

Report on the 4th virtual meeting of the Expert Network on a Multilateral Framework on Investment Facilitation for Development

6 October 2020

The 4th virtual meeting of the Expert Network on a multilateral Framework on Investment Facilitation for Development (IFF4D) took place on 6 October 2020. The meeting had 17 participants, including the project support team and speakers.

The meeting was chaired by Mr. Axel Berger (Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik, DIE) and concluded by Karl P. Sauvant (Resident Senior Fellow, Columbia University/CCSI). Mr. Rudolf Adlung, independent trade policy analyst, former Counsellor, Trade in Services Division at the WTO, and Mr. Robert Basedow, Assistant Professor International Political Economy, European Institute, London School of Economics, provided input addressing the questions below. The invitation, the list of participants, and Mr. Adlung's presentation on "*Investment Facilitation: Issues for Discussion*" are attached.

The meeting focused on the issue of integrating an IFF4D into the WTO. The following questions were addressed:

- What are the legal possibilities for integrating a IFF4D into the WTO?
- What can be learned from existing WTO agreements (e.g., the GATS) to avoid contradictions?
- What is the potential purpose and function of a committee on investment facilitation?
- How does a potential IFF4D relate to the dispute settlement system of the WTO?
- How can the WTO system support the implementation of an IFF4D?

The discussion was held under Chatham House Rules to enable frank and open exchange.

Discussion highlights

I. Legal possibilities for integrating an IFF4D into the WTO

The creation of separate IF regimes for services and non-service sectors

- **Services:** Currently the General Agreement on Trade in Services (GATS) provides a framework that includes various IF-related measures such as various publication and notification requirements, creation of enquiry points, and creation of contact points by economically advanced Members to provide developing-country suppliers with commercially

relevant information. Such measures could be complemented by tailored Additional Commitments (ACs) (Art. XVIII). ACs may include qualifications standards, and licensing matters. ACs could be used to pursue a variety of development and sustainability-related objectives (e.g., creation of an information and advisory center for SMEs, free provision of professional education and training, compliance with certain SDG-related principles, prevention of collusion among major suppliers). Relevant initiatives might be taken at any time, either on an individual basis or in coordination by a ‘critical mass’ of interested Members. Note that any measure affecting trade in services is subject to the MFN requirement of GATS.

- **Non-service sectors:** Relevant investment facilitation measures need to be defined in the absence of an existing framework for non-service sectors. Investment facilitation measures could be implemented either in the form of: (a) open plurilateral agreements, supported by a consensus of the Members, by which relevant obligations would be assumed by participants on an MFN basis or (b) informal understandings among interested Members independent of the WTO system. Such informal understandings would not be enforceable through the WTO dispute settlement system. However, depending on the envisaged measures, there is no need for an enforceable, binding agreement. The WTO Consolidated Text on an IF framework currently includes many “best effort” clauses.

Common regime: A Common regime framework could be implemented that would be equivalent to recent Preferential Trade Agreements (PTAs). PTAs combine provisions on cross-border trade in services, defined to embrace modes 1 and 2, with separate cross-cutting chapters on investment and the movement of people. However, it is unrealistic to expect Members to embark on such an enormous project in current circumstances. A more practical alternative could consist of a cross-sectoral framework that applies to the scheduling of IF measures that focus on administrative, procedural and regulatory issues. The creation of such a framework, possibly in the form of an Annex to the WTO Agreement, however, would need to be consensus-driven.

Open plurilateral agreement: An open plurilateral agreement, without the need to distinguish between services and non-services sectors, was raised as a legal possibility for an IFF4D. In order to arrive at an open plurilateral agreement under WTO law that can be serviced by the Secretariate, the first stage will always require consensus, which could be vetoed by any Member. Members can agree on a “critical mass” that would trigger the application of the agreement. It was said that reaching a consensus in the current political climate may be very difficult. The only way around this requirement might be a soft law model.

