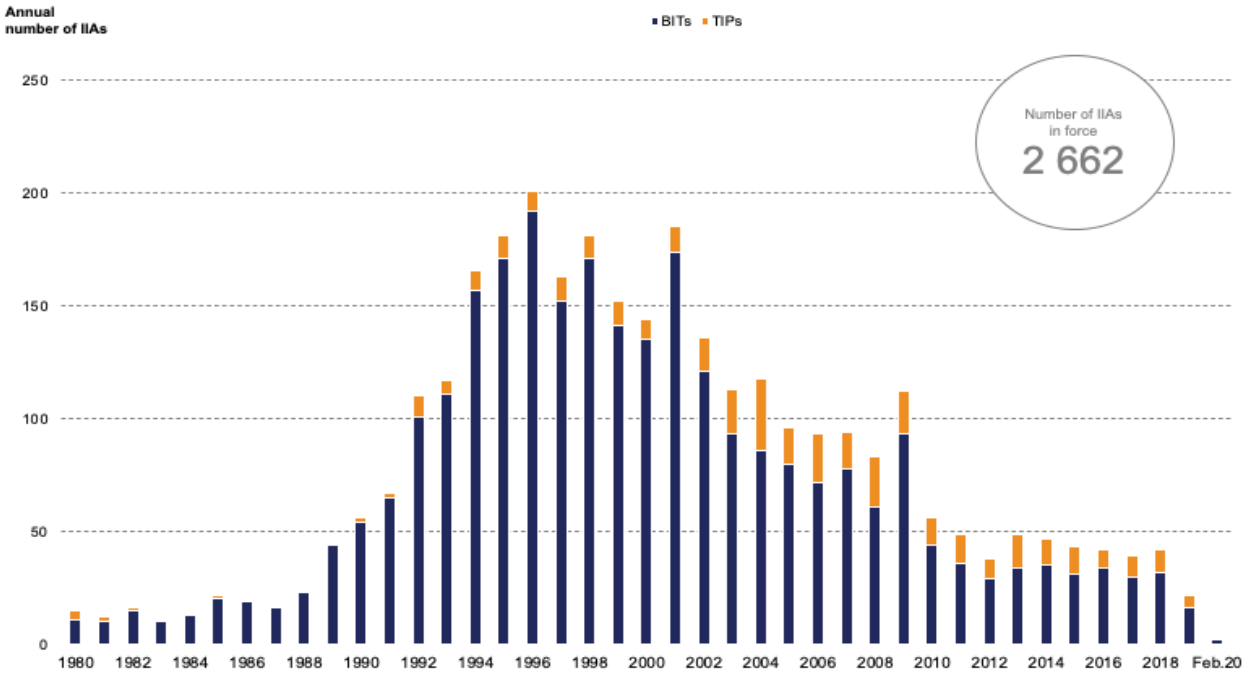
99 Schlemmer, E .C. (2008, June 26,). Investment, investor, nationality, and shareholders. In P. Muclinski, F. Ortino, & C. Schreuer (Eds.), *The Oxford handbook of international investment law* (pp. 52–53). Oxford.

100 Van den Bossche, P. & Zdouc, W. (2017, July). *The law and policy of the World Trade Organization: Text, cases and materials.* Cambridge Core, pp. 385–388.

101 UNCTAD. (2020). *International investment agreements navigator.* https://investmentpolicy.unctad.org/international-investment-agreements

102 UNCTAD. (2020). *The changing IIA landscape: New treaties and recent policy developments.* https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d4.pdf

Figure 1. Evolution of IIAs over the past four decades



Source: Reprinted from UNCTAD's Investment Policy Monitor, April 2020 Edition (Issue 23).

The vast majority of IIAs focus on the protection of investments and investors. Among other obligations, they require states to compensate investors in case of direct and indirect expropriation; to treat investors fairly and equitably; to not treat national investors more favourably than foreign investors; and to not treat some foreign investors more favourably than others. A proportion of IIAs also include so-called umbrella clauses. These stipulate that states are not only required to fulfill the treaty's obligations regarding expropriation, fair and equitable treatment (FET), non-discrimination, and so forth, but must also respect other commitments that the government has undertaken elsewhere.[103]

In addition to these substantive standards, almost all IIAs contain a clause providing for a private right of action for resolving disputes. [104]The so-called ISDS clause allows investors to challenge measures taken by the host states allegedly in breach of the IIA directly before

[103] Footer, M. E. (2017). Umbrella clauses and widely-formulated arbitration clauses: Discerning the limits of ICSID jurisdiction. *The Law & Practice of International Courts and Tribunals, 16*(1), 88,92 https://doi.org/10.1163/15718034-12341343; OECD. (2008, March 17). *International investment law: Understanding concepts and tracking innovations*, p. 102. https://www.oecd.org/investment/internationalinvestmentagreements/internationalinvestmentlawunderstandingconceptsandtrackinginnovations.htm

[104] UNCTAD (n.d.). *Investment Dispute Settlement Navigator.* Investment Policy Hub https://investmentpolicy.unctad.org/investment-dispute-settlement

investor–state tribunals.[105] ISDS is a process unique in international law in which (i) the claimant-investor may bring a claim directly against the host state; (ii) the dispute is resolved by an arbitral tribunal constituted on an ad hoc basis for that particular dispute; and (iii) both disputing parties, including the claimant-investor and the respondent-state, play an important role in the selection of the arbitral tribunal. A large number of states now perceive the current model of investor–state arbitration to be an inadequate method of resolving disputes. Several reform efforts are underway at the bilateral, regional, and multilateral levels. At the multilateral level, ISDS reform is currently ongoing at the United Nations Commission on International Trade Law (UNCITRAL). This process is examining three categories of states' concerns with ISDS: (1) concerns related to the consistency, coherence, predictability, and correctness of arbitral decisions; (2) concerns related to arbitrators and decision-makers; and (3) concerns related to the cost and duration of ISDS cases.

