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SCOPE OF AN INVESTMENT FACILITATION FRAMEWORK: IMPLICATIONS FOR ITS DEVELOPMENTAL CLAIM

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DISCLAIMER: The Third World Network (TWN) prepared this analytic piece with the purpose of contributing to the discussions pertaining to a multilateral investment facilitation (IF) framework. While it discusses issues related to the proposed framework, TWN considers that the fundamental starting question remains whether there is a need for a multilateral investment facilitation framework and whether investment should be regulated under the rules of the World Trade Organization (WTO). The historical record, including the failed experiences pertaining to the multilateral investment agreement and the previous attempts to bring investment into the WTO (as one of the 'Singapore issues'), points towards the inadequacy of a one-size-fits-all approach to investment-related disciplines.

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1. INTRODUCTION

Discussions on investment facilitation are proceeding within the context of a joint plurilateral initiative, which is being hosted by the WTO.[2] This initiative is not officially part of the WTO agenda of work. At the 11th WTO Ministerial Conference, consensus was not reached among WTO Members over the proposal presented by Friends of Investment Facilitation for Development (FIFD), comprising at the time 16 WTO Members, to adopt a decision to establish an Investment Facilitation Group within the WTO. In light of the lack of consensus, States supportive of the initiative decided to proceed through 'plurilateral' discussions. The initiative is presented as one focused on facilitating investment for development purposes.

This brief discusses the potential approach to scope under the proposed framework and its relation to operationalising the stated objectives of the initiative. The scope of any treaty is central to determining the extent of the obligation undertaken by a Contracting Party, including the institutional, legislative and other changes it will imply at the domestic level, as well as its intrusiveness on national policy space. The breadth and depth of the scope is determined by the definitions to be adopted. Operationalising any developmental objective targeted by the framework ought to start from the design of the scope and definitions. For those purposes, it is important to pay close attention to whether the mix of proposals being discussed provides the grounds and legal tools for targeting investment for development. Attention is also needed towards the impact of the proposed disciplines on the policy and regulatory tools that countries need in order to actively and dynamically link foreign direct investment (FDI) to domestic developmental goals.

According to publicly available documents and presentations by proponents of the initiative,[1] the proposed scope will cover all and any investors and investments in both services and non-services sectors. The brief discusses six main issue areas including the 'measures', 'investments', 'sectors' and 'levels of government' to be covered under the proposed IF framework, the limitations of relying on exceptions, and the potential overlap with existing WTO agreements.

2. 'MEASURES' TO BE COVERED UNDER THE PROPOSED IF FRAMEWORK

The breadth of measures to be covered under the framework will define the extent to which the proposed substantive obligations, such as in the areas of transparency and regulatory disciplines, will be burdensome and intrusive on national regulatory space. A scope that covers existing as well as new measures that affect, directly or indirectly, investments in all sectors, will consequently leave significant implications across the different substantive obligations to be included under the framework.

Under WTO law, the term 'measures' implies a broad scope. Under the General Agreement on Trade in Services (GATS), for example, the definition of 'measures' is non-exhaustive, covering any measure by a Member, in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.[3] It has been argued that the open list in Article XXVIII GATS, providing that '"measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form', reveals that 'none of the various regulatory instruments is a priori excluded from the scope of the GATS'.[4] It follows that, given that the list extends to 'any other form', any government action can be a 'measure' according to the GATS.[5] There is no indication that only legislative or administrative actions should qualify as measures in the GATS context.[6] Furthermore, the inclusion of administrative activities

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2 The term 'hosted' is used here given that the meetings pertaining to this plurilateral initiative are held at the premises of the WTO, and the WTO website is used to archive working documents and proposals pertaining to it. The use of the term 'hosted' does not imply that these discussions are an official part of the WTO processes.

3 See Article XXVIII.a GATS.

4 Rüdiger Wolfrum and Peter-Tobias Stoll (eds), WTO-Trade in Services, Max Planck Commentaries on International Trade Law, page 54, referencing: *P. M. Michaelis*, Dienstleistungshandel (GATS), in: *M. Hilf & S. Oeter* (eds), WTO-Recht, Rechtsordnung des Welthandels, 2005, 375, 391, and *Krajewski*, National Regulation and Trade Liberalization in Services, 2003.

