



d·i·e

Deutsches Institut für
Entwicklungspolitik



German Development
Institute

INVESTMENT FACILITATION FOR DEVELOPMENT – A WTO/GATS PERSPECTIVE

*Rudolf Adlung, Pierre Sauvé and
Sherry Stephenson*

About the paper

This report is part of a series of background papers written in the context of a project by the International Trade Centre (ITC) and the German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE) on 'Investment Facilitation for Development'. The project supports the negotiations of a multilateral framework on investment facilitation for development by building negotiation capacity in developing (including least developed) countries, channelling ground-level and analytical expertise to negotiators and promoting public discussions of issues related to investment facilitation for development.

Disclaimer: The views and opinions expressed in this paper are those of the authors and do not necessarily reflect the views of the International Trade Centre, the World Bank Group or their member countries.

Publisher: International Trade Centre (ITC)

Title: INVESTMENT FACILITATION FOR DEVELOPMENT- A WTO/GATS PERSPECTIVE

Publication date and place: Geneva, November 2020

Page count: 20

Language(s): English

Citation Adlung, R., Sauvé, P., and Stephenson, S. (2020). Investment Facilitation for Development - A WTO/GATS Perspective. International Trade Centre, Geneva, Switzerland.

For more information, contact: Quan Zhao zhao@intracen.org

For more information on Investment Facilitation for Development, see: <https://www.intracen.org/itc/Investment-Facilitation-for-Development/>

ITC encourages the reprinting and translation of its publications to achieve wider dissemination. Short extracts of this paper may be freely reproduced, with due acknowledgement of the source. Permission should be requested for more extensive reproduction or translation. A copy of the reprinted or translated material should be sent to ITC.

© International Trade Centre (ITC)

ITC is the joint agency of the World Trade Organization and the United Nations.

About the authors

Rudolf Adlung currently works as an independent trade policy analyst. After graduating from Basel University (MA and PhD in economics), he gained his first professional experience at the Kiel Institute for the World Economy (IfW) and, from 1980, the German Ministry of Economics. In 1990, he joined the then GATT Secretariat. After several years in the Trade Policies Review Division, he served, until retirement in 2014, as senior economist in the Trade in Services Division. His recent publications deal with RTAs in services, the applicability of GATS to services exports, the interaction between investment treaties and the GATS, the risks and opportunities of open plurilateral trade agreements, and BREXIT from trade-in-services perspective.

Pierre Sauvé is a Senior Trade Specialist in the Geneva office of the World Bank's Macroeconomics, Trade and Investment Global Practice, where he leads the Bank's work on trade governance and represents the World Bank Group in the G20 Trade and Investment Working Group. Previously, he served as Director of Studies, Deputy Managing Director and Director of External Programs and Academic Partnerships at the University of Bern's World Trade Institute (WTI), in Switzerland, where he maintains a visiting professor appointment. His principal research interests lie in the areas of trade in services, the regulation of foreign direct investment, comparative regional integration and the political economy of the multilateral trading system, issues on which he has published extensively in leading academic outlets. His latest book, co-authored with Dora Neo and Imola Streho and entitled *Services Trade in ASEAN: The Road Taken and the Journey Ahead*, was published by Cambridge University Press in 2019.

Sherry M. Stephenson was a Senior Fellow with the International Centre for Trade and Sustainable Development (ICTSD) in Geneva from 2013 to 2018, where she developed and executed a work programme on services, covering multilateral, plurilateral and regional services issues. Prior to the ICTSD, she worked with the Organization of American States (OAS) in Washington DC, where she guided the organization during the Free Trade Area of the Americas (FTAA) negotiations (1995-2004). Before the OAS, Ms. Stephenson was an Advisor to the Ministry of Trade in Indonesia where she assisted the Government in developing its final offer for the Uruguay Round. Previously, she has worked with the OECD, GATT and UNCTAD Secretariats. Ms. Stephenson has published three books and numerous articles. She was a member of the World Economic Forum's Global Trade Agenda Council and contributed to its annual reports of 2011, 2012, 2013, and 2014. She is currently a member of the Pacific Economic Cooperation Council (PECC) Services Task Force as well as the T20 Trade Investment and Globalisation Task Force, and has contributed to its Policy Briefs on Services.

Contents

A.	INTRODUCTION	7
B.	MULTILATERAL RULES GOVERNING INVESTMENTS IN SERVICES: THE GATS	8
C.	OVERVIEW OF GATS OBLIGATIONS AND COMMITMENTS	10
	C.1 Main elements	10
	C.2 Development-related flexibilities	11
D.	INVESTMENT FACILITATION AND THE GATS: RELEVANT PROVISIONS	12
	D.1 Scope of existing disciplines	12
	D.2 Investment facilitation via Additional Commitments	16
E.	LOOKING AHEAD	17

Acronyms

AC	Additional Commitments
BIT	Bilateral Investment Treaty
ENT	Economic Needs Test
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IFF4D	Investment Facilitation Framework for Development
ILO	International Labour Organization
ITC	International Trade Centre
LDC	Least Developed Country
MA	Market Access
MFN	Most-Favoured Nation
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential Trade Agreement
SDG	Sustainable Development Goal
TFA	Trade Facilitation Agreement
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

*You can't always get what you want / But if you try sometime /
You'll find / You get what you need.*

The Rolling Stones, 1968

Abstract

WTO talks on investment facilitation (IF), launched at the 11th Ministerial Conference in 2017, have garnered significant traction, currently involving over 100 Members. This paper explores possible landing zones of ongoing IF negotiations, recalling that by extending to a policy area not subject to existing WTO disciplines, i.e., foreign investment in non-service sectors, a prospective IF regime would need to command a consensus decision among a fractured WTO membership. Moreover, by aiming to develop a generic set of investment disciplines straddling the WTO's goods-services divide, the negotiations inevitably overlap with provisions under the General Agreement on Trade in Services (GATS) while at the same time introducing concepts used in merchandise trade under the General Agreement on Tariffs and Trade (GATT). Any initiative aimed at establishing a comprehensive IF regime will thus have to overcome deeply enshrined conceptual differences between the two agreements. This is the case, for example, with regard to subsidy- and regulation-related disciplines, which are significantly broader and deeper under the GATT than they are in services trade. Given such differences, even in pursuit of similar policy aims, questions remain over the nature and feasibility of a consistent and legally dependable IF framework.

A. INTRODUCTION

Investment is a precondition for economic growth and development. International investment flows help expand a country's resource base and are commonly regarded as a major source, and a powerful vector, of technical progress. In turn, such expectations have prompted a variety of policy initiatives since the mid-1990s aimed at harnessing the development promise of foreign direct investment (FDI) at the bilateral, regional and multilateral levels. Such expectations also explain participants' strong endorsement, at the 11th WTO Ministerial Conference, of a Joint Statement on Investment Facilitation for Development. The Statement has since been renewed and is today endorsed by over 100 Members (counting the EU-27 Members individually). No other initiative has garnered as much support in the wake of this Conference.¹

Signatories of the Joint Statement envisage the creation of a multilateral framework aimed, among other things, at facilitating the greater participation of developing and least-developed Members in global investment flows. The discussions are intended to be 'Member-driven, transparent, inclusive, and open to all WTO Members'.² Yet, three items, widely considered as particularly contentious, were explicitly excluded from the outset: *market access*, *investment protection*, and *Investor-State Dispute Settlement (ISDS)*. Accordingly, this paper focuses on a range of procedural and organizational aspects of the ongoing talks, including possible improvements in transparency, predictability, efficiency and consistency of national investment regimes.