It is the inclusion of ISDS provisions in IIAs that makes understanding the relationship between the proposed MFIF and IIAs so important. New disciplines on investment facilitation in the WTO context could still end up being scrutinized by an investor–state tribunal, even if ISDS is explicitly excluded from the MFIF. As explained below, a foreign investor could decide to bring an ISDS claim under an IIA to challenge a government measure through the umbrella clause, the FET clause, and possibly the MFN clause, alleging a violation of MFIF disciplines. In such a case, the foreign investor could request compensation for harm caused.[106]

ISDS is a fundamentally different system of dispute settlement that is provided for under WTO and trade agreements. ISDS is designed for different actors and therefore pursues different objectives and applies different remedies to processes for the settlement of trade disputes. While the WTO's dispute settlement system is state–state and aims at getting Members to comply with their obligations, ISDS is between a private actor and the state and aims to obtain monetary compensation for that private actor.

When the WTO's Dispute Settlement Body finds that a Member has acted in violation of WTO rules, the Member has the opportunity to bring those WTO-inconsistent measures into compliance within a "reasonable period of time." Only if that compliance fails to occur can the Dispute Settlement Body authorize the complaining Member to suspend concessions or other obligations, and this normally requires several further steps and rulings. By contrast, if a breach of the IIA is found in ISDS, the damages will be calculated with interest from the day the measure at issue was taken, and the damages award will be in favour of the investors, not the state.

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[105] Dolzer & Schreuer, 2012, pp. 235–244 (n. 87); Gaukrodger, D., & Gordon, K. (2012). *Investor-state dispute settlement: A scoping paper for the investment policy community* (OECD Working Papers on International Investment 2012/03). https://www.oecd-ilibrary.org/finance-and-investment/investor-state-dispute-settlement_5k46b1r85j6f-en

[106] Dolzer & Schreuer, 2012, pp. 293–299 (n. 87); Demirkol, B. (2015). Remedies in investment treaty arbitration. *Journal of International Dispute Settlement, 6,* 403; Jana, A. (2016). Reparation in investment treaty arbitration. *Proceedings of the Annual Meeting, American Society of International Law, 110,* 228.

4.3. Relevant Clauses in IIAs and the Potential Interactions with the MFIF

4.3.1 Umbrella Clauses

4.3.1.1 BACKGROUND

Some IIAs contain clauses that extend the treaty's reach beyond the rights and obligations that it explicitly spells out; these are known as umbrella clauses. The earliest version of this type of clause was included in the Abs-Shawcross Draft Convention of 1959.[107] The relevant clause read: "Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party."[108]

One scholar on umbrella clauses explains the intention of the clause at the time it was adopted and its relevance for the current context, in which the clause can be triggered by private parties:

> This provision was intended to cover contractual undertakings between States and private investors as well as unilateral undertakings made by States. Its purpose was to clarify that 'unilateral violation of a concession contract is an internal wrong'. However, at this early stage it was not contemplated that private investors would have *locus standi* against the State, and therefore the question of whether such a clause might potentially trigger a multitude of international law claims was not considered. [footnotes omitted][109]

The 1959 draft clause has found its way into IIAs still in force today. Out of the 2,576 treaties that have been "mapped" under UNCTAD's IIA Navigator, 43% include so-called "umbrella clauses."[110] The wording used in umbrella clauses can vary and has evolved over time, with modern treaties increasingly avoiding their inclusion altogether. However, older treaties, many of which are in force today, typically include short and broad umbrella clauses, such as:

> "Each Party shall observe any obligation it may have entered into with regard to investments."[111]
>
> or

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[107] Draft Convention on Investment Abroad 1959, reprinted in UNCTAD. (2000). *International investment instruments: A compendium* (Vol. V), pp. 301–304 (Abs-Shawcross Draft Convention).

[108] Abs-Shawcross Draft Convention 1959, Art. 2; Schwarzenberger, G. (1960). The ABs-Shawcross Draft Convention on Investments Abroad: A critical commentary *Journal of Public Law 9,* 147.

[109] Sasson, M. (2017). Treaty versus contract claims, and umbrella clauses: When a contract breach may become a treaty breach. In *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Ch. 6). Kluwer Law International.

[110] UNCTAD (n. 94).

[111] U.S.–Argentina BIT, Art. II(c) (signed Nov. 14, 1991; entered into force Oct. 20, 1994).

> "Each Contracting Party shall observe any obligation it may have entered into with regard to investments and investment activities of investors of the other Contracting Party."[112]

Other clauses are defined slightly more narrowly. For example, some umbrella clauses refer to "specific investments":

> "Each Party shall observe any other obligation it may have *with regard to a specific* investment of an investor of the other Party."[113] [emphasis added]
>
> or
>
> "Each Contracting Party shall observe any obligation it may have entered into *with regard to specific* investments by investors of the other Contracting Party. This means, inter alia, that the breach of a contract between the investor and the host State will amount to a violation of this treaty."[114] [emphasis added]

Investor–state tribunals have interpreted umbrella clauses in very different ways. Because there is significant variation in the formulation of umbrella clauses and because tribunals composed of different persons may use different interpretative approaches, the meaning of umbrella clauses remains uncertain.[115] In general, however, the narrower clauses referring to commitments or undertakings with respect to "specific investments" have been interpreted more narrowly. While these would likely cover (certain) commitments in investor–state contracts, they would less likely cover general obligations in domestic laws.[116]