5 Ibid.

6 Max Planck, supra note 4, referencing GATT Panel Report, *Japan – Semi-Conductors*, BISD 35S/116, para 106.

indicates that the measure need not have legal quality; it can also be a mere factual activity, whereby '… [e]ven promotional or information activities of the government can be considered measures'.[7] Taking such an approach in the context of the GATS, it has been argued that 'it is not necessary for a measure to regulate or directly aim at influencing trade in services; rather, even non-final, indirect and de facto restrictions are sufficient to broaden the scope of the GATS'.[8]

WTO jurisprudence has interpreted broadly the term 'affecting'. In interpreting the wording 'measures affecting trade in services', the panel in *EC-Bananas III* provided that '*[n]o measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.*'[9] In *EC-Bananas III*, the Appellate Body, while dealing with the question of whether the GATS is applicable in cases where measures regulating trade in goods (e.g. import licensing procedures) have indirect negative effects on trade in services, held that the term 'affecting' should be interpreted broadly.[10] It argued that the ordinary meaning of the word 'affecting' implied a measure that has 'an effect on', which indicated a broad scope of application.[11] In the context of Art. III GATT 1994, previous panels found that the term 'affecting' was wider in scope than such terms as 'regulating' or 'governing'.[12]

If such an approach is adopted under a future IF framework, it will mean that no measure affecting investment would be excluded from the coverage of the framework. The potential use of the terms 'that affect' or 'related to' (for example 'measures affecting/related to FDI') under the IF framework would indicate that the scope will not necessarily be restricted to those measures directly dealing with investment facilitation. The types of measures that would be covered under such an approach could vary from investment codes, public-private partnership laws, to licensing procedures and requirements, technical standards, central bank regulations, and administrative measures and proceedings, among others. Measures indirectly dealing with investment facilitation, such as an environmental policy that could potentially affect which investments are allowed by a certain jurisdiction, or a health policy that affects the way licences and technical standards are designed for investments in the pharmaceutical or medical sectors, could be potentially caught under such a scope. Moreover, where the framework extends coverage to measures that are 'adopted' or 'maintained', it would apply to those existing as well as new measures. Thus, measures that countries had in place before the framework was designed could be questioned under the disciplines to be adopted under the IF framework. Where the boundary line is to be drawn will be a matter of legal interpretation, especially where the agreement does not offer any guidance.

3. 'INVESTMENTS' TO BE COVERED UNDER THE PROPOSED IF FRAMEWORK

The definition to be adopted for 'investments' covered under the proposed IF framework will play a crucial role in enhancing, or limiting thereof, the potential to target investment facilitation towards developmental objectives. The broader and less specific the definition of investments, the harder it will be to achieve a developmental objective as a result of the framework. For example, if the framework is to adopt an asset-based definition of investment similar to the one usually included in old-style international investment agreements (IIAs), the result could be in contradiction with the stated objective of targeting investment facilitation to development (See in the Annex an example of such an asset-based definition). Such asset-based definitions of investment usually provide that the term 'investment' means every kind of asset owned

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7 Max Planck, supra note 4.

8 Max Planck supra note 4, page 45, referencing *acharias*, WissR 38 (2005), 290, 302; *Michaelis*, in: *Hilf & Oeter* (eds), 375, 391, para 43.

9 See: Panel report in *EC-Bananas III*, para 7.285, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm

10 See *EC-Bananas III*, WT/DS27/AB/R, para 220 clarifying that Art. XXVIII lit. c GATS does not determine the meaning of 'affecting trade in services', referenced in Max Planck supra note 4, page 45.

11 Ibid, para 220.

12 Panel Reports in the Bananas dispute: *EC-Bananas III (Ecuador)*, WT/ DS27/R/ECU, *EC-Bananas III (Mexico)*, WT/DS27/R/MEX, *EC-Bananas III (US)*, WT/ DS27/R/USA, para 7.281; the GATT Panel Report, *Italy – Agricultural Machinery*, BISD 7S/60, para 12, referenced in Max Planck supra note 4, page 45.

or controlled, directly or indirectly, by an investor. They also include a non-exhaustive list of tangible and intangible assets, including portfolio investments in shares, stocks or other forms of equity participation, as well as intellectual property rights. For example, under an asset-based definition that covers different stages of the investment, the proposed framework could potentially cover the enterprise itself and 'any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges'.[13] Investment arbitration tribunals have noted that '[o]ne striking feature of this definition is the fact that all items listed in this provision are mentioned for illustrative purposes. They do not have the effect of restricting in any manner the notion of an investment and the scope of the subject matter of the [bilateral investment treaty] BIT'.[14]

Under international investment agreements, broad definitions of covered 'investments' and 'investors' meant that treaty protections extend to assets that may not have any economic benefit to the host economy. Many countries have been trying to address this through revisiting the scope and definition of protected investments and investors under their IIAs, in order to target those provisions to investments with developmental added value, and not just to any investments.[15] This includes through adopting an enterprise-based definition, explicitly excluding portfolio investments from the definition of 'investment', requiring an effective contribution to the host State's economy and its development, and limiting the assets covered by the definition of 'investment' through an exhaustive list.

Adopting an asset-based definition of covered investments under the proposed IF framework will be in tension with the overall objectives often associated with this initiative, which link it with facilitating investment for development. A broad definition of investments as such will make the impact of the substantive obligations to be adopted under the framework much more intrusive on a country's policy space. It will also be contradictory to efforts that many countries are undertaking to tighten the boundaries of the definition of covered investments under their international investment treaties, as mentioned above. For example, if an IF framework will include a provision on transfers related to investment coupled with a broad non-exhaustive definition of 'investment', that would undermine a country's efforts to limit the impact of the transfers provision under their IIAs through carefully and narrowly crafting the definition of 'covered investment'. The interaction with IIAs could become more complicated if commitments undertaken under the proposed IF framework get imported under the umbrella of IIAs, and consequently become arbitrable through the investor-State dispute settlement (ISDS) built into most existing IIAs. (For more discussion on this point, see below the box entitled: Potential challenges in the interaction between an IF framework and IIAs.)