Soft law model for an IFF4D: Developing countries may not have incentives to commit to a binding agreement on IF. Developing countries that are struggling to attract investment, and which are not part of the deep RTAs because they do not have the capacity to commit to these agreements, may be interested in an IFF4D that is not binding but rather functions as an information sharing platform. Such a platform would be based on soft law, best practices and learning rather than legally binding commitments. This approach is similar to many trade facilitation measures that are implemented through soft law, or the model of the Organisation for Economic Co-operation and Development (OECD). An opposing view raised in the meeting was that the WTO is a rule making organization, and therefore a soft law approach would be a fundamental reorientation of the WTO. In addition, if the IFF4D is only based on soft law, any commitment to provide capacity building and technical assistance would be voluntary. The soft

law approach does not require an IFF4D under the WTO; UNCTAD provides soft law guidelines and various other international organizations are dealing with providing IF technical assistance (while struggling to receive funding).

Hybrid model for an IFF4D: The TFA is considered a success because it addresses known barriers with respect to country borders, and public officials have experience with such problems, which makes it easier to address these problems in a practical manner. In addition, the agreement focuses on technical issues, leaving political debates aside. The WTO and other international organizations have provided technical assistance helping countries implement the agreement. Another reason for the TFA's success was that it did not create many new commitments but specified GATT commitments and created recommendations and soft law around trade facilitation issues. An IFF4D could take the same approach of combining hard law and "best effort" provisions. Such "best effort" provisions will always be hard to enforce because of interpretation issues. The problem may be that many developing countries will not sign an IFF4D agreement if it includes hard law commitments.

II. Learning from existing WTO agreements to avoid contradictions

The current draft of the IFF4D contains various GATS-inconsistent definitions (e.g., mandate of enquiry points), definitional modifications and uncertainties (e.g., meaning of 'investment', treatment of recognition measures and MFN exemptions), and non-existing flexibilities (e.g., an implementation programme covering already applicable obligations). A conflict-of-rules provision could ensure the continued prevalence of relevant treaty obligations. However, it would not protect governments from misinterpreting their scope for action. Countries can distinguish obligations that are already hard obligations under the GATS by excluding them from the IFF4D.

III. Committee on Investment Facilitation

The possible functions and agenda for a Committee on Investment Facilitation might include:

- Undertaking ongoing investment-facilitating initiatives, possibly based on WTO Secretariat reports;
- Exchanging views on implementation of the IF4DF, sharing experiences and providing a communication platform for best practices;
- Providing a platform for peer pressure: Countries should notify the Members with respect to their implementation stages of the IFF4D, and such progress should be tracked routinely;
- Establishing initiatives to promote *sustainability*-related investment objectives;
- Addressing distortions in investment disciplines to overcome the current financial crises;
- Providing an outreach platform for other international organizations, NGOs and states to cooperate and improve the investment climate among developing and developed countries. In this context it was noted that there is no experience in the WTO for institutionalizing stakeholders' contributions, and that there may be a risk in such close collaboration.
- Bringing together the trade and investment communities.

IV. Relevance of WTO's dispute settlement understanding (DSU)

The WTO's DSU is fully applicable to 'measures by Members affecting trade in services' (GATS Art. I:1). Any Member is free at any time to invoke the DSU, challenging other Members' non-compliance with the Agreement. The TFA opens the door for complaints under the DSU. However, the TFA's implementation programme for developing countries and LDCs provides specific phase-in periods, which are reflected in a parallel exemption from DSU challenges. Similar provisions might be included in an IFF4D. However, because market access and investment protection are exempt from the IFF4D, the likelihood of legal challenges may remain remote in general.

In practice, Governments are quite hesitant to use the DSU for services-related matters. Since 1995, there have been about 40 consultations over services-related disputes in the GATS context. This reflects the fact that the commitments under the GATS are rather shallow and difficult to interpret. It is easier to seek remedies under BITs than to motivate governments to use the DSU of the WTO.

With respect to the IFF4D, it was emphasized during the discussion that countries would be very hesitant to enter into such commitments that subject them to WTO dispute settlement mechanisms (DSMs). For years, the WTO DSM has been criticized for not being constructive with respect to sustainable development, so this approach would be hard to align as the IFF4D is supposed to contribute to sustainable development. As such, the role of a DSM in contributing to the sustainable development goal seems very limited. It was also mentioned that an IFF4D will likely not be subjected to a DSM because the IFF is much more intrusive into the domestic system.