By aiming to develop a generic set of investment disciplines straddling the WTO's goods-services divide, the initiative inevitably overlaps with provisions governing services trade under the General Agreement on Trade in Services (GATS). This is hardly surprising given that more than 60 per cent of the world's FDI stock is in services and, thus, covered by the GATS. Accordingly, government measures affecting investment conditions in services, in whatever context, are subject to the most-favoured-nation treatment (MFN) clause found in Article II of the GATS, apart from a limited range of exceptions, including for preferential trade agreements (PTAs). Yet analysis of these exceptions, and of Members' compliance with relevant GATS obligations, is complicated by the reality of significant definitional and substantive variations between, and sometimes even within, the agreements concerned.

Interestingly, the national treatment (NT) obligation does not feature among the three items explicitly excluded from further consideration by the Joint Ministerial Statement. Indeed, it appears almost inconceivable that an agreement meant to facilitate investment for development would not, as a general principle, provide for the treatment of established foreign investors on a non-discriminatory basis. Yet, the exclusion of *investment protection* from the scope of the negotiations, according to the Joint Ministerial Statement, is tantamount to eschewing NT, one of the key obligations in international investment agreements. It remains to be seen whether such a (perceived) gap will be addressed at a later stage.

Another issue of key importance concerns the very organisation of the negotiation and implementation processes. The Joint Ministerial Statement envisages a 'multilateral framework' on Investment Facilitation for Development. This rules-out the creation of an exclusive (e.g., constrained reciprocity) plurilateral agreement modelled, for example, on the WTO's Government Procurement Agreement. A multilateral framework is realistically conceivable only in the form of an agreement that is endorsed by the full WTO Membership, while binding only a 'critical mass' of signatories that are ready to accept the policy constraints involved and willing to extend the agreement's benefits to all Members, including those not assuming reciprocal obligations.

Decisions taken on the basis of an explicit consensus may not be legally required in all instances for the adoption of an Open Plurilateral Agreement that builds on and deepens existing obligations among groups

¹ Apart from ongoing talks on investment facilitation, plurilateral discussions proceed among WTO Members under three other Joint Statements agreed at the Buenos Aires Ministerial Conference, dealing with electronic commerce, domestic regulation in services as well as micro-, small- and medium-sized enterprises (MSMEs).

² As of 9 October 2020, 105 WTO members had signed the Joint Ministerial Statement on Investment Facilitation for Development, issued on 5 November 2019. (WTO Document WT/L/1072/Rev.1)

of Members. However, this has been standard WTO procedure to date, in accordance with Article IX:1 of the WTO Agreement.³ Insofar as a prospective investment regime extends to policy areas not subject to existing WTO disciplines, i.e., foreign investment in non-service sectors, a consensus decision appears warranted in any event. The Nairobi Ministerial Declaration of 2015 explicitly confirmed that a decision to launch multilateral negotiations on new issues would need to be agreed by all Members.⁴ Such a decision arguably does not appear within reach in current circumstances.

Behind these political/institutional impediments, partly attributable to the WTO's current state of affairs, lies a further challenge. As already indicated, any initiative aimed at establishing a comprehensive Investment Facilitation Framework for Development (IFF4D) would have to overcome deeply enshrined gaps between the underlying legal regimes of GATS and GATT, even in pursuit of quite similar policy aims (see the listing in Section D.1). For example, while essentially limited to cross-border trade, the subsidy- and regulation-related disciplines under the GATT are significantly broader and deeper than those under its services counterpart. Given such differences, questions remain over the nature of a consistent common framework. In the end, would negotiators need to compromise either on cross-sectoral consistency, and devise two separate regimes, or on legal enforceability, and focus on developing a comprehensive understanding on a best-endeavours basis? These issues are taken up in the analysis that follows.

B. MULTILATERAL RULES GOVERNING INVESTMENTS IN SERVICES: THE GATS

It may be surprising, at first glance, to refer to a trade agreement in an investment context. Yet, the definitional scope of services trade under the GATS is significantly broader than that of conventional agreements governing merchandise trade. It extends, inter alia, to services supplied by foreign suppliers that are commercially established in a host-country market. Indeed, 'commercial presence' (Mode 3) is by far the most economically relevant mode of supply, accounting for close to 60 per cent of total services trade covered by the Agreement. It is the mode of supplying services against which WTO Members have to date shown the highest propensity to schedule commercially meaningful commitments, a trend that reveals the economic benefits host members generally associate with larger FDI inflows in services markets as well as their continued ability (and policy preference) to exercise regulatory dominion over foreign-established firms.

The other modes of supply under the GATS relate to cross-border trade (Mode 1), the consumption of services abroad (Mode 2), and the supply of services through natural persons in a host-country (Mode 4). Access conditions on Mode 4 are also relevant in the current context as they extend not only to self-employed professionals and to foreigners employed by foreign-owned service suppliers, but also to business visitors who enter a country to prepare for, or to carry out, transactions under other modes. The ability to send key personnel abroad in order to establish and/or operate foreign affiliates is generally an important factor in a company's investment strategy. Yet, the Mode 4 commitments of virtually all WTO Members remain exceedingly shallow, though most prevalent in regard to intra-company transferees.⁵

As with the GATT, a key element of the GATS is the MFN principle, which applies to any government measure affecting services trade under whatever mode of supply.⁶ Pursuant to GATS Article II, each Member is obliged to 'accord immediately and unconditionally to services and service suppliers of any other Member

³ The Article calls upon Members to continue 'the practice of decision-making by consensus followed under GATT 1947'. Relevant cases include the Information Technology Agreement, initiated in 1996, its extension in 2015, well as the Fourth and Fifth Protocols to the GATS on telecommunications and financial services, respectively. The negotiations on the two Protocols were concluded in 1997 (Fourth Protocol) and 1999.