Meanwhile, broader clauses referring to "any obligations with respect to investment" have been interpreted more broadly. Multiple tribunals assessed the broad umbrella clause contained in the 1992 USA–Argentina BIT in a swath of cases brought during the Argentine economic crisis in the early 2000s. The tribunals concluded that the umbrella clause covered not only obligations under contracts between the government and the investor but also other legal obligations.[117] Article II(2)(c) of that treaty provides: "Each Party shall observe any obligation it may have entered into with regard to investments." For example, the tribunal dealing with the case brought by a set of

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[112] Article 4, Japan–Mozambique BIT (2013). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3114/download

[113] Article 12, Finland–Kazakhstan BIT (2007). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3510/download

[114] Article 11, Austria–Kyrgyzstan BIT (2016). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5500/download

[115] Sasson, 2017 (n. 103); Pereira de Souza Fleury, R. (2015). Umbrella clauses: A trend towards its elimination. *Arbitration International, 31,* 679.

[116] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) paras. 163–166.

[117] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic ICSID Case No. ARB/02/1, Decision on Liability October 3, 2006; CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Award, May 12, 2005; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, May 22, 2007; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, September 28, 2007.

U.S. energy investors—LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc.—after the Argentine government nullified guarantees related to gas distribution looked at whether those guarantees were enforceable through the umbrella clause.[118] The tribunal considered that the guarantees given in Argentina's gas legislation were indeed specific enough to constitute international obligations for Argentina under that BIT, concluding that Argentina's non-compliance with those guarantees violated the umbrella clause.[119]

Another tribunal tasked with an energy case involving gas transportation, which was brought by Enron against Argentina, referred to the LG&E case above as well as a separate case between SGS Société Générale de Surveillance S.A. and Pakistan. That tribunal concurred with this approach, stating:

> Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation. 'Obligations' covered by the 'umbrella clause' are nevertheless limited by their object: *'with regard to investments.'* [footnotes omitted][120]

The Enron tribunal therefore also found that the umbrella clause in the USA–Argentina BIT did not only extend to commitments made with respect to a specific investment, but was broad enough to extend to a wide range of obligations as long as they generally concerned investment issues.

Another renowned case involving umbrella clauses was *SGS v. The Republic of Paraguay*. In its jurisdictional decision, the tribunal examined the umbrella clause contained in the BIT between Switzerland and Paraguay, which provides that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[121]

The tribunal interpreted this clause broadly:

> On this basis, we have little difficulty in finding jurisdiction over Claimant's claims under Article 11. That article creates an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the

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[118] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006.

[119] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, paras 164–175.

[120] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, May 22, 2007, para.274. The decision was ultimately annulled for reasons not pertaining to the interpretation of the umbrella clause.

[121] Paraguay–Switzerland BIT (1992), Article 11. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2747/paraguay---switzerland-bit-1992-

> other Party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally, etc.[122]

These interpretations of broad umbrella clauses indicate that they are not limited to commitments made in a contract vis-à-vis an investor or even in another form with respect to a specific investor or investment.[123] Rather, these interpretations include a wide array of government legal commitments with respect to investment in general, which are often not known at the time of the conclusion of the BIT.

4.3.1.2 UMBRELLA CLAUSES AND WTO COMMITMENTS: POTENTIAL INTERACTION

To date, investor–state tribunals have addressed questions relating to the scope of umbrella clauses and how they relate to different types of contracts to which the state is a party, as well as commitments under national legislation. However, it is not clear whether commitments in international agreements, including under the WTO, would be considered as falling under an umbrella clause.

The issue came up in connection with two cases brought by Philip Morris against the governments of Uruguay and Australia, respectively, to challenge new laws and regulations on the packaging for tobacco products. The *Philip Morris v. Uruguay* tribunal examined the umbrella clause in the BIT between Uruguay and Switzerland, which provides: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[124]

In that case, Philip Morris alleged that its trademarks were "commitments" entered into by the government with respect to investments. The tribunal considered a number of intellectual property conventions to which Uruguay is a Party or Member, including the WTO's TRIPS Agreement. It then concluded "that under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power" (footnote omitted).[125] This finding led not only to a rejection of an alleged violation of the expropriation provision but also of the claim that the claimants' trademark registration was within the scope of "commitments" covered by the umbrella clause. The tribunal

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[122] SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2010, para. 167.

[123] Eureko v. Poland, Partial Award, August 19, 2005, paras. 246–250; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (January 29, 2004), paras. 119,155; Continental Casualty v. Argentina, ICSID Case No.ARB/03/9, Award, September 5, 2008), para. 301.

[124] Switzerland–Uruguay BIT (1988), Article 11. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3004/switzerland---uruguay-bit-1988-

[125] Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, para. 271.

also noted that Uruguay "did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system to anyone eligible to register a trademark."[126]

The tribunal examined the umbrella clause, concluding that a trademark registration was not a "commitment" under that clause. In doing so, the tribunal did not address the question of whether or not, in principle, a commitment assumed by a state under TRIPS or another international agreement could constitute a commitment under the umbrella clause, and there is no indication that the claimant specifically invoked that argument.