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13 See for example: Korea-USA investment agreement (2007) and Australia-USA investment agreement (2004). Other investment agreements with an asset-based definition could be found on the following website: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

14 Extracts from award in *Patrick Mitchell v. The Democratic Republic of Congo*, Case No. ARB/99/7, paragraph 46, available on https://www.italaw.com/sites/default/files/case-documents/italaw1195.pdf

15 See for example, UNCTAD World Investment Report 2020, page 115, available at: https://unctad.org/en/PublicationsLibrary/wir2020_en.pdf. The report shows that most of the IIAs concluded in 2019 narrowed the definition of investment (e.g. by referring to the characteristics of an investment; exclusion of: portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts). See also IIA mapping by UNCTAD, available at : https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. The mapping shows that that most of the IIAs that exclude portfolio investment from the definition of 'investment' or use an enterprise-based definition of 'investment' were signed in the last 10 years.

3.1 Potential challenges in the interaction between an IF framework and IIAs

The joint ministerial statement underlying the initiative on IF provided that: 'These discussions shall also seek to clarify the framework's relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organizations.'[16]

The interaction between the proposed IF framework and IIAs raises multiple issues for consideration, which are briefly discussed below:

1. The commitments under the proposed framework could potentially filter into the world of IIAs and ISDS where countries are party to IIAs that include umbrella clauses, broad 'fair and equitable treatment' (FET) clauses, or broad most-favoured nation (MFN) clauses. Through such clauses, future undertakings on IF could be brought under the protective 'umbrella' of the international investment treaty, meaning that their breach becomes a violation of the IIA.[17] This would potentially make those commitments arbitrable through ISDS.

For example, an umbrella clause could read as follows:

'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party',[18] or 'Each Party shall observe any obligation it may have entered into with regard to investments.'[19]

According to the United Nations Conference on Trade and Development (UNCTAD), 1,109 out of the 2,577 treaties that they have mapped include an umbrella clause.[20] Such a clause requires a host State to respect any obligation that it has assumed with regard to a specific investment, such as obligations undertaken in an investment contract or concession agreement, or potentially a multilateral framework on IF. Investment law scholarship have noted that '[f]or the majority of scholars, the clause imposes a substantive treaty obligation on the host state to comply with its undertakings towards investments, including contractual commitments. Any non-compliance with or breach of such undertakings, even if of a commercial nature, constitutes a violation of this treaty obligation'.[21] As shown above, umbrella clauses are usually broadly written to cover every conceivable obligation of the host State. Investors often rely on an umbrella clause as a catch-all provision to pursue claims when a host State's actions do not otherwise breach the BIT.[22]

16 See: Joint Ministerial Statement on Investment Facilitation for Development WT/MIN(17)/59.

17 UNCTAD's Reform Package for the International Investment Regime (2018 edition), page 46, available at: https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime- 2018-edition-

18 See: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Moldova of 19 March 1996 (and which entered into force on 30 July 1998), Article 2. Available at http://www.unctad.org/sections/dite/iia/docs/bits/uk moldova.pdf.

19 See: Treaty between the United States of America and the Republic of Moldova concerning the Encouragement and Reciprocal Protection of Investment of 21 April 1993 (and which entered into force on 25 November 1994), Article II.3, available at http://www.unctad.org/sections/dite/iia/docs/bits/us_moldova.pdf.

20 See: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

21 See: Newcombe, A, Paradell, L, Law and Practice of Investment Treaties. Standards of Treatment, Kluwer Law International, 2009, p. 466.

22 Source: http://uk.practicallaw.com/8-519-0939

At least one investment tribunal had opined that a broad MFN clause, that does not restrict its application to any particular kind of substantive obligation under the bilateral investment treaty (BIT), 'can import an umbrella clause (which is substantive in nature)' from another BIT, 'thereby extending the more favourable standard of protection granted by the "umbrella" clause in [other BITs]'.[23] In elaborating on its opinion, the tribunal in the same case 'reject[ed] the Respondent's argument that "umbrella" clauses are procedural in nature and cannot be imported through an MFN clause because they give a means of protection for contractual and other undertakings, rather than a unique standard of behaviour'.[24] Where such an approach is to be adopted, and besides being available in a high number of treaties, the umbrella clause could be imported into treaties that do not include it.