⁴ Nairobi Ministerial Declaration, WTO Document WT/MIN(15)/DEC, 21 December 2015. Last accessed on 12 November 2020 from https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm

⁵ See WTO (2009). Presence of Natural Persons (Mode 4). *Background Note by the Secretariat*. WTO document S/CW/30. Last accessed on 23 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=108652

⁶ Pursuant to GATS Article XXVIII(a), "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form`.

treatment no less favourable than that it accords to like services and suppliers of any other country'. This applies across the full policy range, apart from carve-outs for PTAs, recognition initiatives concerning standards, licences, etc., and measures individual Members had listed as MFN exemptions.⁷ In addition, like many other agreements, the GATS features a range of general exceptions covering, inter alia, measures necessary to protect public morals, life and health, etc. (Article XIV), as well as various national security-related exceptions (Article XIVbis). Very few sectors or sector segments are excluded per se from the scope of the Agreement; these concern services directly related to the exercise of traffic rights, i.e., a key segment of air transport, and services supplied in the exercise of governmental authority.⁸

The relevance of bilateral investment treaties (BITs) to the WTO/GATS regime has been largely ignored to date. This is somewhat surprising since virtually all Members have concluded BITs, over 100 in some cases, which generally contain provisions, in many variations, that are subject to the MFN obligation of GATS Article II (e.g., guarantees of national treatment post-establishment, fair and equitable treatment, transfers of funds, and compensation for expropriation).⁹ The possibility to list MFN exemptions for such treaties has, however, been used by fewer than 20 WTO Members.

In discussing the GATS' policy impact in the current negotiating context, it is useful to distinguish between three different types of provisions:

- (a) Unconditional obligations which are universally applicable across all service sectors, including the principle of MFN treatment.
- (b) Specific commitments on Market Access (MA), National Treatment (NT) and any Additional Commitments (ACs) that a Member might have inscribed in its services schedule.
- (c) Conditional obligations, in particular disciplines on regulatory conduct and content, which are triggered by the existence of specific commitments.

Particularly interesting among the GATS provisions that are potentially relevant for the envisaged IFF4D are ACs under Article XVIII (Section D.2). The Article allows Members to schedule undertakings across a virtually open-ended range of regulatory measures. The respective provisions are without any equivalent in the GATS' merchandise trade precursor, the General Agreement on Tariffs and Trade (GATT). The fact that they have played only a limited role to date, apart from the telecommunications sector, is attributable mostly to the WTO's stalemate in recent years.

Looking ahead, great care will need to be paid to ensuring that the services-related provisions of a prospective IFF4D are compatible with existing definitions, obligations and commitments. There is already much confusion surrounding the existence of parallel patchworks of policy disciplines under BITs and the investment-related provisions in PTAs, with different sets of obligations, definitional variations, etc. To ensure overall consistency, it is not sufficient that the same terms be used in different treaty settings. What ultimately matters are the underlying concepts. There are WTO Members, for instance, that are bound by three differing concepts of MFN and NT, one under the GATS and two under various PTAs. It is by no means excluded that a fourth one could emerge from a future IFF4D.¹⁰

⁷ This possibility existed only at the time of the Agreement's entry into force or, in the case of new Members, at the date of accession.

⁸ The latter category is defined, in Article I:3(c), to consist of services which are supplied neither on a commercial basis, nor in competition with one or more suppliers.

⁹ Brazil is one of the very few Members that have not ratified any BIT. However, it recently concluded several Agreements on Cooperation and Facilitation of Investments (CFAI), which provide for information exchange and consultation mechanisms intended to defuse conflicts but, unlike conventional BITs, do not allow investors to initiate arbitration procedures against the State. Morosini, Fabio, Nicolás M. Perrone & Michelle R. Sanchez-Badin (2019), Strengthening multi-stakeholder cooperation in the international investment regime: The Brazilian model, *Columbia FDI Perspectives* No. 263. See also Adlung, Rudolf (2016). International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS. *The Journal of World Investment & Trade*, 17(1), 47-85.

¹⁰ While the GATS' benchmark for MFN and national treatment is the absence of discrimination between *like services and service suppliers*, a number of PTAs refer to the absence of discrimination between services and service suppliers in *like circumstances* or in *like situations*. In turn, recent drafts of an investment-facilitating regime referred to non-discrimination between *like investments and investors*. For a comprehensive analysis of different NT concepts from a trade-in-services perspective, see Diebold, N. F. (2010). *Non-*

C. OVERVIEW OF GATS OBLIGATIONS AND COMMITMENTS

C.1 Main elements

The GATS requires each WTO Member to submit a schedule of services commitments. The schedule consists of four columns, with the first identifying the sector concerned, the second and third specifying any limitations on Market Access (MA) and National Treatment (NT), respectively, and the fourth allowing for the inscription of Additional Commitments. The latter may be undertaken with respect to any other measures affecting trade in services, including qualifications, standards and licensing matters (Article XVIII).

A characteristic feature of the GATS is its adaptability, which allows governments to tailor their commitments to their perceived policy needs or even avoid any access obligations in individual sectors or modes of supply. By the same token, however, all WTO Members are bound by a framework of core disciplines, the conditional and unconditional obligations alluded to before, which must be accepted *tel quel* regardless of any country- or sector-specific considerations (Box 1). These disciplines are mostly of an institutional/operational nature and apply from day one. There is thus little scope for the Agreement's differential implementation based for instance on the development levels of individual Members, as is available under the GATT-anchored Trade

Box 1 Framework obligations under the GATS

All service sectors

- MFN treatment (Art. II:1), with possibility of exemptions
- Publication requirement of all measures covered by the Agreement (Art. III:1)
- Establishment of enquiry points to inform other Members upon request (Art. III:4)*
- Establishment of contact points to facilitate access of service suppliers from developing countries to market-related information (Art. IV:2)**
- Non-discriminatory and transparent use of recognition measures (Art. VII)

Scheduled sectors

- Notification of new measures and legal changes that 'significantly affect trade' (Art. III:3)
- Administration of generally applicable measures in a reasonable, objective and impartial manner (Art. VI:1)
- Timely treatment of requests for authorization (Art. VI:3)
- Adequate procedures to verify applications in professional services (Art. VI:6)
- Certain (rudimentary) disciplines governing the application of licensing and qualification requirements and technical standards (Art. VI:5)
- Access to and use of public telecommunications networks and services (Annex on Telecommunications)

* *The implementation period for individual developing countries may be extended beyond the generally applicable two-year period after the Agreement's entry into force.*

** *Developing and least-developed countries are expected to comply only 'to the extent possible'. In implementing the obligation, 'special priority' is to be given to least-developed countries (Art. IV:3).*

Facilitation Agreement (TFA).¹¹

Reflecting the high doses of regulatory precaution governing what for most original WTO Members was a complex and novel area of global rule-making, the schedules that emerged from the Uruguay Round (1988-1994) revealed a strong preference for modest policy bindings. The fact that the GATS called for successive

discrimination in international trade in services: 'Likeness' in WTO/GATS. Cambridge University Press, Cambridge. DOI:10.1017/CBO9780511675843

¹¹ The TFA, which was adopted at the WTO's 9th Ministerial Conference in 2013, distinguishes between three categories of disciplines that may be phased-in at different stages; developing and least-developed countries are entitled to self-designate these stages. See *infra* n 14.

rounds of trade liberalizing negotiations (Article XIX:1) was not a motivating force either. As a result, the average number of services commitments per Member currently stands at little more than one-third of the 160 sub-sectors contained in the classification list used for scheduling purposes.¹² However, this average conceals significant differences between the commitments undertaken by original WTO Members and those of 36 countries that acceded to the world trade body since January 1995 as well as between the commitments undertaken by developed, developing and least-developed countries, respectively. Thus, while the Uruguay-Round schedules of a few developing countries contained less than five sub-sectors, the commitments subsequently assumed by some transition economies cover over 140 sub-sectors at high levels of liberalization, in some instances more so than those of OECD member countries. Late accession, i.e., post-Uruguay Round, obviously came at a price.