By contrast, Philip Morris specifically argued in its case involving Australia, which was brought under the Australia–Hong Kong BIT, that Australia's Plain Packaging Act violated that BIT's broad umbrella clause. The clause provided that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."[127] Philip Morris argued that Australia breached international rules on intellectual property, claiming that the Plain Packaging Act was in violation of the TRIPS Agreement, the Paris Convention for the Protection of Industrial Property, and the TBT Agreement. Philip Morris claimed that this led to a violation of the umbrella clause as well as the FET obligation, the latter of which is described further in the next section of this paper.[128] The tribunal did not take a position on this point because the case was dismissed for procedural reasons at the jurisdictional stage, and the substantive questions relating to the umbrella clause were never addressed.[129,130]

4.3.1.3 UMBRELLA CLAUSES: KEY LESSONS AND CONCLUSIONS

Case law indicates that broadly phrased umbrella clauses can extend to contractual, legislative, and other commitments that the host state has made with respect to investments. These commitments need not be made with respect to "specific" investments, just investments in general. Commitments made by WTO Members in a potential MFIF would very likely fulfill this requirement, since all the measures covered will relate to investment. Unless explicitly excluded in the relevant IIA, a broad umbrella clause could be interpreted to extend to commitments made in the context of the MFIF. This interpretation is probable, though it should be noted that there is a

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126 Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, para. 480.

127 Australia–Hong Kong, China SAR BIT (1993). https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/207/australia---hong-kong-china-sar-bit-1993-

128 Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Notice of Arbitration, November 21, 2011; also, in Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, February 19, 2010.

129 Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-1, Award on Jurisdiction and Admissibility, December 17, 2015.

130 It is worth noting that the Australian Plain Packaging Act has been under review in an ongoing WTO dispute brought by several Members, with final reports from the Appellate Body on the appeals filed by two of the original complainants issued on June 9, 2020. Further details on the reports are available in the WTO's Documents Online portal, under the references WT/DS435/25 and WT/DS441/26.

lack of arbitral decision making to date on the question of whether umbrella clauses extend to a state's WTO commitments. Also, only 43% of all IIAs in force include umbrella clauses, and their breadth and language can vary.

4.3.2 FET

4.3.2.1 BACKGROUND

Most IIAs contain a requirement for the host state to treat investors of the state party "fairly and equitably." According to a database maintained by UNCTAD, FET provisions are included in nearly 95% of all IIAs[131] and are the most litigated standard in treaty-based investor–state arbitration: around 83% of all treaty-based investor–state arbitration has involved claims based on an FET provision.[132]

The most frequently used clause in most older BITs is an "unqualified" FET clause that simply requires that host states provide FET. Another approach, which emerged in the 1990s with the North American Free Trade Agreement (NAFTA), is formulated as the minimum standard of treatment under customary international law. Finally, responding to expansive tribunal interpretations of FET, a third, more recent approach relies on a standard of treatment that specifies and lists the types of actions covered by the standard.

Unqualified FET Clauses

Unqualified FET clauses are typically formulated as follows: "Investments made by investors of each Contracting Party shall be accorded fair and equitable treatment …."[133] This type of provision has often allowed investors to succeed in ISDS where their expropriation, non-discrimination, and other specific claims have failed. The standard has been interpreted in so many ways that, in practice, it is difficult to predict when the actions of a state will violate the FET standard. This makes it harder for states to actively prevent disputes. The treaty language itself in its most used form, as reproduced above, gives no guidance, and tribunals interpreting this obligation have used a wide range of approaches. A very broad approach was taken in 2003 in the *Tecmed v. Mexico* case, a dispute concerning the government's refusal to renew an operating permit for a hazardous waste landfill. The *Tecmed* tribunal found that, to avoid violating the FET obligation, the host state must act in a manner that "[d]oes not affect the basic expectations that were taken into account by the foreign investor to make the investment" and is "free from ambiguity and totally transparent," so that the investor may know all the relevant rules and regulations and their respective goals before investing.[134] Although subsequent tribunals have criticized the *Tecmed* tribunal's definition of FET as creating "a programme of good governance

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131 UNCTAD. (2020a). Investment Policy Hub. http://investmentpolicyhub.unctad.org/IIA

132 UNCTAD. (2020b). Investment Policy Hub. http://investmentpolicyhub.unctad.org/ISDS

133 Israel–Myanmar BIT (2014), Article 2.2.

134 Tecnicas Medioambientales TECMED S.A. v. Mex., ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003) at para.154.

that no State in the world is capable of guaranteeing at all times,"[135] it has nevertheless been endorsed by many subsequent tribunals.

One important aspect developed by tribunals is the notion that the FET obligation protects investors' "legitimate expectations." This concept is also at the heart of the *Tecmed* tribunal's interpretation of the FET standard. However, tribunals' approaches to *Tecmed* have differed widely. One tribunal, for example, cautioned that taking *Tecmed* literally would result in host state obligations that were "inappropriate and unrealistic." Moreover, it reasoned that investors' expectations must be reasonable and legitimate in light of the circumstances prevailing in the host country.[136]

With such diverging approaches to interpreting FET clauses, as well as the related concept of investors' legitimate expectations, it is hard to predict any specific approach. However, where a written commitment of a government to act one way or another has been made, this will inevitably influence a decision of a tribunal when assessing an investor's legitimate expectations.

Minimum Standard of Treatment Clauses

Some IIAs take a different approach, relying on the concept of "minimum standard of treatment."[137]This clause has been widely used in IIAs negotiated by the United States and Canada since the 1990s and later in other parts of the world.[138] It is clearly narrower than the traditional FET clause. First, it is limited to customary international law, which has generally (though not always[139]) been interpreted by tribunals to set a higher threshold.[140] Moreover, it clarifies its relationship to other, separate agreements, which could include the WTO agreements, by stating that a breach of another agreement does not establish a breach of the investment treaty at issue.

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[135] El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, para. 342 (Oct. 31, 2011).

[136] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, March 17, 2006, paras. 304-05.

