



Deutsches Institut für
Entwicklungspolitik



German Development
Institute

Report: 6th virtual meeting of the Expert Network on an Investment Facilitation Framework for Development

The 6th meeting of the Expert Network took place on **20 May 2021**, from 9:00am to 10:15am EDT.

The meeting focused on **options to integrate an Investment Facilitation Framework for Development into the WTO rulebook**. The meeting covered legal as well as political challenges that need to be taken into account by the negotiating parties.

The meeting was moderated by Axel Berger, Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). Opening speakers included Petros Mavroidis, Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School, and Hamid Mamdouh, Senior Council at King and Spalding LLP (Geneva office) and Visiting Professor, Queen Mary University of London, Centre for Commercial Law Studies (CCLS). Concluding remarks were provided by Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI.

This report is a summary of the discussion at the workshop. A list of the participating members in the meeting and the programme are attached to this report.

Discussion highlights

The following possibilities for integrating an Investment Facilitation Framework for Development (IFF4D) into the World Trade Organization (WTO) rulebook were presented during the meeting.

- The multilateral route includes three options. Establishing a new multilateral agreement (Article III.2 of the WTO agreement), which will require a consensus by all WTO members, interpretation of existing agreements (Article IX.2 of the WTO agreement), or an amendment of an existing agreement (Article X of the WTO agreement).
- The plurilateral route refers to an agreement by a sub-set of WTO members and includes three main options. The first involves adding (coordinated) schedules to the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), which do not fall under the consensus requirement of article X of the WTO agreement. However, this option would limit the obligations under the IFF4D to the scope of the two agreements. The other option would be an amendment of the WTO agreement under Article X.9, which requires a consensus by all WTO members to add a new plurilateral agreement under Annex 4. The last

option involves establishing a new mechanism (Annex 5) for agreements that would not require the participation of all members but extend all benefits to WTO members on a MFN basis.

I. The multilateral route

The multilateral route was addressed only briefly, because establishing a new multilateral agreement (III.2 WTO agreement) would require a consensus by all WTO members, which is currently not likely. The option of interpretation of existing agreements is also problematic: Article IX:2 of the WTO agreement establishes that a decision to adopt a multilateral interpretation can only be taken by the Ministerial Conference or the General Council, and that such decisions must be approved by a three-fourths majority of members. In addition, this option encounters substantive issues, as interpretation is still limited to the text itself and may not be sufficient to cover all aspects under negotiation in the IFF4D negotiations. The last option of amending the existing agreement (Article X of the WTO agreement) may be more achievable. Under the amendment clause, amendments to some provisions of the WTO agreement or the GATT that are of a nature that would alter the rights and obligations of the WTO members, would take effect upon acceptance by two thirds of the members on those consenting members and thereafter for each member upon its acceptance of the amendment. Amendments to provisions of the WTO agreement or of the GATT of a nature that would not alter the rights and obligations of the members, will take effect for all members upon acceptance by two thirds of the WTO members. The rules for amendments under the GATS are different. Depending on the specific provisions of the agreement that are being amended the requirement for the acceptance of two thirds of the members may apply only to the accepting members or to all members.

II. The plurilateral route

Coordinated scheduling

During the meeting the option of integrating the IFF4D into the GATT and/or the GATS by coordinated scheduling undertaken by the interested WTO members was introduced. The challenge of scheduling under both agreements is that the scheduling is limited to the scope of the agreements. Consequently, where the substantive matter of the IFF4D goes beyond these agreements, it cannot be added to individual members' schedules, as is elaborated below.

Coordinated scheduling under the GATT: Under the GATT, members can schedule obligations related to foreign direct investment (FDI) in connection with producing goods, under the non-tariff measures section. It was indicated that this option is not optimal for the incorporation of the IFF4D as the GATT refers to the treatment of goods, not the treatment that is given to investors or manufacturers in a member's territory.