C.2 Development-related flexibilities

The variation observed in the number of commitments between and within groups of Members is clearly indicative of the Agreement's flexibility. Such flexibility is further enhanced, as noted above, by the possibility of adding limitations or by completely eschewing commitments in individual sectors and/or modes of supply. Looking ahead, Article XIX:2 provides that, in pursuing the mandated liberalization process under the Agreement, there shall be 'appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and ... attaching conditions aimed at achieving the objectives referred to in Article IV'. (The latter Article deals with increasing the participation of developing countries in world trade.)

However, once scheduled, a commitment applies regardless of a country's developmental status, and the same is true of the conditional obligations, including disciplines relating to domestic regulation (tentative as they currently are), that are triggered by the scheduling of specific commitments. Thus, by way of example, the obligation concerning the reasonable, objective and impartial administration of measures of general application, as stipulated in GATS Article VI:1 (see below), is equally applicable across all Members in their scheduled service sectors.¹³

On the other hand, Members retain the freedom to go beyond what they are committed to do under WTO Agreements. For example, they could extend Article VI:1-type domestic regulation disciplines to services that have not been subjected to commitments and, of course, to transactions beyond the scope of the GATS. To further clarify this issue: while the TFA may constitute a major source of inspiration to proponents of an IFF4D, its section II contains far-reaching flexibilities for developing and least-developed countries (LDCs). These include the possibility to self-designate the regulatory disciplines they are ready to comply with at various stages of an individual implementation process.¹⁴ Similar cross-cutting flexibilities may be envisaged for a future investment-facilitating regime. However, they must not extend to obligations that are already applicable under current GATS provisions (Box 1), although there might be calls to provide Members with additional leeway in the event, for example, of acute financial constraints.

Yet, it would have been feasible, at the scheduling stage, to phase-in individual commitments, including commitments under Article XVIII (ACs, Section D.2), or to condition their entry into force on criteria linked to economic needs tests (ENTs). Again, the Agreement offers a lot of flexibility in this regard. Like any other commitments, ACs featuring GATS-plus regulatory disciplines could focus specifically on certain groups of

¹² The list is contained in WTO (1991). Services sectoral classification list. *Note by the Secretariat*. WTO document MTN.GNS/W/120. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

¹³ Certainly, there is still the possibility for economically advanced countries to extend preferential access conditions under the Generalized System of Preferences (GSP) and the LDC Services Waiver. See UNCTAD (2015). *Generalized System of Preferences*. UNCTAD website. Last accessed on 23 November 2020 from: <https://unctad.org/topic/trade-agreements/generalized-system-of-preferences> and UN (2020). *Preferential market access for services and service suppliers – Services waiver*. UN LDCs' Portal. Last accessed on 23 November 2020 from: <https://www.un.org/ldcportal/preferential-market-access-for-services-and-service-suppliers/>

¹⁴ Article 14 of the TFA distinguishes between three categories of provisions: (i) those that are immediately applicable in developing countries and within one year in LDCs; (ii) those that a developing country or LDC designate for application after a transitional period following the TFA's entry into force; and (iii) those that are designated for future application and require the provision of assistance and support for capacity building.

enterprises and/or take account of particular economic circumstances. It might thus be possible, for example, to introduce size-specific criteria with a view to exempting smaller companies or new entrants from disproportionate regulatory burdens.¹⁵

D. INVESTMENT FACILITATION AND THE GATS: RELEVANT PROVISIONS

In considering the impact of a regulatory regime, of whatever type, on investment decisions, a variety of factors warrant attention. These include the transparency, consistency and predictability of relevant measures, as well as the existence of impartial and effective approval and enforcement procedures. A number of GATS provisions might prove relevant and provide inspiration in this context, given that the Agreement applies to 60 per cent of the world's FDI stock and has meanwhile been tested over a 25-year span. As already noted, there are no equivalent WTO provisions covering investments in non-service sectors.

The following discussion provides an overview of potentially relevant GATS disciplines that might be expected to promote investment for sustainable development and could readily be implemented via ACSpursuant to GATS Article XVIII. The authors' intention is not to provide a ready-made 'cookbook' for negotiators but rather to point out ingredients that are, or could be made, available in pursuit of governments' prevailing policy objectives. What matters in the end are not freely floating statements, but Members' commitment to creating a consistent and legally dependable framework.

D.1 Scope of existing disciplines

(a) Notification and information¹⁶

GATS Article III features various transparency-related requirements that are either generally applicable or confined to scheduled sectors (Box 1). The latter include a notification requirement, under Article III:3, concerning any changes in laws, regulations, etc. that significantly affect trade in services covered by specific commitments.

Moreover, pursuant to Articles IV:2 and 3, developed countries and, to the extent possible, other Members are required to establish contact points to provide service suppliers from developing countries with information on their respective markets. Interestingly, this requirement not only relates to the provision of official information concerning registration, recognition and qualifications, but extends to 'commercial and technical aspects of the supply of services' and 'the availability of services technology'. However, the authors are not aware of any studies that would trace the impact, if any, of these obligations.

Experience shows that not all WTO Members have been able or willing to comply with existing notification requirements. While some 700 measures were notified since the Agreement's entry into force in 1995, over one in four notifications originated from two Members only, Albania and Switzerland. Many Members have notified no changes under these provisions.¹⁷ Moreover, certain types of measures, including those relating to BITs, have consistently been ignored even as they clearly aim, by improving investment conditions, to affect services trade under Mode 3.

¹⁵ See, for example, Adlung, R. & Soprana, M. (2013). SMEs in services trade - A GATS perspective. *Intereconomics*, 48(1), 41-50.

¹⁶ A complete overview of notification requirements under the GATS is provided in a handbook by the WTO Secretariat, which is available from: -https://www.wto.org/english/tratop_e/serv_e/serv_handbook_on_notifications_e.pdf (last accessed on 25 November 2020).

¹⁷ An analysis of Members' compliance rates with all WTO-related notification requirements between 1995 and 2014 points to enormous differences, ranging from well above 80% to below 20%. See Karlas, J. & Parizek, M. (2020). Supply of policy information in the World Trade Organization: Cross-national compliance with one-time and regular notification obligations, 1995–2014. *World Trade Review*, 19(1), 30-50.

Members' poor notification compliance may be attributable to various factors, including weak inter-agency coordination within governments and concerns about potentially adverse interpretations in the event of disputes. However, the negotiation of an IFF4D offers a fresh opportunity to confirm the existence of such obligations and promote greater compliance, possibly combined with the provision of technical assistance. The inter-agency co-ordination needs associated with the envisaged creation of a WTO Committee on Investment Facilitation might well provide additional tailwind.