[137] The 2016 Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, Article 6, reads:

> Minimum Standard of Treatment
>
> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

[138] E.g. Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Sep. 9, 2006; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, February 27, 2009; Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea, June 1, 2015; The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar, November 6, 2016.

[139] Boone Barrera, E. (2019, April 27). *The case for removing the fair and equitable treatment standard from NAFTA* (CIGI Paper No. 128). https://ssrn.com/abstract=3012347

[140] Glamis Gold, Ltd. v. U.S., NAFTA/UNCITRAL, Award, para. 22 (June 8, 2009).

This approach goes back to early experiences with NAFTA, whose original language required "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[141] Arbitral tribunals in early cases had interpreted this threshold broadly.[142] In reaction to these broad interpretations and out of concern that FET could be used in case of a violation of any other obligation within or outside NAFTA (for example, agreements under the WTO), the three NAFTA parties (Canada, Mexico, and the United States) issued a binding interpretation through the NAFTA Free Trade Commission in 2001. This interpretation stated that "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." They also noted that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105."[143]

The "Listing" Approach to FET: An attempt at clarification

In recent years, another approach to FET has been developed, given that relying on customary international law still provided insufficient predictability, as the main concepts from customary international law were often interpreted in different—and at times contradictory—ways. This approach, first introduced by the European Union, relies on defining the FET standard by establishing a list of which instances it covers.[144]

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[141] North American Free Trade Agreement (NAFTA), Art. 1105(1), December 17, 1992, 32 I.L.M. 289 (1993).

[142] See Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000; S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL, Partial Award, November 13, 2000.

[143] NAFTA Free Trade Commission (2001). *North American Free Trade Agreement: Note of Interpretation of Certain Chapter 11 Provisions.* http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp

[144] For example, Article 8.10 of the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada reads, under "Treatment of investors and of covered investments":

> 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (g) denial of justice in criminal, civil or administrative proceedings; (h) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (i) manifest arbitrariness; (j) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (k) abusive treatment of investors, such as coercion, duress and harassment; or(l) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
> …
> 4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
> …
> 6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.#

The full text of the CETA investment chapter: Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement, October 30, 2016. http://investmentpolicyhub.unctad.org/Download/TreatyFile/5380

Under this emerging approach, which is not yet widely used, the FET standard is further clarified. It does still leave some room for broad interpretation and maintains, to a certain degree, the concept of legitimate expectations. This provision also clarifies the relationship to separate international agreements, which includes those under the WTO, providing that a breach of such agreement does not constitute a breach of the FET clause. Some countries have taken a similar "listing" approach but have excluded certain elements that allow for broad interpretations, such as references to "arbitrariness" and "legitimate expectations."[145]

4.3.2.2 FET AND WTO COMMITMENTS: POTENTIAL INTERACTION

Arbitral decision making has varied widely and the contours of a state's obligation under FET—whether it is the unqualified or the more detailed standard—remain in flux. Over the past two decades, tribunals have often interpreted the standard widely and have found a wide range of situations as being covered by the standard. Tribunals, to varying degrees, have found the FET standard to include, inter alia, an obligation of good faith, consistency, transparency, and due process.[146] Tribunals have also found the FET to include the protection of investors' "legitimate expectations."

Given the blurry and bendable contours of the FET clause, the proposed MFIF disciplines could significantly impact the interpretation of the FET obligation in investor–state cases involving claims about government decision making and administrative processes. A tribunal will likely take into account host states' obligations under the MFIF since these relate to several aspects that tribunals have considered when analyzing a state's behaviour under the FET clause. For example, Section II of the proposed MFIF sets out disciplines on the transparency of investment measures. Transparency has been considered by various tribunals when interpreting the FET standard.[147] While the transparency aspect is usually not explicitly mentioned in IIAs, the MFIF provides detailed rules on the publication and availability of measures; the type of information to be published when an authorization is required to invest in a country; and disciplines requiring the opportunity to provide advance comment on proposed measures.

Furthermore, Section III of the MFIF *Informal Consolidated Text* covers the streamlining and speeding up of administrative procedures and requirements. This section includes disciplines on the "consistent, reasonable, objective and impartial administration of measures" (Articles 7.1 and 7.2) and the reduction and simplification of administrative procedures and documentation requirements (Articles 8.1-8.4). It also requires "clear criteria for administrative procedures"

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[145] Article 4, Brazil–India Investment Cooperation and Facilitation Treaty. (2020). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download. Here, parties also avoided the language "fair and equitable."

[146] See, for instance, Dolzer, R. (2014). Fair and equitable treatment: Today's contours. *Santa Clara Journal of International Law, 12,* p. 15. http://digitalcommons.law.scu.edu/scujil/vol12/iss1/2

[147] Ibid., p. 30.

(Articles 9.1-9.3). These disciplines, again, address issues that some tribunals have found to constitute elements of the FET standard.[148]

Furthermore, the MFIF includes lengthy provisions on authorization procedures, ranging from the application of time frames and periods to fees and charges and rules on electronic applications. While IIAs typically do not include provisions on authorization and permitting processes, several tribunals have considered issues pertaining to the manner in which host states designed or conducted permitting and authorization procedures as part of the FET analysis.[149]

The question then is how the potential new administrative law disciplines under the proposed MFIF might impact the interpretation and application of the FET standard through investor–state tribunals. There are at least two ways in which the proposed MFIF disciplines could influence how a tribunal interprets the FET clause. First, a tribunal would likely look at the various international commitments a host state would have entered into when interpreting vaguely formulated clauses. This would be in line with principles of treaty interpretation. According to Article 31.3(c) of the Vienna Convention of the Law of Treaties, which reflects customary international law on treaty interpretation, a treaty term should be examined in light of *"any relevant rules of international law applicable in the relations between the parties"* (emphasis added). Therefore, an investor–state tribunal constituted under an IIA would likely take into account the more detailed disciplines agreed to by parties to the IIA under the MFIF.[150] In the event that a state has committed to MFIF disciplines, an investor–state tribunal would likely interpret the FET clause in light of those more detailed and precise commitments. This could go as far as concluding that a violation of MFIF disciplines would also constitute a violation of the FET clause.