Coordinated scheduling under the GATS: This was proposed as the better option for scheduling, as the scope of the GATS captures more of the content of the IFF4D. However, the provisions of the GATS are limited to the treatment of services and service suppliers of other members. Under the service supplier definition, the GATS only covers services FDI involving at least 50% foreign ownership or control. Applying these provisions to FDI will mean that the obligations under the IFF4D provisions will be applicable only regarding service suppliers of other members and will

not cover all types of other investors under the IFF4D. It was noted that the scope of the IFF4D is not yet defined and that there are ongoing discussions regarding different definitions, such as “investors” and “investment” that will also affect the implications of incorporating the IFF4D under the GATS scheduling provisions.

It was indicated that most of the provisions under the IFF4D that relate to transparency and streamlining of administrative procedures can be scheduled and are within the scope of the GATS under Article 18 as long as it refers to services FDI, which includes provisions that enable the development of a sound regulatory environment. However, currently the IFF4D negotiations go beyond transparency and administrative procedures and include the establishment of focal points, dispute prevention mechanisms, provisions of responsible conduct of investors, anti-corruption, and special and differential treatment issues that may not be within the scope of the GATS. It was also noted that such provisions will need the assistance of a designated committee where members can discuss issues related to sustainable investment and development under the IFF4D provisions, and that the scheduling route does not provide such a forum.

It was emphasized that, even if a WTO member willingly takes upon itself obligations that go beyond the scope of the GATS, the obligations will probably not be enforceable by any future dispute settlement panel. Furthermore, adding obligations beyond the scope of the GATS under the scheduling provisions could be considered outside the WTO practice and could face resistance by other members. Members may claim that it is not possible to change the scope of the GATS through scheduling provisions even if a member is only adding obligations to its own schedules, and such resistance can lead to objections to the certification process.¹ While completing a certification procedure requires the absence of objection by other WTO members, this should not be equated with “consensus” within the meaning of Article IX (Decision-Making) of the WTO agreement. While the latter provides the rules for joint action that binds the entire membership through consensus-based decisions (and voting if necessary), a schedule certification procedure has the sole object and purpose of the verification of the content of the modifying member’s schedule regarding its effect on existing rights of other members under the WTO agreement. Hence, the expectation is that an objecting member would identify the specific elements giving rise to an objection. The mere fact that footnote to Article IX refers to the absence of objections does not create equivalence between the certification of a schedule and the adoption of a consensus decision by all Members.

An additional challenge that was mentioned regarding the coordinated scheduling option was the question of including special and deferential treatment provisions. Under the IFF4D, one of the main issues that is being discussed involves adopting the Trade Facilitation Agreement (TFA) approach to special and differential treatment. Consequently, there would be different categories of members’ commitments under the IFF4D, including transitional periods for implementing individual commitments under the agreement and an option for members to request technical assistance and capacity building. A majority of developing countries insists on applying the TFA approach to special and differential treatment. In this regard, it was mentioned that the flexible nature of the GATT and GATS with respect to scheduling commitments would allow members to schedule their commitments under the IFF4D while taking into account flexibilities such as

¹ Certification is the process of attesting changes to the authentic text of schedules to reflect modifications resulting from renegotiations under the GATT and the GATS as sources of enforceable legal obligations of WTO members.

transition periods and technical assistance, as long as the commitments are within the scope of the agreements. Accordingly, under the scheduling route, developing countries may associate the implementation of an obligation with acquiring technical assistance.

Overall, many experts felt that because of the scope limitations of the GATT and the GATS, the scheduling route may not be the best option for the integration of the IFF4D into the WTO rulebook.

Annex 4 of the WTO agreement

Currently, Annex 4 of the WTO agreement consists of two plurilateral agreements, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. Unlike the agreements in the first three annexes of the WTO agreement, which are binding on all WTO members, the plurilateral agreements are binding only on those WTO members that have accepted them and are typically applied on a non-MFN basis. However, in order for the IFF4D to be added as an Annex 4 agreement there is a need for consensus by all WTO members. It was noted that there is one more plurilateral agreement in the WTO, the Information Technology Agreement (ITA), which was concluded by 29 participants at the Singapore Ministerial Conference in December 1996, and which is not included under Annex 4. However, the ITA is an agreement on tariff reduction not on rules like the IFF4D, so it is an imperfect example of such an integration option.