(b) Regulatory content

GATS Article VI:4 mandates Members to negotiate any necessary disciplines to prevent measures relating to qualification requirements and procedures, technical standards and licensing requirements from constituting unnecessary barriers to services trade. Such requirements should be no more burdensome than *necessary to ensure the quality of the service*. Pending the entry into force of the long called-for disciplines, Article VI:5 provides for their provisional, and tightly circumscribed, application in scheduled sectors.

Negotiations under Article VI:4, and on three other GATS Articles (dealing respectively with subsidies, emergency safeguards, and government procurement) remain outstanding a quarter century after the GATS' entry into force. Prospects in these areas have hardly improved in recent years, quite the opposite. Nevertheless, in preparation of the WTO's 11th Ministerial Conference, some 30 delegations submitted a proposal calling for the development of (open plurilateral) Disciplines on Domestic Regulation pursuant to the GATS Article VI.4 mandate,¹⁸ with the stated aim of incorporating a Reference Paper with such disciplines into their services schedules by the 12th Ministerial Conference.

A sector-specific precursor of the envisaged outcome already exists for accountancy services. The 'Accountancy Disciplines', adopted by the Council for Trade in Services in 1998, are meant to be integrated into the GATS 'no later than the conclusion of the current services trade negotiations'.¹⁹ Interestingly, these disciplines contain a 'necessity test' which, though forming part of the negotiating mandate in Article VI:4(b), has proved particularly controversial since. Accordingly, Members with relevant commitments are required to eschew measures that are 'more trade-restrictive than necessary to fulfil a legitimate objective'. An openly defined list of such objectives follows, including 'the protection of consumers ... , the quality of the service, professional competence, and the integrity of the profession'. This listing certainly provides for more flexibility than the sole reference to the 'quality of the service' featured in Article VI:4. Of course, further criteria, including sustainability-related considerations, could still be added. Yet, high expectations in this area do not, on the whole, appear justified. Indeed, a closer look at the latest generation of putatively 'frontier' PTAs suggests the need for caution. Necessity tests of various types feature in less than one-fifth of current agreements.²⁰

Many Members' apparent aversion to codifying 'necessity' reflects a sense of uneasiness about the potential impact of disciplines that are broadly applicable across all service sectors or at least across sectors subject to specific commitments. The fact that it was possible to integrate necessity-related criteria into the Accountancy Disciplines might owe not only to the more open and dynamic negotiating mindset prevailing in the early days of the GATS, but also to a more narrowly defined and, thus, more predictable sectoral and policy context. If so, it might be worth testing the readiness of interested Members to complement broadly applicable regulatory disciplines with more focused understandings, again MFN-based. In turn, these might include an obligation of rendering regulations no more restrictive than necessary to serve legitimate policy purposes, such as promoting sustainable development.

(c) Subsidisation

¹⁸ See WTO (2017). Disciplines on Domestic Regulation. *Revision*. WTO document WT/GC/190/Rev.2; WT/MIN(17)/7/Rev.2. Last accessed on 23 November 2020 from: https://docs.wto.org/dol2fe/pages/fe_search/fe_s_s009-dp.aspx?language=e&catalogueidlist=240862

¹⁹ WTO (1998). *Disciplines on Domestic Regulation in the Accountancy Sector*. Document S/L/64. Last accessed on 25 November 2020 from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/L/64.pdf>

²⁰ WTO (2019). *World Trade Report 2019 - The future of services trade*. Geneva: Author. Last accessed on 25 November 2020 from: https://www.wto.org/english/res_e/booksp_e/00_wtr19_e.pdf

Sustainable development goals have moved up the political agenda in recent years and inspired various proposals to modify trade and investment rules. Investors are increasingly expected to address environmental concerns, meet specified employment targets, promote various labour market outcomes, provide professional education and training, develop local economic links, respect certain working practices, promote greater inclusivity, etc. The ‘nudging’ incentives involved are not necessarily financial in nature, but can include more streamlined approval procedures, less frequent controls of regulatory compliance, better access to certain public services, and so forth (Box 2).

Nevertheless, such endeavours may be of limited economic significance when compared to the financial incentives bestowed under generally available subsidy programmes. The pressure to promote investment in order to create, maintain or ‘reshore’ some of the jobs ‘lost’ to foreign outsourcing will hardly abate in coming years. And the financial armouries of developed countries tend to be better filled than those of many poorer countries. An IFF4D could thus seek to contain the extension of (excessive) financial incentives, given in particular that ‘facilitating greater developing and least-developed Members’ participation in global investment flows should constitute a core objective of the framework’ (Joint Ministerial Statement of November 2019). However, just as mandated discussions on developing subsidy disciplines for services have revealed a sustained collective preference for inaction,²¹ the readiness to address incentive-related issues in the current context should not be overrated.

Box 2: Non-financial incentives to facilitate foreign investment for development¹

Potential host countries (→ Inward FDI)

- Measures to improve access to and use of business visas
- Creation of grievance mechanisms (including ombudspersons) for aggrieved investors
- Adoption of a ‘Silent Yes’ mechanism for administrative approvals
- Ensuring the transparency of investment incentives
- Fostering linkages with local suppliers, including through the creation of databases
- Creating mechanisms for effective policy coordination among agencies at all government levels
- Ensuring the proper functioning of the contact points for foreign service suppliers to be established under GATS Article IV:2

Home countries (→ Outward FDI)

- Providing project evaluation assistance
- Promoting compliance with basic labour, environmental and corporate social responsibility standards

Source: These examples are mostly inspired by Sauvart, Karl P. and Matthew Stephenson (2019), ‘Concrete measures for a Framework on Investment Facilitation for Development: Report’ (Contribution to an Expert Workshop at the WTO).

Investment protection might be added to this listing, inter alia, though it is explicitly excluded under the Joint Ministerial Statement (Section A.1).

Relevant WTO disciplines on subsidy-related matters differ significantly between goods and services trade. They are considerably stricter under GATT provisions, including under the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Trade-Related Investment Measures (TRIMS) than they are under the GATS. In particular, the GATS does not contain any prohibitions comparable to the ASCM’s ban on export-promoting and import-substituting subsidies. Similarly, governments are not prevented *per se* from supporting domestic producers or investors contingent on these preferring locally established suppliers of components over those competing from abroad. As noted above, the potentially most relevant constraints under GATS are the obligations of MFN and National Treatment. Yet, the latter

²¹ For a more detailed discussion, see Sauv , P. & Soprana, M. (2018). Disciplining service sector subsidies: Where do we stand and where can we (realistically) go?. *Journal of International Economic Law*, 21(3), 599-619.

obligation applies only if a Member has undertaken commitments in the sector without listing subsidy-related limitations under the mode concerned.²²