Another potential interaction between the MFIF and the FET standard relies on the fact that commitments under the MFIF can create "legitimate expectations" of the investor. Tribunals have found that legitimate expectations can be generated based on the legal order of the state.[151] While most cases revolve around national legislation, administrative practice, and contractual undertakings and commitments, relevant international treaties are also part of the state's legal order. The crucial question for investor–state tribunals is whether the state has made a specific enough representation or commitment to generate legitimate expectations of the investor, inducing the investor to make the investment.[152] As such, the commitments that a WTO

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148 See for example, Thunderbird v. Mexico; Genin v. Estonia; and Waste Management v. Mexico.

149 See, for example, Clayton/Bilcon v. Canada; Crystallex v. Venezuela.

150 On the interaction between WTO and investment law, see Kurtz, J. (2016). *The WTO and international investment law: Converging systems.* (Cambridge International Trade and Economic Law). Cambridge: Cambridge University Press., pp. 205–206; Gourgourinis, A. (2013). *Reviewing the administration of domestic regulation in WTO and investment law: The international minimum standard as 'one standard to rule them all'?* In F. Baetens (Ed.), *Investment Law within international law: Integrationist perspectives* (pp. 298–329). Cambridge: Cambridge University Press.

151 Dolzer, 2014, pp. 20–24 (n. 139).

152 Paparinskis, M. (2014). *The international minimum standard and fair and equitable treatment* (pp. 225–228) (Oxford Monographs in International Law). Oxford University Press.

Member undertakes in the MFIF could be considered as specific enough for the state to generate legitimate expectations of the investor. A violation of a commitment of the MFIF would then constitute a violation of the investor's legitimate expectation and therefore a violation of the FET obligation.

The concern about litigating WTO or other trade requirements in an investor–state context through the FET clause is not new and is the reason why the NAFTA parties adopted an interpretative statement as explained above. It should be noted that a determination that there has been a breach of a separate international agreement does not establish that there has been a breach of the FET clause (or the minimum standard of treatment clause). The issue has also been argued in ISDS cases. In the *Methanex v. United States,*[153] *Canfor v. United States,*[154] and *Kenex v. United States* cases,[155] investors claimed that a violation of FET can be based upon a finding that a measure is inconsistent with WTO rules.[156] Similarly, in the *Peter Allard v. Barbados* case, the claimant brought an FET claim based on alleged violations of Barbados's commitments under international environmental treaties.[157] Tribunals, in all these cases, rejected the arguments mainly on the basis of factual circumstances. However, it remains a real possibility that a state could be found in breach of FET under an IIA as a result of its violation of another international agreement.

In *Philip Morris v. Uruguay* the tribunal seemed to confirm that international instruments can create legitimate expectations. In that case, claimants submitted in their notice for arbitration that Uruguay violated the obligation to provide FET by failing to respect the claimants' intellectual property rights, as provided for under the TRIPS Agreement and Paris Agreement on Protection of Industrial Property Rights.[158] The tribunal did not examine the relevance of either agreement in the operation of FET. It did, however, examine the investor's legitimate expectations in the light of the World Health Organization's Framework Convention on Tobacco Control and its relevant guidelines.[159] The tribunal considered those international instruments to be the basis for establishing the legitimate expectations of the claimant. In that case, however, the instruments

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153 Claimant Rejoinder para. 56- 57, Methanex v. United States (2004). https://2009-2017.state.gov/s/l/c5818.htm.

154 Statement of Claim, para. 114, 122, 146–47, Canfor Corp. v. United States (2004). https://2009-2017.state.gov/s/l/c7424.htm

155 Notice of Arbitration E, § 5(iv), (v), Kenex, Ltd. v. United States (2002). https://2009-2017.state.gov/s/l/c7423.htm

156 Verrill C. (2005, January 1). Are WTO violations also contrary to the fair and equitable treatment obligations in investor protection agreements? *ILSA Journal of International & Comparative Law, 11*(2), 287–295.

157 Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06. Award, June 27, 2016, para. 33–52, 164–165, 170.

158 Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, February 19, 2010.

159 Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016.

were used against the claimant, and the tribunal concluded that "the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products."[160]

4.3.2.3 FET: KEY LESSONS AND CONCLUSIONS

As described above, potential new international disciplines under the MFIF are likely to have a significant impact on ISDS tribunals' interpretations of the FET standard. When interpreting the broad and bendable FET standard, investor–state tribunals will likely interpret the clause in light of the commitments that states have made under the MFIF to determine whether or not the host state has violated the FET standard. A breach of an MFIF commitment could then lead to a finding of a breach of the FET clause in the IIA. Commitments made under the MFIF could also be seen by investor–state tribunals as creating "legitimate expectations" of the investor, which, if frustrated through state conduct, would lead to a compensable violation of the FET standard.

The unqualified FET standard, still present in most IIAs today, will pose the most significant risks to states in this respect. Meanwhile, FET standards that are based on customary international law or those FET clauses clarified through a listing approach might be less prone to form the basis of an FET violation.