Adding the IFF4D as an Annex 5 to the WTO agreement

Currently under the WTO agreement, agreements are included under Annex 1 and Annex 4. Annex 1 includes the multinational agreements, which are binding on all members, and Annex 4 includes the agreements that are binding only on parties to the agreement and benefits are also usually limited to the parties to the agreement. The establishment of Annex 5 as a new category of agreements that are binding on some members but benefit all members on a MFN basis would be an option for an IFF4D. Adding Annex 5 will still require a consensus by all WTO members. The difference between Annex 4 and 5 for the IFF4D outcome is whether it creates “rights” for non-signatories. Even if there is consensus to add the IFF4D to Annex 4 and signatories promise to apply it on MFN basis, it still would not create rights for non-signatories unless other amendments are introduced to change the nature of Annex 4 to accommodate agreements that are binding on some but create rights for all. Consequently, Annex 5 is likely to receive more support by all WTO members as it creates enforceable rights for non-signatories.

III. Political challenges for the integration of the IFF4D in the WTO rulebook

The legal route that will be taken to integrate a future IFF4D into the WTO rulebook will imply differently on the political costs faced by its supporting members. Consequently, the first political challenge will be how to mobilize the support of non-participating members to the agreement in the WTO. To unlock the consensus requirement under the WTO agreement, there needs to be an incentive to non-participant members to support the agreement. The first type of incentive is of a public good type, which refers to the institutional well-being of the WTO itself. The IFF4D negotiations envisage a new type of stand-alone agreement that although it is not supported by the full membership includes commitments that benefit signatories and non-signatories at the same

time. The nature of the commitments, which refer to regulatory reforms of its signatories that are adopted on a non-discriminatory basis, the focus on development and the strong support by developing countries make the IFF4D negotiations a best case for such a new type of WTO agreement. If there, however, is no consensus for the IFF4D within the WTO, the negotiating members can decide to sign an agreement independently which may have serious consequences for the WTO going forward.

The second type of incentive is transactional, for example linkages with other negotiation areas of interest to non-participants in the IFF4D. The second type of incentive will also depend on the content of the agreement especially with respect to development-related provisions such as implementation flexibilities and the provision of technical assistance. Strengthening the development dimension of the IFF4D will help overcome resistance by other members and may increase the number of participating members in the negotiations. The more WTO members take part in the IFF4D negotiations, the greater the pressure will be to integrate the IFF4D into the WTO rulebook.

Annex 1: Invitation



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Deutsches Institut für
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German Development
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Invitation: 6th virtual meeting of the Expert Network on an Investment Facilitation Framework for Development, 20 May 2021, 15:00-16:15 CET

Dear Expert Network members,

Thank you very much again for your willingness to participate in the Expert Network on Investment Facilitation for Development, established in the framework of a project carried out by the International Trade Centre (ITC) and the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE).

The 6th meeting of the Expert Network will take place on **20 May 2021**, from 9:00am to 10:15am Eastern Daylight-Saving Time (EDT), 15:00 to 16:15 Central European Time (CET), and 21:00 to 22:15 China Standard Time (CST).

The meeting will focus on **options to integrate an Investment Facilitation Framework for Development into the WTO rulebook**. Negotiations on an international agreement on investment facilitation for development are progressing well and negotiating members are aiming to achieve a substantive outcome ahead of the next WTO ministerial conference at the end of 2021. Given this progress, it is high time to reflect on ways to integrate a (most likely plurilateral) agreement on investment facilitation for development into the WTO rulebook.

The meeting will reflect on legal possibilities to integrate an agreement on investment facilitation for development into the WTO as well as political challenges that need to be taken into account by the negotiating parties.

The discussion will be held under Chatham House Rule to enable a frank and open exchange. The main results of the discussion will be summarized in a short report which will be fed into the WTO process on investment facilitation.

Moderator: Axel Berger, Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE).

Opening speakers:

Petros Mavroidis, Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School – *“What are the legal options to adopt a (plurilateral) agreement on investment facilitation for development into the WTO?”*

Hamid Mamdouh, Senior Council at King and Spalding LLP (Geneva office) and Visiting Professor, Queen Mary University of London, Centre for Commercial Law Studies (CCLS) – *“What are the key political challenges regarding the integration of a (plurilateral) agreement on investment facilitation for development in the WTO and how could they be overcome?”*

Concluding remarks: Karl P. Sauvant, Resident Senior Fellow, Columbia University/CCSI.