V. WTO system supporting the implementation of a IFF4D

As stated above, there are difficulties in establishing an IFF4D under the WTO system, the main one being the consensus requirement in dealing with issues not covered by existing multilateral frameworks due to the current political climate. However, this may be mitigated by the desire of a number of countries to have a binding agreement combined with the needs of developing countries and LDCs for technical assistance and capacity building, which would be provided under the agreements as hard commitments.

The added value of an IFF4D coming under the WTO would be that the Framework would be a mirror to the TFA commitments and bring developing countries to a technical assistance program that would help them achieve implementation capacity. This is what makes the TFA attractive, and this would also be true for a WTO agreement for IF. This would be true even when taking a hybrid approach, as the added value would lay in the support for developing countries to achieve implementation capacity. In addition, the added value of the WTO is that it is a platform. The WTO has a major benefit that it can bring together the trade and investment communities and other stakeholders.

Annex 1: Invitation



d.i.e

Deutsches Institut für
Entwicklungspolitik



German Development
Institute

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 4th meeting of the Expert Network will take place on **6 October 2020** from 9:00am to 10:30am Eastern Daylight-Saving Time (EDT), 15:00 to 16:30 Central European Time (CET), and 21:00 to 22:30 China Standard Time (CST). To attend the meeting, we kindly ask you to [register here](#).

The meeting will focus on the issue of **integrating an international framework on investment facilitation for development into the WTO**. More specifically, we would like to discuss the following questions with you:

- What are the legal possibilities to integrate a Multilateral Framework on Investment Facilitation into the WTO?
- What can be learned from existing WTO agreements (e.g. the GATS) to avoid contradictions?
- What is the potential purpose and function of a committee on investment facilitation?
- How does a potential Multilateral Framework on Investment Facilitation for Development relate to the dispute settlement system of the WTO?
- How can the WTO system support the implementation of a Multilateral Framework on Investment Facilitation for Development?

The discussion will be held under Chatham House Rule to enable 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:

Rudolf Adlung, independent trade policy analyst, former Counsellor, Trade in Services Division at the WTO.

Robert Basedow, Assistant Professor International Political Economy, European Institute, London School of Economics.

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

To enhance the dialogue in the session and ensure that we address as many questions as practicable, we would like to hear from you – prior to the meeting – by submitting your questions through this [link](#). To join the meeting, kindly, click on the link below shortly before 15:00pm CET on 6 October 2020 and follow the instructions. If you are not able to connect online, you could connect using the dial-up options provided at the end of this email.

[Join Zoom 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, we attach the reports of the last meetings of the Expert Network.

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

Rudolf Adlung

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.

Robert Basedow

Robert Basedow is an Assistant Professor in International Political Economy. Prior to joining the LSE, he was an official at the Organisation for Economic Co-Operation and Development (OECD)

in Paris, worked as consultant for the European Institutions, the German government and was a Max Weber Postdoctoral Fellow at the European University Institute (EUI) in Florence. He studied political science and political economy at the LSE, Sciences Po Paris, the University of St. Gallen and the Moscow State Institute for International Relations (MGIMO). His research focuses on EU trade and investment policy, international dispute settlement mechanisms and international regulatory cooperation and conflict.

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.

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>), participated in various events relating to it and currently assists 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), stepping down as its 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
Axel	Berger	German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
Ayelet	Berman	National University of Singapore (NUS)
Manjiao	Chi	University of International Business and Economics (UIBE)
Pablo Agustín	Escobar-Ullauri	Permanent Mission of Ecuador to the WTO
Geoffrey	Gertz	Brookings Institute
Ahmad	Ghouri	University of Sussex
Anabel	Gonzalez	Peterson Institute for International Economics (PIIE)
Federico	Ortino	King's College London
Christian	Pitsch	Gesellschaft für Internationale Zusammenarbeit
Karl P.	Sauvant	Columbia Center on Sustainable Investment (CCSI)