Some treaties also include a clarification that *"a breach of a separate international agreement does not establish a breach"* of the FET clause. This type of clarification reflects the concerns of states that the FET clause could be used to challenge obligations under other treaties through ISDS based on an IIA. Whether this type of clause will, in practice, effectively safeguard a state from breaching the FET standard by breaching the MFIF, has not yet been tested.

4.3.3 MFN Provisions in IIAs

4.3.3.1 BACKGROUND

Most IIAs include MFN provisions.[161] The wording of MFN clauses in IIAs can vary. Older treaties —still in the majority today—typically direct contracting parties to treat investments by investors of the other party no less favourably than they treat investments of investors of a third state. Some treaties explicitly set out the phases of the investment covered by the standards:

> Each Contracting Party shall in its territory accord investors of the other Contracting Party, as **regards the management, maintenance, use, enjoyment or disposal of their investments**, treatment not less favourable than that which it accords to its own

[160] Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, para. 430.

[161] Nikièma, S. (2017). *The most-favoured-nation clause in investment treaties* (IISD Best Practices Series). https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf

> investors or investors of any third State, whichever is more favourable to the investor concerned. [emphasis added][162]

Such clauses are usually referred to as post-establishment MFN clauses. Some IIAs go beyond the post-establishment phases to include the "establishment" or "expansion" phases. While still in the minority in investment treaties, most investment chapters in free trade agreements include such pre-establishment language:

> Each Party shall accord to investors of the other Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the **establishment, acquisition, expansion**, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments. [emphasis added][163]

Traditionally, IIAs include two types of MFN-specific exceptions or restrictions. First, regional integration agreements and double taxation treaties are exempt from the MFN obligation. Some IIAs also specifically exclude certain sectors or types of measures, and there is a growing inclusion in IIAs of general exceptions based on similar clauses in the WTO's GATT and variations thereof.[164]

The great majority of IIA cases examining the MFN clause, however, concern the relationship of the MFN clause in relation to rights and obligations under other IIAs. Since the early 2000s, investors have alleged violations of the MFN clause, arguing that other investors were favoured under IIAs with more generous procedural rights. In the famous Mafezzini case, a tribunal for the first time agreed with the investors that it could rely on provisions of another IIA through the MFN clause in the underlying IIA.[165] This approach was followed by many tribunals to varying degrees, while other tribunals rejected this approach, leaving much legal uncertainty for states and claimants. In response to these developments, some states have begun to include explicit clarifications to avoid the import of procedural rights under other treaties through the IIA's MFN clause. For example, some recent treaties read:

> It is understood that the treatment referred to in this Article to be accorded with respect to investors and their investments does not include dispute resolution mechanisms, …

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[162] Article 4, Guyana–Switzerland BIT (2005). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3042/download

[163] Article 3, Finland–Kazakhstan BIT (2007). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3510/download

[164] Adlung, 2016, p. 71ff (n. 66); Pérez-Aznar, F. (2017, December). The use of most-favoured-nation clauses to import substantive treaty provisions in international investment agreements. *Journal of International Economic Law, 20*(4), 777–805, https://doi.org/10.1093/jiel/jgx034

[165] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7. On the importation of standards of treatment, see Batifort, S. & Benton Heath, J. (2018). The new debate on the interpretation of MFN clauses in investment treaties: Putting the brakes on multilateralization. *American Journal of International Law, 111,* 873–913. See p. 886ff.

> which are provided for in other international investment treaties or trade agreements between a Contracting Party and a non-Contracting Party.[166]

While much of the debate has focused on the import of procedural rights through the MFN clause, less has focused on the importation of substantive rights. Tribunals have not hesitated to allow the importation of substantive standards under IIAs with third parties, such as FET clauses through the MFN clause.[167] As a response to this, some treaties, such as those negotiated by the European Union, now also exclude the importation of substantive. They clarify that the inclusion of additional substantive obligations in treaties with third parties cannot alone result in a breach of the MFN clause. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides:

> Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.[168]

This formulation aims to avoid the importation of substantive provisions by defining what constitutes "treatment." It clarifies that a treaty obligation does not constitute treatment and therefore cannot give rise to a violation of the most favourable "treatment" obligation. Only if measures are "adopted or maintained" by the host state can such a breach occur. Whether this formulation will achieve the desired objective has not yet been tested.

4.3.3.2 MFN IN IIAS AND WTO COMMITMENTS: POTENTIAL INTERACTION

Investor–state tribunals have considered WTO jurisprudence for the examination of substantive provisions in IIAs.[169] Yet, there are no known cases in which a tribunal has construed an MFN clause as incorporating obligations that states have undertaken in their capacity as WTO Members. This could be attributed to the fact that the WTO on the one hand and IIAs on the other have different subject matter coverage with limited overlap. In addition, given the wide WTO Membership, the likelihood that two state parties to an IIA are also WTO Members is high. As a consequence, substantive provisions in the WTO agreements are not likely to lead to a violation of an MFN clause in the IIA.

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166 Article 4 of the Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (2015). https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3284/download

167 Batifort & Heath, 2018, p. 889ff (n. 158).

168 CETA, article 8.7(4) second sentence.

169 Corn Products International Inc v. United Mexican States (ICSID Case No ARB(AF)/04/1) Decision on Responsibility, January 15, 2008 [122]; Cargill Incorporated v United Mexican States (ICSID Case No ARB(AF)/05/2) Award, September 18, 2009 [193]; Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan (ICSID Case No ARB/03/29) Award, 27 August 2009 [389]; International Thunderbird Gaming Corporation v The United Mexican States (NAFTA/UNCITRAL) Award, January 26, 2006 [174]-[176]; Methanex Corporation v United States of America (UNCITRAL/NAFTA) Award, August 3, 2005 [35], [37].