While subsidy-specific disciplines may yet be negotiated under GATS Article XV in response to one of the rule-making mandates inscribed in the Agreement, prospects for doing so appear dim, as they have long been for other Uruguay Round leftovers.²³ Alternatively, following similar ongoing negotiations in the area of domestic regulation, interested Members might seek to embed subsidy disciplines as Article XVIII Additional Commitments. The ultimate purpose is all too obvious: facilitating investment for *development whilst* avoiding the granting of potentially distortive incentives on the part of economically well-endowed countries. The prevailing trend, strongly impacted by the fiscal policy response to the COVID-19 pandemic, appears to point in the opposite direction, however, affording Members with well filled public coffers ever broader scope for state support measures.²⁴

(d) Other disciplines promoting foreign market participation

- *Recognition of standards, licences, certificates*

Not surprisingly, mirroring the poor response to similar requirements under Article III, there have been relatively few notifications concerning the recognition of foreign professional degrees, certificates and licences to date.²⁵ In many cases, the (non-)recognition of foreign professional degrees and certificates could be a key determinant of Market Access, including for foreign investors, and be used to influence competitive conditions for various policy reasons. Many governments might thus be hesitant to disclose their recognition measures and underlying criteria. There is, as well, the possibility of administration-internal information and coordination problems, particularly in federal states. Some officials may also believe, erroneously, that recognition measures applied in the context of PTAs are exempt from GATS Article VII disciplines.

The promotion of recognition initiatives should be a key element of an agreement that attempts to reduce and simplify administrative procedures with a view to streamlining investment conditions. This could include language beyond the mere obligation, in GATS Article VII:3, not to (ab-)use recognition measures as a means of discrimination or a disguised restriction on trade in services.²⁶ Members might be expected, for instance, to accelerate approval procedures if similar investment projects have already been screened and accepted elsewhere or if these comply with certain widely recognized principles, for example in the context of UN, ILO, or OECD endorsed guidelines.

- *Promoting competition*

Potential investors might be deterred by the possibility of seeing access to putatively open markets undermined by powerful domestic operators. While many different manifestations of competitive distortions can be identified, the GATS features at least one potentially relevant (but weakly enforceable) discipline. According to Article VIII, Members are required, *inter alia*, to ensure that monopolies and exclusive suppliers do not abuse their position in expanding into market segments that are covered by specific commitments.

In a similar vein, signatories of the Reference Paper on basic telecommunications services, adopted by a majority of WTO Members in the form of an Additional Commitment, are required to prevent major suppliers

²² Sauv e & Soprana (2018), *op. cit.*

²³ See Sauv e, P. (2002). Completing the GATS framework: Addressing Uruguay Round leftovers. *Aussenwirtschaft*, 57(3), 310-341.

²⁴ Departures from Members' GATS-committed NT obligations for subsidies are particularly frequent among the limitations inscribed in PTAs (see below): about three-quarters of a sample of 66 PTAs reviewed were found to contain GATS-minus commitments for subsidies. See Adlung, R. & Miroudot, S. (2012). Poison in the wine: Tracing GATS-minus commitments in regional trade agreements. *Journal of World Trade*, 46(5), 1045-1082.

²⁵ Seventy-three notifications were received between January 1995 and December 2019, of which 14 from Switzerland and 10 from Australia.

²⁶ For example, under Article 2.6 of the Agreement on Technical Barriers to Trade, annexed to the GATT, Members are required 'to give positive consideration to accepting as equivalent the technical regulations of other Members ... provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations'.

from engaging in certain anti-competitive practices.²⁷ Of course, similar obligations might be used to discipline dominant suppliers and/or state-owned enterprises in other service industries as well. Such obligations could, for instance, complement references to Corporate Social Responsibility and to Measures against Corruption as contained, e.g., in some recent PTAs.

- *Provision of public services*

Pursuant to the Annex on Telecommunications (para 5(a)), foreign service suppliers have to be accorded, *inter alia*, access to and use of public networks and services on 'reasonable and non-discriminatory terms and conditions'. This is a potentially powerful requirement that might help dispel concerns about protectionist abuses of existing exclusivity rights and, thus, encourage foreign participation, including via an established presence, in potential user industries. However, two qualifications need to be borne in mind. First, this obligation covers only supplies to industries in GATS-scheduled services and, second, there are no equivalent WTO rules governing access to and use of other infrastructurally relevant sectors (e.g. road, rail and air transport; postal services; certain financial services). The question arises of whether such gaps could be filled in the context of the current initiative.

D.2 Investment facilitation via Additional Commitments

GATS Article XVIII allows for the negotiation of commitments on issues other than Market Access and National Treatment, 'including those regarding qualifications, standards and licensing matters'. Such additional commitments are inscribed in a separate column of a Member's schedule specifically designed for this purpose. Certain elements of what might be covered by such commitments, including competition and regulation related disciplines, could also be inscribed in tariff schedules under the GATT.²⁸ However, the scope of such bindings would essentially be confined to trade in products without extending to the regulatory and administrative requirements governing the treatment of producers/suppliers.

Additional Commitments under GATS Article XVIII could be used to clarify administrative issues, including authorization requirements and procedures, specify the treatment of flawed applications, clarify relevant timeframes, fees and charges, etc. They could also address more substantive policy concerns relating, for example, to the provision of public services (e.g. transport or health in remote regions), supervision and control of activities with systemic implications (e.g. prudential or data privacy-related concerns), independence of the authorities involved, and so forth. Like any other GATS commitments, such ACs could be phased-in over specified periods and/or be modified in view of regional or sectoral variations within a country's investment regime.

With the exception of the Reference Paper on basic telecommunications, WTO Members have made limited use of Article XVIII to date.²⁹ The Reference Paper was prepared among interested governments during the negotiations on these services, which were concluded in early 1997. It contains various regulatory disciplines as well as transparency-related and institutional obligations. The number of GATS schedules embedding the Reference Paper today exceeds 100.³⁰

Of course, a Member would be free at any time to unilaterally undertake whatever Additional Commitment it deems appropriate. Nevertheless, a coordinated approach among interested Members might be preferable for at least two reasons. First, it would help avoid excessive fragmentation of regulatory conditions and, thus,

²⁷ A major supplier is defined to be a supplier which has the 'ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities or (b) use of its position in the market'.

²⁸ Hoekman, B. & Mavroidis, P. C. (2017). MFN clubs and scheduling Additional Commitments in the GATT: Learning from the GATS. *European Journal of International Law*, 28(2), 387-407.

²⁹ For example, Canada has scheduled Additional Commitments providing that foreign legal consultants are exempt, temporarily, from normal accreditation requirements in certain Provinces. See WTO (1994). Canada. *Schedule of specific commitments*. Document GATS/SC/16. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

³⁰ Remarkably, given the sensitivities surrounding the use of 'necessity tests', Section 3 of the Paper postulates, *inter alia*, that universal service obligations should not be more burdensome than necessary for the universal service defined by the Member.

reduce information and compliance costs. Second, it might prove easier to 'sell' to sceptical Members as an initiative that would not undermine existing commitments but rather enhance their relevance with regard to the most important mode of supplying services.