Sherry	Stephenson	Member PECC Services Network
Matthew	Stephenson	World Economic Forum (WEF)
Speakers		
Rudolf	Adlung	Independent Trade Policy Analyst, former Counsellor, WTO Trade in Services Division
Robert	Basedow	Assistant Professor International Political Economy, European Institute, London School of Economics
Secretariat		
Mohamad	Fakhreddin	International Trade Centre (ITC)
Jean-Sébastien	Roure	International Trade Centre (ITC)
Quan	Zhao	International Trade Centre (ITC)

Annex 3: Presentation by Rudolf Adlung - Investment Facilitation: Issues for Discussion

Investment Facilitation: Issues for Discussion (Excluding Market Access, Investment Protection and ISDS)

1. How to integrate Investment-Facilitation (IF) disciplines into the WTO?¹

Option A: Creation of separate IF regimes for services and non-service sectors

(i) Services

A multilateral framework exists: the GATS. Various IF-related disciplines are in tune with generally applicable obligations under Arts. III, IV, VI, etc.; they could be complemented by tailored Additional Commitments (Art. XVIII).

(a) *General Obligations and Disciplines (GATS, Part II)*:² Various publication and notification requirements; creation of Enquiry Points by all Members; creation of contact points by economically advanced Members to provide developing-country suppliers with commercially relevant information; reasonable, objective and impartial administration of measures of general application; some (rudimentary) regulatory disciplines;

(b) *Additional Commitments (ACs)*: May relate to qualifications, standards, licensing matters, etc. as scheduled by the Member(s) concerned. ACs could be used to pursue a variety of development,- competition- and/or environment-related objectives (e.g., creation of an information and advisory center for SMEs, free provision of professional education and training, compliance with certain SDG-related principles, prevention of collusion among major suppliers). Relevant initiatives might be taken at any time, either on an individual basis or, possibly in coordination, by a ‘critical mass’ of interested Members.

¹ The questions were raised by the organizers of the Expert Network.

² These obligations apply quasi automatically as specified in the GATS. While certain obligations are applicable across all services (‘unconditional obligations’), others are conditional on the existence of specific commitments.

To be kept in mind: Any measure affecting trade in services is subject to the MFN requirement of GATS Art. II:1 which applies across all sectors, whether scheduled or not. (A case in point: fair-and-equitable-treatment provisions in BITs; see section 4. below.) Departures are permissible in specified circumstances (MFN exemptions, preferential trade agreements (PTAs), recognition measures, general and security exceptions, preferences under the 'LDC waiver') and in certain 'sensitive' sectors.³

(ii) Non-service sectors

Potentially relevant investment disciplines - transparency-/notification-/regulation-related - remain to be defined in the absence of an existing framework. (There is no mode-3 equivalent governing investments in non-service sectors.) The respective disciplines could realistically be implemented either in the form of

- (a) open plurilateral agreements where, within a commonly established structure (→ consensus), relevant obligations would be assumed by participants on an MFN basis or
- (b) informal understandings among interested Members independent of the WTO system.

'GATT-extra' projects (option (a)) might be rendered legally enforceable through inclusion in Appendix 1 of the WTO's Dispute Settlement Understanding (DSU).⁴ However, Members may have more pressing concerns these days ...

Challenge: The borderline between goods and services trade is blurred in sectors such as '3D printing' or 'contract manufacturing'.⁵ (It is thus difficult to assess, in the absence of further information, whether and where GATS- and/or GATT-disciplines apply to individual stages in an international supply chain.) In addition, there are classification problems between certain service sectors, in particular in Internet-related areas.⁶ The underlying classification dates from the early 1990s and reflects the economic situation at the time. Back to the 'drawing board'? The resource implications would be enormous, and the outcome highly uncertain.

Option B: Common regime ('marriage')

At first glance, it might appear tempting to develop a multilateral equivalent to recent PTAs which combines provisions on cross-border trade in services, defined to embrace modes 1 and 2, with separate cross-cutting chapters on investment and movements of person.⁷ However, it is unrealistic to expect Members to embark on such an enormous project in current circumstances.