The situation would be different in the context of the proposed MFIF, due to the overlap in coverage and subject matter with IIAs. From that perspective, the interaction between the MFIF with IIAs would be quite similar to the interaction between two IIAs, where many tribunals have allowed for the importation of procedural and substantive standards in one IIA through the MFN clause in the other. This situation would be particularly relevant if the MFIF does not include all WTO Members and where the concessions are not extended to non-MFIF Members on an MFN basis, similar to the GPA and its revision. In this scenario, an investor could rely on the MFN clause to import provisions under the MFIF in a case where the host state is part of the MFIF but the investor's home state is not. Here, the investor could argue that the host state is treating investors from MFIF Members[170] more favourably.

The next step would be to see whether the applicable IIA does not include an exception to the MFN clause. Most IIAs include exceptions for taxation and regional integration and trade agreements. Depending on how this exception is formulated, it could extend to the WTO agreements or frameworks such as the MFIF. Other more recently developed exceptions could also come into play, though they remain a small minority in IIAs and have not been tested in ISDS jurisprudence.

Finally, the MFN clause in the MFIF could allow for the importation of substantive or procedural standards in IIAs.[171] Under the MFIF, it would be an MFIF Member/Party that would bring such a claim against another Member/Party, assuming the framework is subject to state–state dispute settlement, namely the WTO's DSU. The current draft does not seem to include an exception that is specific to the MFN principle included in the MFIF. However, as noted previously, the MFIF *Informal Consolidated Text* does include some different options aimed at excluding investment protection and investor–state processes from the scope of the agreement, as described in Part 1.4 of this paper. How effective these provisions would be and whether their formulation will change remains unclear at this stage.

4.3.3.3 MFN: KEY LESSONS AND CONCLUSIONS

An investor from a state that is not a Member/Party to the MFIF could bring a claim under an IIA against an MFIF Member/Party, alleging a violation of the MFN clause. The argument would be that the MFIF leads to more favourable treatment of those WTO Members that are part of that framework. Such types of importation of substantive standards have been repeatedly permitted by tribunals with respect to standards included in third party IIAs. Some treaties may exclude regional economic integration and trade agreements from the MFN provision, and a few recent treaties have begun to limit its scope to disallow the importation of third party IIA standards. However, the possibility remains for most IIAs.

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[170] Or Parties, if using the language adopted in the case of the GPA as another closed plurilateral.

[171] This hypothesis has been analyzed with respect to the GATS in Adlung, 2016, p. 71ff (n. 66).

The MFN clause in the MFIF may also allow the importation of IIA standards into a possible state–state dispute in the WTO. It is unclear whether draft clauses on scope currently integrated in the MFIF text would bar this possibility.

4.3.4 MFIF AND THE INTERNATIONAL INVESTMENT REGIME IN REVIEW

Given the overlap in scope and coverage between the MFIF and the extensive IIA network, it is important for WTO Members involved in the MFIF discussions to understand the interaction between the two regimes in order to avoid any unintended legal consequences. The analysis in this paper shows that new disciplines under the MFIF could significantly influence outcomes of cases brought by investors against MFIF Member host states under IIAs. First, an investor could initiate an investor–state process pursuant to an IIA containing a broadly worded umbrella clause, arguing that a breach of a commitment of the host state taken under the MFIF also amounts to a breach of the umbrella clause under the IIA. Secondly, most IIAs include vaguely formulated FET clauses. An investor could allege a breach of FET by arguing that the host state's MFIF commitments have created a legitimate expectation of the investor to be treated in accordance with MFIF disciplines. In addition, a tribunal may interpret the language of the FET clause in light of the host state's other obligations under international law, including the MFIF. This would likely influence the outcome of a tribunal's assessment and, in some circumstances, could potentially lead to a finding that a breach of an MFIF discipline is also a breach of the FET clause. Finally, if the MFIF is not extended to all WTO Members on an MFN basis, investors from non-MFIF Member home states could bring an ISDS claim against an MFIF Member alleging a violation of the IIA's MFN clause.

While only few cases have assessed the interaction between WTO disciplines and the IIA regime so far, a study of the relevant clauses in IIAs—umbrella, FET, and MFN—and related jurisprudence indicates that the potential scenarios described above are feasible, and MFIF disciplines may find their way into ISDS. WTO Members involved in the MFIF discussions have already made it clear that they do not wish for the MFIF to cover ISDS or investment protection. How to operationalize this effectively requires further study and would likely require action beyond those involved in the MFIF.

Part 5. Conclusion

This paper has sought to provide a comprehensive, though by no means exhaustive, analysis of the discussions of the JSI on investment facilitation, considering the latest developments and texts in this process against both the WTO agreements and architecture, as well as the international investment regime. Along the way, some recurring questions and considerations have emerged that are worthy of further consideration. Questions on definitions, scope, jurisdiction, and application are not just theoretical concerns but practical ones that can affect a WTO Members' future liabilities and commitments and the prospect of facing legal claims, either under the WTO's DSU or under the investor–state provisions included in IIAs. The analysis is meant to provide WTO Members with some of the information they may need as they determine their needs, development priorities, and next steps.

The COVID-19 pandemic and related emergency measures have put the JSI's transition from discussions to negotiations on hold for the time being, and the timing of the WTO's Twelfth Ministerial Conference (MC12), while tentatively being considered for June 2021, is still uncertain. While the restrictions and the global health crisis that caused them are devastating, the additional time forced by this situation could allow future discussions to address these questions in further detail, along with giving participants and non-participants alike the opportunity to consider what other questions and considerations should be brought to bear going forward, such as lessons from other forums such as UNCTAD and the OECD, whose work in this area has been extensive.

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