Similarly, the commitments to be undertaken under a new multilateral framework on IF could trickle into the world of IIAs and ISDS through a broadly worded and interpreted 'fair and equitable treatment' (FET) clause. Violation of this standard has been the most frequently successful claim in ISDS cases followed by direct and indirect expropriation claims.[25] This provision has become a 'catch all' clause, especially given the indeterminacy of its threshold of liability. It has been interpreted to cover 'legitimate expectations' and claims in regard to failure of a State to act in a transparent manner in its administrative decision making.[26] If fulfilment of obligations under a future multilateral framework on IF would be argued as 'legitimate expectations' of a foreign investor, then the IF undertakings could potentially find their way into the jurisdiction of international investment arbitration tribunals. Or, if a tribunal determines that a breach of another separate international agreement would constitute a breach of the FET standards, then the investment facilitation undertakings could be imported into and enforced via ISDS in an IIA through the FET provision.[27]

In addition, the most-favoured nation (MFN) clause under IIAs might operate as a route for importing IF undertakings under an IIA, especially where the IIA covers similar investment facilitation provisions. For example, a contracting party to the IF framework might implement its commitments in a way that excludes investors from States not party to the IF framework (for example, might not offer the same opportunities to comment on proposed measures or might not offer the same liberalisation of the transfers related to their investments). In that case, and where there is an IIA with a broad MFN provision (i.e. that does not exclude trade agreements from its scope) and ISDS, the investor covered by such an IIA could sue the State for failure in extending to it the same treatment it offers to investors from other State Parties to the IF framework.

2. Some proponents of the IF initiative link it with the process of reforming investment agreements. They note that investment facilitation is a missing element under traditional IIAs and that agreeing an IF framework could contribute to reforming and balancing the IIA regime. These claims have significant limitations especially since the proposed IF initiative is not geared to serve as a successive agreement

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23 Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013, para 396. Source: Investor-State law guide. In this case, the investor argued that Moldova was in breach of its specific undertakings contained in a July 1, 2008 Agreement on location of duty-free store network at the state border crossing points and the related Tender. The investor turned to the MFN clause in the France-Moldova BIT, based on which the claim was brought, in order to import an 'umbrella' clause from either the Moldova-UK or the Moldova-USA BIT, through which the investor wanted to make the breach of the 2008 Agreement arbitrable under ISDS provided in the France-Moldova BIT. The MFN clause of the France-Moldova BIT reads as follows: 'Each Contracting Party shall extend, in its territory and in its maritime area, to nationals and companies of the other Contracting Party, regarding their investments and activities connected with these investments, treatment not less favourable than that granted to its nationals or companies, or treatment granted to the nationals and companies of the most favoured nation, if the latter is more favourable...' (See article 4 of the BIT).

24 Ibid, para 395. Source: Investor-State law guide.

25 See: https://investmentpolicy.unctad.org/investment-dispute-settlement

26 See: International Institute for Sustainable Development (IISD), 'Investment Treaties and Why they Matter to Sustainable Development', page 12 and IISD, Review of recent investment arbitration decisions 2012-2013, page 17.

27 In an attempt to avoid such a situation, Article 9.6.3 CPTPP provides that: 'determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article'. Text available at: https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/9.-Investment-Chapter.pdf

that could potentially help amend existing commitments under IIAs. So as of now, one cannot expect that this initiative would add value to the process of reforming existing IIAs.

3. The effectiveness of attempts to design a legal shield through which the undertakings under a future multilateral framework on IF could potentially be shielded from being imported under the realm of IIAs and ISDS could be limited. This is so because a lot would depend on how the investment arbitral tribunals would approach their jurisdiction, and how they apply the umbrella clauses or other provisions of the IIA and interpret their relation to the IF undertakings. States joining an IF framework might seek to craft language under the IF framework for the purposes of stopping contracting parties and covered investors of IIAs from referring to or relying on the IF framework for any purpose pertaining to IIAs. However, an arbitral tribunal looking into an investor's claim of breach of the umbrella clause or FET due to lack of fulfilment of obligations under the IF framework will be deciding its own subject matter jurisdiction. Tribunals will have to decide their jurisdiction based on the instruments containing the parties' consent to jurisdiction[28], usually including those in the IIA itself, and the International Centre for Settlement of Investment Disputes (ICSID) Convention rules or other arbitral rules. It is well known that tribunals are the judge of their own competence and that the ICSID Convention confers this exclusive power upon the tribunal.[29] Furthermore, previous awards included clear statements that unless a party to an IIA waives its rights to adjudication or the IIA imposes a restriction of the exercise of subject-matter jurisdiction, the tribunal will have jurisdiction over the claim as long as the IIA and the applicable arbitral rules allow.[30] In light of the above, whether States could alter the jurisdiction of investment arbitral tribunals through provisions to be crafted under a future multilateral framework on IF is an issue that needs close consideration. This includes considering situations where one party to the IIA is a contracting party to the IF framework while the other party to the IIA has not joined the IF framework.