A more workable alternative, at first glance at least, could consist of a cross-sectoral framework that applies to the scheduling of IF disciplines of an administrative, procedural and regulatory nature. While the creation of such a framework, possibly in the form of an Annex to

³ Maritime transport is subject to a special provision (MFN-related), core segments of air transport are excluded, and prudential measures are carved-out under the GATS Annex on Financial Services. See Matsushita et al (2017).

⁴ Adlung and Mamdouh (2018)

⁵ 'Contract manufacturing' consists of manufacturing operations based on inputs owned by others. Close to 30 Members have inscribed relevant commitments in their services schedules. Adlung and Zhang (2013).

⁶ Mitchell and Mishra (2017).

⁷ See, for example, USMCA, CPTPP or CETA.

the WTO Agreement, would need to be consensus-driven, the assumption of relevant obligations, MFN-based, would then be left to interested Members (see section (ii)(a) above).

Yet, significant gaps between the two underlying Agreements - GATT and GATS - would remain to be addressed (or ignored?). These concern, inter alia, the precise scope of the MFN clause, the role of international standards, or the difference between regulatory obligations that apply quasi automatically (section (i)(a) above) and others that would need to be specified, etc.

The easy solution (?)

2. Possibility for an Investment Facilitation Framework (IFF) to build on WTO Agreements?

Services trade:

The necessary elements are in place (see 1.A): General obligations and disciplines combined with possibility of Additional Commitments (Example: 4th and 5th Protocol to GATS). In addition, there is a harmonization effect across Members generated by the MFN clause in GATS Art. II:1.

BUT:

- The current draft IFF contains various GATS-inconsistent elements (e.g., mandate of enquiry points), definitional modifications and uncertainties (e.g. likeness requirement, meaning of 'investment', treatment of recognition measures and MFN exemptions), and non-existing flexibilities (e.g. implementation programme covering already applicable obligations). While a conflict-of-rules provision could ensure the continued prevalence of relevant treaty obligations, it would not protect governments from misinterpreting their scope for action.
- If market access and investment protection are excluded from the IFF discussions, what is the remaining role (if any) of the national-treatment obligation? Ensuring non-discriminatory extension of subsidies? (However: Very many PTAs provide even more leeway for subsidies than the respective Members' GATS commitments.)⁸ Avoiding regulatory discrimination, in terms of fees, charges, processing periods, etc.? (The current draft IFF expects authorization fees and charges to be commensurate with the processing costs incurred, etc., but there is no explicit non-discrimination requirement.)

Other sectors (accounting for close to 40 % of world investment stock): ???

3. Issues to be raised in a Committee on Investment Facilitation?

A possible agenda might include:

- Ongoing investment-facilitating initiatives, possibly based on WTO Secretariat reports (e.g. in the TPRM context).
- Exchange of views on implementation / functioning of the IFF.
- Relationship with negotiations on domestic regulation and e-commerce.
- Role of existing WTO/GATS disciplines and of IF-related ACs. Possible extension of certain conditional obligations to non-scheduled service sectors and beyond?

⁸ Adlung and Miroudot (2012).

- Learning from recent PTAs? Main patterns? ⁹ Scope for harmonization?
- Initiatives to promote *sustainability*-related investment objectives, e.g. in BIT (re-) negotiations or in the G20 context.
- Distortions in investment disciplines attributable to ...
 - ▶ State ownership, government procurement, provision of public services (e.g. education, health), special status of ‘sensitive’ sectors (e.g., finance, transport),
 - ▶ lavish incentives provided by financially well-endowed administrations, including attempts to ‘re-shore’ jobs lost in international competition and/or
 - ▶ subsidized acquisitions of foreign companies in strategic industries.
- Need for targeted disciplines to protect the commercial interests of smaller, less politically connected players.

4. **Relevance of WTO’s dispute settlement understanding (DSU)?**

Already fully applicable to ‘measures by Members affecting trade in services’ (GATS Art. I:1). Any Member would thus be free at any time to invoke the DSU with a view to challenging other Members’ non-compliance with the Agreement, including its General Obligations and Disciplines (section 1.(i)(a)) and any ACs that might have been scheduled under Art. XVIII (section 1.(ii)(b)). In the same vein, Art. 24.8 of the Trade Facilitation Agreement (TFA) opens the door, in the event of conflicts, for complaints under the DSU. With an important facet: the TFA’s implementation programme for developing countries and LDCs, with specified phase-in periods, is reflected in a parallel exemption from DSU challenges. Similar provisions might be included in an IFF - provided their scope remains confined to newly created GATS-plus disciplines.