To register for the meeting and receive the meeting-link details, please [register here](#). Please note that, to avoid any difficulties, **only registered participants will receive the password** to join the on-line meeting.

If you would like to request the floor to speak or send written questions or comments during the meeting, please feel free to type your question or request in the chat window by pressing on the chat icon in the middle-bottom pane of the Zoom window.

For your reference, the reports of the last Expert Network meetings can be found [here](#).

Thank you in advance for participating in the Expert Network and sharing your expert insights.

With best regards,

Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC

Axel Berger, Senior Researcher, DIE

Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI

Bios

Axel Berger

Axel Berger is a Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). He works on the design, effects and diffusion patterns of international trade and investment agreements, with a focus on emerging markets and developing countries. Other areas of current research include the effects of an international investment facilitation framework, the impact of free trade agreements on upgrading within global value chains and the role of the G20 in global governance. He teaches international political economy at the University of Bonn and regularly advises developing countries, development agencies and international organisations on trade and investment matters.

Hamid Mamdouh

Hamid Mamdouh is Senior Council at King and Spalding LLP (Geneva office) and Visiting Professor, Queen Mary University of London, Centre for Commercial Law Studies (CCLS). Prior to retirement from the WTO at the end of September 2017, he was Director of the Trade in Services and Investment Division, since May 2001. Previously, he was Senior Counsellor in the Trade in

Services Division and had been the Secretary of the WTO Council for Trade in Services since the establishment of the WTO in 1995. During that time, he was also responsible for legal affairs relating to Trade in Services and the implementation of the General Agreement on Trade in Services (GATS).

Petros C Mavroidis

Petros C Mavroidis, Professor of Law at Columbia Law School, New York, since 2003. He served as a member of the World Trade Organization (WTO) legal affairs division from 1992 to 1995 and has been a legal adviser to the WTO since 1996. He was the chief co-rapporteur for the American Law Institute study “Principles of International Trade: The WTO” (2013). Among his most recent publication is *China and the WTO: Why Multilateralism Still Matters*, Princeton University Press, 2021, co-authored with André Sapir.

Karl P. Sauvant

Karl P. Sauvant introduced the idea of an International Support Program for Sustainable Investment Facilitation in the E15 Task Force on Investment Policy in 2015. From there, the proposal was taken forward in the WTO. He has written extensively on this subject (see <https://ssrn.com/author=2461782>). He currently assists, as Senior International Advisor, the ITC and DIE on a project on Investment Facilitation for Development. He retired in 2005 as Director of UNCTAD’s Investment Division and established, in 2006, what is now the Columbia Center on Sustainable Investment (CCSI). He stepped down as the Center’s Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

Annex 2: Attendance list

First name	Last name	Affiliation
Expert Group members		
Rudolf	Adlung	Independent Trade Policy Analyst, former Counsellor, WTO Trade in Services Division
Robert	Basedow	Assistant Professor in International Political Economy, London School of Economics and Political Science
Axel	Berger	German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
Manjiao	Chi	Professor and Founding Director, Center for International Economic Law and Policy, Law School, University of International Business and Economics, China
Yuka	Fukunaga	Professor, Wasada University
Khalil	Hamdani	Visiting Professor, Lahore School of Economics
Bernard	Hoekman	Robert Schuman Chair, Director of the Global Economics Research Area of the Global Governance Programme, Dean of External Relations, European University Institute
Makane Moïse	Mbengue	Professor and Director, Department of Public International Law and International Organization, Faculty of Law, University of Geneva

Federico	Ortino	King's College London
Christian	Pitsch	Gesellschaft für Internationale Zusammenarbeit
Rodrigo	Polanco	World Trade Institute
Michelle	Ratton	Professor, Getulio Vargas Foundation
Karl P.	Sauvant	Columbia Center on Sustainable Investment (CCSI)
Matthew	Stephenson	World Economic Forum (WEF)
Speakers		
Hamid	Mamdouh	Senior Council at King and Spalding LLP (Geneva office) and Visiting Professor, Queen Mary University of London, Centre for Commercial Law Studies
Petros C.	Mavroidis	Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School