Depending on the definition of 'investments' to be adopted, the framework could potentially be addressing issues that overlap or interact with WTO agreements, such as the General Agreement on Tariffs and Trade (GATT), the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), the GATS, and potentially the Trade-Related Intellectual Property Rights Agreement (TRIPS). Such an overlap could emerge if the definition of investments to be covered under the IF framework does not clarify the difference between 'goods and services invested' and 'goods and services produced by the investment'. For example, under investment agreements, the differentiation between 'goods or services invested' and 'goods or services produced' has not always been clear-cut and could be confused depending on the adopted interpretations.[31] For example, if investments covered under the proposed IF framework will

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28 https://www.univie.ac.at/intlaw/wordpress/pdf/0101001_Schreuer_Jurisdiction-and-Applicable-Law-in-Investment-Treaty-Arbitration.pdf

29 See for example: *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Procedural Order No. 2, 16 October 2002, para 22, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para 8, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* I, ICSID Case No. ARB/98/2, Decision on Jurisdiction, 8 May 2002 [French], para 80.

30 See for example: *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Dissenting Opinion of Joseph P Klock Jr., 18 January 2017, para 5, where it was noted that unless a party waives its rights to adjudication or the treaty imposes a restriction of the exercise of subject matter jurisdiction the tribunal has jurisdiction over the claim as long as the requirements of the ICSID Convention Article 25(1) are met.

31 For example, in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, the activities associated with investments were taken to be qualifying as an 'investment'. In the dissenting opinion by Mr Yawovi Agboyibo (9 February 2004), para 17 provided the following: '…17. Besides, I do not think that the flexibility of the notion of investment can be used to cover every service referred to in Article I (c) of the BIT. A service, just like property, receivables, debt or any other element referred to in Article I (c) of the BIT, may not be qualified as an investment unless it is involved in a production process. "Goods or services invested" cannot be confused with "goods or services produced". In the present instance, the services provided to third parties by the Claimant in the DRC and fees billed or returned for consideration are products of investment. It could be otherwise only if these fees were reinvested. Then they would constitute an investment within the meaning of Article I (c) (vii) of the Treaty.' Article I(c) refers to the asset-based definition included in the IIA between the DRC and the United States (available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/828/download).

be taken to mean those goods and services produced as a result of the investment, such as goods and services sold locally and not necessarily those goods and services re-invested, the resulting rules could potentially overlap with the TBT and SPS rules.

Furthermore, it is important to closely consider the stage of investment to which the proposed framework would apply. For example, if the framework is to apply to all the stages in the cycle of investment, including 'admission, establishment, acquisition and expansion…' of investments, it might potentially carry pre-establishment implications. In investment treaty jurisprudence 'admission' has been taken to mean 'pre-establishment stage'. For example, in the decision on jurisdiction taken in the *Philip Morris v. Uruguay case*,[32] 'admission and acceptance' were both found to refer to the 'pre-establishment' stage. The right to admit is the same as the right to regulate whether to allow investments to enter.[33] If this is to be the case, the proposed IF framework will not be limited to the post-establishment stage and could potentially impact pre-establishment issues, including market access.

4. A NEGATIVE-LIST APPROACH TO DETERMINING 'SECTORS' TO BE COVERED UNDER THE PROPOSED IF FRAMEWORK

Under the WTO's standard practice, Member States actively and selectively choose the sectors in which to undertake commitments, which is referred to as a positive-list approach. This is, for example, the approach under the GATS. This feature enables Members to undertake commitments in line with their developmental level and objectives. It is thus crucial in the process of aligning commitments under a certain treaty with domestic developmental goals. If the IF framework is to cover all FDI in all sectors, except for specific exclusions to be decided by participating countries (such as through a non-conforming list or carve-out), it with diverge from the usual practice under other WTO agreements. Such a 'negative-list approach' will pose multiple challenges from a developmental perspective. For example, it will require countries to carefully identify all the related sectors which need to be excluded in order to safeguard a sensitive sector. It will also mean that it will automatically apply to new sectors as long as they are not carved out.

UNCTAD had noted that the negative-list approach '…narrows considerably the discretion of a host country, since it can only use its prerogative to exclude specific activities from the operation of the standard at the time an agreement is completed… At the same time, a host country may protect certain industries or activities by way of a "negative list", although this involves a difficult assessment as to which industries or activities need such special treatment…'.[34] UNCTAD also pointed out that 'the negative-list approach is demanding in terms of resources. It requires a thorough audit of existing domestic policies. It may be better suited for countries that have a sophisticated domestic regulatory regime and sufficient institutional capacity for properly designing and negotiating their schedules of commitments'[35] (See in the Annex a more detailed listing of concerns with the negative-list approach). Generally, it is unclear why such an open approach would be considered more adequate for a multilateral framework on investment facilitation, despite the stated objective of targeting investment facilitation for development.