Box 2 contains possible elements which, if further specified, could form part of a Reference Paper on investment facilitation which might be implemented under GATS Article XVIII. Though the focus here is on initiatives by host countries, guidelines and recommendations for source countries could also be included. Any of these elements could sit alongside full commitments on MA and NT in the areas concerned.

The question arises once more about compliance and enforcement. High expectations might yet again not be warranted given the experience with existing GATS disciplines (e.g. Articles III (transparency), V (economic integration), VI (domestic regulation) and VII (recognition)). On the other hand, continued work on such issues might generate positive learning externalities for the government agencies involved.

Of course, whatever the incentives or disciplines that might form part of ACs under the GATS, it is easy to conceive of equivalents in non-service sectors. There is a major challenge, however: the creation of a consistent and coherent system that, ideally, extends over the whole economy. Would all Members be prepared to contribute to, or at least, condone such an initiative which, in non-service sectors, would not build upon already existing framework provisions?

E. LOOKING AHEAD

Recent developments in global trade governance and the world economy do not provide the ideal backdrop to advance new multilateral initiatives. The WTO is engulfed in a deep crisis and the COVID-19 pandemic has precipitated the most profound global economic contraction since the 1930s. In such circumstances, the imperative of saving lives and preserving jobs, rather than pursuing sustainability-enhancing aims, has tended to predominate. Yet, all is not bleak, as can be adduced from the rising traction that the Investment Facilitation for Development initiative has nevertheless continued to garner. Three reasons suggest that such a trend may well gain further momentum once the economic recovery sets in more durably.

First, as noted by Sauvant, the UN's Sustainable Development Goals (SDGs) have become the lodestar of international economic policy.³¹ Such a trend will not suddenly abate. Already, many voices have been heard calling for the post-pandemic pursuit of more sustainable and inclusive growth trajectories aligned with SDG aims.

Second are learning-by-doing effects. An increasing number of PTAs feature sustainability-promoting elements that could facilitate their future adoption and refinement.

Third, there are generally fewer intractably entrenched positions concerning multilateral rules on services under the GATS than exist, for example, under long-established Understandings and Agreements in merchandise trade. This may not only provide more (and much needed) negotiating space, but also create scope for soft-law provisions which may be more faithfully respected, through regular peer review, than elsewhere.

What then should an IFF4D look like? Were such a framework to deal solely with investment facilitation in services, potentially relevant GATS templates are readily available. Interested Members could indeed launch a coordinated attempt with a view to modifying their services commitments pursuant to GATS Article XXI (Modification of Schedules). This could be done at any time. As in previous cases, including the extended Uruguay Round negotiations on telecommunications and financial services, participants could draft a protocol of acceptance to which any agreed improvements in commitments and upgrades of regulatory disciplines, possibly via Additional Commitments, could be attached. The Protocols would enter into force upon ratification by all participants or otherwise, if not achievable within a set timeframe, proceed from a joint decision by ratifying Members (presumably on a critical mass basis). The existing GATS framework,

³¹ Sauvant, K. P. (2019). Promoting sustainable FDI through international investment agreements. *Columbia FDI Perspectives*, No. 251.

including its definitional and institutional structure, would remain intact. A Committee on Investment Facilitation could provide a forum for future consultations among Members. Enforcement would occur via the WTO's dispute settlement mechanism.

However, as indicated, the above observations apply to investments in service sectors only. Investments in other sectors, which make up more than one-third of cross-border investment activity, come up against empty normative space within the current scope of the WTO Agreement. Pursuant to Article X:1, any Member could initiate a proposal to amend the Agreement and widen its substantive remit to address investment issues more broadly. It would then be for the Ministerial Conference to agree, by consensus and within 90 days, whether to submit the proposal to Members for acceptance. In the absence of consensus, the Conference could then decide by a two-thirds majority vote. The latter scenario has never been tried, and it does not arguably offer a realistic option in the current, politically fraught, context.

An IFF4D should not in principle consist of two separate regimes for goods and for services. The WTO's long-entrenched (and increasingly artificial) goods-services divide does not reflect the reality of contemporary cross-border commerce. While such rule-making fusion commands innate intuitive appeal,³² current approaches raise various questions that may need to be addressed in the future course of the negotiations. These include:

(a) The role of development-related flexibilities in services trade. A key facet of the WTO's Trade Facilitation Agreement (TFA) is the possibility for developing and least-developed countries to self-designate their implementation programme. Simply extending this flexibility might prove incompatible with certain GATS obligations, both conditional (e.g. Article VI:1) and unconditional (Article III:4), that are already in force (Section C.2).

(b) The structural differences between GATT and GATS (GATT: product-related, focus on-cross-border trade; GATS: product- and producer-related, with four modes of supply). Current rules governing subsidies and similar incentives differ significantly between goods and services trade, and the same is true for key regulatory disciplines, including the role of 'necessity tests'.³³

(c) The definitional scope of 'investment'. There are important disparities between the definitions used in BITs or PTAs, proposals tabled in discussions on investment facilitation, and the GATS concept of commercial presence, where the supplier concerned must be majority-owned or controlled by natural or juridical persons of another Member.

(d) While the GATS' Annex on the Movement of Natural Persons provides significant scope for the use (or denial) of business visas related to services trade, its relevance for movements in non-service sectors deserves further attention.

(e) The precise delineation of the envisaged MFN-clause. The notion of non-discrimination between '*like investments and investors*', as suggested for inclusion in an IFF4D, would deviate from the respective GATS definition and those of many BITs and PTAs.³⁴

(f) Existing transparency and notification obligations under WTO Agreements, where the perennial challenge of improving compliance remains.

³² See, e.g., Hufbauer, G. & Stephenson, S. (2014). The case for a framework agreement on investment. *Columbia FDI Perspectives*, No. 116; Sauv , P. (2019). To fuse, not to fuse, or simply confuse? Assessing the case for normative convergence between goods and services trade law. *Journal of International Economic Law*, 22(3), 355-371.; and Peng, S. Y. (2020). A New trade regime for the servitization of manufacturing: Rethinking the goods-services dichotomy. *Journal of World Trade*, 54(5), 669 -726.

³³ An overview of such tests and their interpretation in WTO dispute cases is contained in a Note by the WTO Secretariat, WTO (2011). "Necessity Tests" in the WTO, *Note by the Secretariat, Addendum*. WTO document S/WPDR/W/27/Add.1. Last accessed on 23 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=104958,101788,28129&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

³⁴ As noted by Diebold (*supra* n 10, at 138 and 195f), there is little Appellate Body jurisprudence on the MFN clause as enshrined in GATS Article II. In two potentially relevant cases (*EC - Bananas III* and *Canada - Autos*), the likeness issue played no central role.

(g) Information exchanges and cooperation among Members. The use of existing instruments such as the Trade Policy Review Mechanism would need to be further explored.