BUT:

- Governments are quite hesitant to ‘go to court’ over services-related problems. Since 1995, the GATS was invoked in 5% of the 600-odd consultations held under WTO DSU.¹⁰
Background: Low levels of liberalization in UR schedules. / Country-internal coordination problems. / Tacit understanding to mutually tolerate interpretational uncertainties (see below). / Availability of a more attractive option for affected investors: ISDS. / Structural particularity of the GATS regimes (more flexibility in the use of policy instruments such as subsidies or domestic regulation, yet no ‘emergency exit’ (safeguard clause)).¹¹
- Since market access and investment protection are exempt from a future IF framework, the likelihood of legal challenges may remain remote in general.

There are elephants in the room, however: Close to 3’000 BITs and other IIAs. Their potential relevance in a WTO/GATS context, including under the GATS’ MFN clause, has been widely ignored to date. (As noted by Footer (2013), the type of treatment guaranteed under mode 3 is the same as that covered by investor protection clauses under many BITs.) No more than 20 Members recognized the (partial) overlap with GATS mode 3 and listed relevant MFN exemptions.¹²

⁹ According to the WTO Secretariat, most existing PTAs focus on improving transparency and facilitating administrative procedures rather than developing GATS-plus regulatory substance. See WTO (2019).

¹⁰ Over the same period, some 700 out of a total of about 1’000 known ISDS cases dealt with services.

¹¹ Sauv  and Soprana (2018).

¹² Concerning the relevance of the GATS’ MFN provision for investment treaties see, e.g., Molinuevo (2012), Adlung (2016), and Creach (2019).

Other sectors: It might be possible, hypothetically, to integrate relevant disciplines into Appendix 1 of the DSU (see 1.A(ii)(a)).¹³ However, ...

5. Support from the WTO system?

At present, an ‘average Member’ has scheduled no more than 30% of the service sectors contained in the generally used classification list (LDCs: 15%; Developed economies: 65%). In turn, this strongly affects the application of those IF-related obligations that are triggered by the existence of specific commitments, of whatever type, in the sectors concerned.

Moreover, ACs under Art. XVIII have played a limited role to date, except in telecommunications where over 90 Members scheduled the Reference Paper (sometimes with modifications).

Problem areas to be kept in mind:

- (i) Exclusion of certain sensitive (sub-)sectors from coverage (air transport!) and interpretational uncertainties (e.g. scope of the prudential carve-out in financial services)
- (ii) Definitional/structural differences between GATS and GATT (→ Relevance of national-treatment obligation; modal coverage; disciplines on subsidies and domestic regulation; treatment of digital trade;¹⁴ availability of international standards; ...)
- (iii) Consensus requirement in dealing with issues not covered by existing multilateral frameworks (e.g. investment in non-service sectors). To be replaced by best-endavour provisions?¹⁵
- (iv) The role of investment deterrents such as widespread disregard of notification requirements, non-extension of recognition initiatives to interested Members, imprecise commitments (use of unspecified Economic Needs Tests, etc.).
- (v) Absence of political tailwind. The WTO currently suffers from ‘a paralyzed negotiating arm, an only halfway functional dispute settlement system and deeply entrenched political divisions.’¹⁶ Is there still a common vision of a rules-based trading system, including among the ‘heavyweights’?

6. The remaining challenge: Developing a coherent concept

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¹³ Adlung and Mamdouh (2018).

¹⁴ Sauvé (2019), Mitchell and Mishra (2017).

¹⁵ Nairobi Ministerial Declaration: ‘Any Decision to launch negotiations multilaterally on such [non-DDA] issues would need to be agreed by all Members.’ Would multilateral negotiations towards a best-endavour outcome be deemed acceptable?

¹⁶ Inside US Trade, 31 August.2020.

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