5. 'LEVELS OF GOVERNMENT' WHICH THE PROPOSED IF FRAMEWORK WOULD APPLY TO

If the framework adopts the approach under the GATS, the obligations will fall on multiple levels of government, including central, regional and local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities (See GATS Article 1.3a). According to the GATS, '[i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their

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32 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013

33 Ibid, para 170.

34 See: http://unctad.org/en/Docs/psiteiitd11v4.en.pdf

35 See: http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

observance by regional and local governments and authorities and non-governmental bodies within its territory'.[36] Such language provides a limited safeguard, but requires that WTO Members take active steps to ensure compliance by different levels of covered government, governmental authorities, and non-governmental bodies. Yet, without such a safeguard, the obligation will be strictly binding on all levels of government.[37] Despite the limited safeguard that language such as 'take such reasonable measures as may be available to it' may provide, such obligation could still be problematic in some countries where the national constitution provides autonomy for regional governments in certain areas (e.g. land). Many regulations are undertaken at the regional and local level, such as regulations based on district or municipal planning.[38] Moreover, the local level is often involved in the provision of basic services, including sewerage services, transportation services (e.g. underground and trams), educational services (e.g. primary schools), and cultural services (e.g. public libraries and theatres).[39] Furthermore, adopting the GATS language would mean that the proposed framework would apply to measures of authorities which are not directly part of the government, such as independent regulatory commissions or other public entities vested with regulatory competence, and non-governmental bodies, such as any association, institution or other entity regardless of its legal constitution and its status under public or private law if governmental powers were delegated to it.[40]

When it comes to dispute settlement, the provisions of the dispute settlement understanding relating to compensation and suspension of obligations apply where a Member State has not been able to secure the observance of the agreement in its territory. Article 22.9 of the WTO Dispute Settlement Understanding (DSU)[41] provides that:

'9. *The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance*.'[42]

It follows that if an IF framework comes to be covered under the DSU, a State that took commitments under the framework could be questioned and potentially sued for lack of observance by regional levels or other subdivisions of government. Recent investment agreements, particularly those focused on facilitation, such as the India-Brazil 2020 agreement, exclude measures by local governments from the scope of the treaty.[43]

Unlike the movement of goods, an investment is an ongoing project that extends over a period of time and its regulation usually extends over the whole cycle of the investment. A traded good may have environmental impacts that need to be regulated after entry at the border. But a factory making that product has land allocation, zoning, labour, financial, currency, taxation, environmental, health and safety, possibly indigenous law issues, competition, and other regulatory implications, before and after it is established. This shows the extent of diversity in the regulations and regulatory authorities that would be entailed in facilitating an

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36 General Agreement on Trade in Services, Article 1.3, available at: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

37 For example, the USFTA investment chapters are usually strictly binding on all levels of government because they are missing this GATS safeguard.

38 Rüdiger Wolfrum and Peter-Tobias Stoll (eds), WTO - Trade in Services, Max Planck Commentaries on International Trade Law, p. 55.

39 Ibid, Max Planck.

40 Max Planck, supra note 42, page 55, referencing Krajewski, National Regulation and Trade Liberalization in Services, 2003. Such non-governmental associations could include private associations licensing doctors or lawyers.

41 This point is discussed on the assumption that one possible consideration by proponents of the framework on IF is to lodge it as one of the covered agreements under the WTO DSU. The intricacies and legality points pertaining to this issue are not discussed under this note.

42 See Article 22 of the Dispute Settlement Understanding on Compensation and the Suspension of Concessions, available at: https://www.wto.org/english/docs_e/legal_e/legal_e.htm

43 See Article 3.6 of Brazil-India Treaty: 'This Treaty shall not apply to: any measure by a local government, provided that it is consistent with Article 5 of this Treaty.'

investment as such. Authorities involved in an investment vary from the investment promotion authorities to regulatory authorities concerned with environmental, health and other public policy considerations, competition and tax authorities, local authorities responsible for land and other resources governed locally, among others. In comparison, the main authorities involved in procedures pertaining to facilitating the trade of a good are usually customs authorities and sometimes authorities responsible for sanitary and phytosanitary measures and technical regulations, standards, and conformity assessments. The scope proposed under the IF framework does not seem comparable to that under any other agreement that WTO Members have designed. The implications of such a scope will be much more far-reaching in comparison to the GATS given the breadth of the measures and sectors proposed to be covered under the scope of the IF framework. This implies that a much larger number of domestic institutions and authorities will be implicated under the framework. Given the above, if the scope of the proposed IF framework would extend to all levels of government, this could potentially exert an enormous pressure on a country's institutional capacities.

6. THE LIMITATIONS OF RELYING ON EXCEPTIONS

If a very broad scope is to be adopted under the proposed IF framework, exceptions to scope might not be enough to deal with the potential implications. For example, where public concessions are carved out from the scope of an IF framework, this will not apply to the investment made as a result of concessions. If a company gets a water concession then establishes a water purification plant (which would be an investment) to implement the water concession, the proposed IF rules would apply to the water purification plant, but not the concession itself.