Two options can be thus identified for any future initiative that aims to advance more than hortatory provisions. The resulting IFF4D could consist of: (i) one broadly applicable understanding among Members on rules and principles covering investments in all sectors; or (ii) two parallel regimes, one for services-related investments and one for other types of commercial investments. In both cases, however, it appears likely that some Members would prefer to sit on the fence.

Option (i) would ensure greater cross-sectoral coherence while compromising on interpretative clarity and legal enforceability in a WTO context. On the one hand, greater uniformity in treatment across sectors might help avoid what are often, and increasingly in the digital age, arbitrary differences in the classification of products/processes under either GATT or GATS (3D printing and contract manufacturing being cases in point).³⁵ On the other hand, it would be quite challenging, in the area of services, to distinguish between the GATS-consistent elements that are already enforceable under the Agreement and other elements that are intended to apply on a best-endeavours basis. In this context, what would be the role of the GATS' MFN clause? In contrast, all provisions in non-service sectors would apply on a best-endeavours basis. It is difficult to conceive of a legally binding outcome in these sectors. An additional element of confusion is the possibility, discussed above, that the same terms might have different meanings depending on whether they are used in a goods or services context. Finally, the services track of option (ii) could be made fully consistent with, and thus enforceable under, the GATS. Whenever there are new elements, these might be implemented via Additional Commitments and/or could be triggered by the MFN clause of Article II. Application in non-service sectors would be governed, again, by a separate set of (non-legally binding) rules.

IF discussions are still at an early stage, with formal negotiations just now commencing.³⁶ For a variety of reasons, it remains difficult to conceive of an outcome that all at once (a) fits under the WTO's umbrella; (b) applies across virtually all sectors and Members; and (c) is free of major incompatibilities. While commercial presence (i.e., Mode 3) accounts for a majority of services trade subject to GATS disciplines and commitments, it has no GATT brethren. Developing a generic set of rules is thus comparable to cultivating segments of virgin land. This Note has sought to draw attention, from a GATS/services vantage point, to various rule-design challenges that negotiators will need to contend with, and pay greater attention to, as the IF talks advance. Solutions to these challenges will be required for interested Members to get what they want (and need): a coherent multilateral framework for investment facilitation for development.

³⁵ Manufacturing operations based on inputs owned by others ('contract manufacturing') are classified as services, while identical operations using inputs owned by the manufacturer are beyond the definitional scope of both GATS and GATT. (Twenty-six Members have scheduled GATS commitments on contract manufacturing.) See Adlung, R. & Zhang, W. (2013). Trade disciplines with a trapdoor: Contract manufacturing. *Journal of International Economic Law*, 16(2), 383-408.

³⁶ WTO (2020 September 25). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 23 November 2020 from: https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.

REFERENCES

- Adlung, R. (2016). International rules governing foreign direct investment in services: Investment treaties versus the GATS. *The Journal of World Investment & Trade*, 17(1), 47-85.
- Adlung, R. & Miroudot, S. (2012). Poison in the wine: Tracing GATS-minus commitments in regional trade agreements. *Journal of World Trade*, 46(5), 1045-1082.
- Adlung, R. & Soprana, M. (2013). SMEs in services trade - A GATS perspective. *Intereconomics*, 48(1), 41-50.
- Adlung, R. & Zhang, W. (2013). Trade disciplines with a trapdoor: Contract manufacturing. *Journal of International Economic Law*, 16(2), 383-408.
- Diebold, N. F. (2010). *Non-discrimination in international trade in services: 'Likeness' in WTO/GATS*. Cambridge University Press, Cambridge. DOI:10.1017/CBO9780511675843
- Hoekman, B. & Mavroidis, P. C. (2017). MFN clubs and scheduling Additional Commitments in the GATT: Learning from the GATS. *European Journal of International Law*, 28(2), 387-407.
- Hufbauer, G. & Stephenson, S. (2014). The case for a framework agreement on investment. *Columbia FDI Perspectives*, No. 116.
- Karlas, J. & Parížek, M. (2020). Supply of policy information in the World Trade Organization: Cross-national compliance with one-time and regular notification obligations, 1995–2014. *World Trade Review*, 19(1), 30-50.
- Nairobi Ministerial Declaration, 21 December 2015, WTO document WT/MIN(15)/DEC. Last accessed on 25 November 2020 from https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.
- Peng, S. Y. (2020). A New trade regime for the servitization of manufacturing: Rethinking the goods-services dichotomy. *Journal of World Trade*, 54(5), 669 -726.
- Sauvant, K. P. (2019). Promoting sustainable FDI through international investment agreements. *Columbia FDI Perspectives*, No. 251.
- Sauvé, P. (2002). Completing the GATS framework: Addressing Uruguay Round leftovers. *Aussenwirtschaft*, 57(3), 301-342.
- Sauvé, P. (2019). To fuse, not to fuse, or simply confuse? Assessing the case for normative convergence between goods and services trade law. *Journal of International Economic Law*, 22(3), 355-371.
- Sauvé, P. & Soprana, M. (2018). Disciplining service sector subsidies: Where do we stand and where can we (realistically) go?. *Journal of International Economic Law*, 21(3), 599-619.
- United Nations (2020). *Preferential market access for services and service suppliers – Services waiver*. UN LDCs' Portal. Last accessed on 25 November 2020 from: <https://www.un.org/ldcportal/preferential-market-access-for-services-and-service-suppliers/>
- UNCTAD (United Nations Conference on Trade and Development). (2015). *Generalized System of Preferences*. UNCTAD website. Last accessed on 25 November 2020 from: <https://unctad.org/topic/trade-agreements/generalized-system-of-preferences>

WTO (World Trade Organization). (1991). Services sectoral classification list. *Note by the Secretariat*. WTO document MTN.GNS/W/120. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

WTO (1994). Canada. *Schedule of specific commitments*. Document GATS/SC/16. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=3671,34022,23146,20088,5079,22853,14218,24805&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

WTO (1998). *Disciplines on Domestic Regulation in the Accountancy Sector*. Document S/L/64. Last accessed on 25 November 2020 from: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/L/64.pdf>

WTO (2009). Presence of Natural Persons (Mode 4). *Background Note by the Secretariat*. WTO document S/C/W/30. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=108652

WTO (2011). "Necessity Tests" in the WTO. *Note by the Secretariat, Addendum*. WTO document SWPDR/W/27/Add.1. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=104958,101788,28129&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

WTO (2017). *Disciplines on Domestic Regulation. Revision*. WTO document WT/GC/190/Rev.2; WT/MIN(17)/7/Rev.2. Last accessed on 25 November 2020 from: https://docs.wto.org/dol2fe/pages/fe_search/fe_s_s009-dp.aspx?language=e&catalogueidlist=240862

WTO (2019). *World Trade Report 2019 - The future of services trade*. Geneva: Author. Last accessed on 25 November 2020 from: https://www.wto.org/english/res_e/booksp_e/00_wtr19_e.pdf

WTO (2020 September 25). *Structured discussions on investment facilitation for development move into negotiating mode*. Press Release, Geneva: World Trade Organization. Last accessed on 25 November 2020 from: https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.