Besides, Members participating in the IF framework might consider adopting the language of the WTO general exceptions or exceptions pertaining to prudential measures or security concerns. In that case, it is important to consider the effectiveness of these exceptions in the context of a very broad scope. General exceptions are subject to interpretations that could limit their effectiveness as grounds to justify policy and regulatory action taken in the public interest and the exceptional measures taken by governments in times of crisis, such as the COVID-19-compounded health and economic crisis. For example, experience shows that in order to benefit from the general exceptions under Articles XX GATT and XIV GATS, a Member will have to meet multiple tests established in these articles, including its chapeau. A 2019 study shows that '[o]nly two of the 48 instances when a country tried to use the WTO exception ostensibly designed to protect environmental and health policies was successful'.[44] In a 2019 decision by the WTO dispute settlement panel in which the 'national security exception' under Article XXI GATT was central, the panel determined that actions taken under Article XXI(b) are reviewable.[45] The panel found that the three subparagraphs of section (b) which lay out the circumstances in which a Member can invoke national security exception can be objectively ascertained by the panel.[46] Particularly, the panel found that it can review the measures to determine whether one of the three circumstances laid out in the subparagraphs of section (b) occurred at the time of the measure's imposition and whether the measure has a plausible connection to the circumstance identified.[47]

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44 Public Citizen, 'Fatally Flawed WTO Dispute System', available at: https://www.citizen.org/article/fatally-flawed-wto-dispute-system-2/

45 For example, see: William Alan Reinch and Jack Caporal, 'The WTO's First Ruling on National Security: What Does it Mean for the United States?', available at: https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states

46 Section b of Article XXI provides the following: 'Nothing in this Agreement shall be construed…(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; …'

47 William Alan Reinch and Jack Caporal, supra note 49.

Regarding the prudential defence test under the GATS Annex on Financial Services, this exception could be significantly watered down given the apparent contradiction between the first and the second sentences, which has been referred to as a 'self-cancelling loophole'.[48] The 'self-cancelling' section reads as follows: '*Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.*'[49] In order to avoid the challenging implications of such language, the self-cancelling wording has not been included in recent free trade agreements (FTAs) such as the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) Article 13.16 on prudential carve-out.[50]

7. CHALLENGING OVERLAP WITH EXISTING WTO AGREEMENTS

The potential overlap with existing agreements of the WTO will eventually determine the legal issues that may arise when designing the architecture of the IF framework, particularly if seeking to bring the results of the initiative under the WTO acquis. For example, the proposed IF framework would overlap with the GATS particularly covering all commitments undertaken by Members in respect of commercial presence in the services sector. It is not proposed that the IF initiative would only apply to those sectors where WTO Members have taken commitments under the GATS. So it will also extend beyond the GATS to cover all other commercial presence in services sectors (where Members have not taken commitments) in addition to commercial presence in non-services sectors, such as mining, agriculture and pharmaceuticals. The definition of investment or FDI to be adopted by the plurilateral initiative will determine the extent to which the scope will go beyond commercial presence (i.e. mode 3) under GATS.

The broad scope of measures proposed under the IF framework would overlap with those covered by the scope of the initiatives (both multilateral and plurilateral) on services domestic regulation disciplines. The latter covers measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services as well as authorisations for the supply of services. However, the latter is supposed to cover only those sectors where States have taken commitments (positive list). Given this overlap, and taking into consideration that the proposed IF substantive disciplines are very similar to the proposed disciplines on domestic regulations in services, participating countries will have to assess the implications of this overlap, and any challenges that may arise if the two sets of disciplines will co-exist in a parallel and potentially un-harmonised manner under the WTO umbrella.[51] This issue could be of particular concern to those countries who had opposed the extension of disciplines on services domestic regulations to all services sectors, and not only those sectors where a State has taken commitments, as well as countries generally concerned with the intrusiveness of domestic regulations disciplines on their policy and regulatory space. Such overlap might require explicit regulation

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48 See: John Anwesen, The Prudential Carve-Out Clause: is Risk the New Corrupt Moral?, 4 PENN. ST. J.L. & INT'L AFF. 749 (2016). Available at: https://elibrary.law.psu.edu/jlia/vol4/iss2/15, referencing G-20 Pittsburgh Summit, Special Pittsburgh G-20 Report from Public Citizen's Global Trade Watch, No Meaningful Safeguards for Prudential Measures in World Trade Organization's Financial Service Deregulation Agreements, at 3-5 (Sept. 2009); see also Communication from Barbados, supra note 49, ¶ 11; Alan Alexandroff et al, Global Trade Watch on the Prudential Carve Out, International Economic Law and Policy Blog (Dec. 12, 2015, 11:57 PM), http://worldtradelaw.typepad.com/ielpblog/2010/05/global-trade-watch-on-the-prudential-carve-out.html.

49 See Article 2(b) of the Annex on Financial Services available here: https://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#annfin

50 Article 13.16 CETA on prudential carve-out provides: 'This Agreement does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons, including: (a) the protection of investors, depositors, policy-holders, or persons to whom a financial institution, cross-border financial service supplier, or financial service supplier owes a fiduciary duty; (b) the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution, cross-border financial service supplier, or financial service supplier; or (c) ensuring the integrity and stability of a Party's financial system….', available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf . See also Article 104 of the CARIFORM-EU EPA, available at: http://publications.europa.eu/resource/cellar/8bcaf1bd-fc10-4309-9663-93215df1fc56.0006.05/DOC_124

51 Proponents of the IF plurilateral initiative recognise that the overlap with disciplines on domestic regulations in services is an issue that needs to be addressed, calling for 'ensur(ing) that these two plurilateral efforts are coherent and not in contradiction with each other'. See for example, presentation by Sherry Stephenson during a webinar entitled 'Integrating an international framework on investment facilitation for development into the WTO' (28 May 2020), available at https://drive.google.com/file/d/1HWp2h5XZlZ1_m4cDCWhDRs3uheZy2n6W/view

of the relationship between the two, similar to how some trade agreements organise the relationship between the investment and services chapters.[52] In case the disciplines agreed under the IF initiative imply an amendment to GATS disciplines in so far as they apply to GATS mode 3 on commercial presence, then WTO rules pertaining to amendments might have to be fulfilled (i.e. Article X.5 of the WTO agreement). Given that the IF initiative covers issues that potentially stretch across two WTO agreements namely the GATT and the GATS, any attempts to integrate the IF outcomes into the WTO will have to grapple with the lack of a coherent framework under which the new rules will be tucked.[53] Where the IF plurilateral initiative covers issues that have not been part of the WTO agreements so far, WTO Members will have to consider whether it will be possible to bring such issues under the WTO acquis without consensus of the WTO membership.

8. CONCLUDING REMARKS

The way scope is to be crafted under the proposed IF framework will play a crucial role in determining the ability to target the facilitation of investment to developmental purposes. Countries taking part in negotiating the IF framework may wish to pay attention to the scope of measures to be covered under the proposed framework, scope of investments and the stage of investment to be covered, as well as the level of government to be covered.

With a negative-list approach, the scope of sectors and domestic laws and regulations potentially reviewable under the proposed framework will be very broad. Exceptions crafted along the lines of the WTO general exceptions and prudential measures carve-out under the GATS do not provide enough grounds to guarantee the policy and regulatory space the countries need in the process of ensuring coherence and positive interaction between FDI and development.

A broad scope coupled with a burdensome transparency regime and broad multilateral disciplines will undermine the policy and regulatory tools that countries need to dynamically link foreign direct investment to developmental goals. Effectively targeting investment facilitation to development would require an approach that is based on a positive-list approach, that is specific and restricted in terms of the investments and measures to be covered as well as levels of government to which the framework will apply.

On a more fundamental level, the added-value of this initiative in comparison to existing investment facilitation efforts remains unclear. Experiences of developing countries revealed that what they need in order to facilitate investment rests to a large extent on building national capacities, through technical assistance, in order to enhance informed decision-making processes, to properly analyse investment proposals, and to foster better collaborative processes to understand investments, investors and their needs.[54]

This note is part of a series that will address multiple elements under discussion pertaining to the proposed multilateral investment facilitation (IF) framework. Other notes will address:

- the transparency regime proposed under the IF framework;
- the multilateral standards proposed under the IF framework;
- special and differential treatment;
- the architecture of the proposed framework and its interaction with the WTO.

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[52] On this issue, see for example: OECD, 'The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements', in International Investment Law: Understanding Concepts and Tracking Innovations (2008).

[53] Proponents of the IF plurilateral initiative recognise these potential challenges. For example, see the presentation of Rudolph Adlung in a webinar entitled 'Integrating an international framework on investment facilitation for development into the WTO' (28 May 2020), available at https://drive.google.com/file/d/1HWp2h5XZlZ1_m4cDCWhDRs3uheZy2n6W/view

[54] See for example, Martin Dietrich Brauch and Howard Mann, 'Investment facilitation for sustainable development: Getting it right for developing countries', Columbia FDI Perspectives Perspectives No. 259 (August 2019), available at: http://ccsi.columbia.edu/files/2018/10/No-259-Mann-and-Brauch-FINAL.pdf. See also: Martin Dietrich Brauch Howard Mann Nathalie Bernasconi-Osterwalder (January 2019), Report of SADC-IISD Investment Facilitation Workshop, available at: https://www.iisd.org/sites/default/files/publications/sadc-iisd-investment-facilitation-workshop.pdf

ANNEXES

A. Example of an asset-based definition of investment

The term 'investment' means every kind of asset owned or controlled, directly or indirectly, by an investor, including:

1. (i) an enterprise and a branch of an enterprise;
2. (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
3. (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
4. (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
5. (v) claims to money and to any performance under contract having a financial value;
6. (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
7. (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations, and permits, including those for the exploration and exploitation of natural resources; and
8. (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

An investment includes the amounts yielded by investments, in particular, profit, interest, capital gains, dividends, royalties and fees. A change in the form in which assets are invested does not affect their character as investment.

B. Concerns with the negative-list approach

(This material is collated by Sanya Reid Smith, Third World Network)

The following collates concerns raised by international organisations, governments and legal experts on the use of a negative-list approach, particularly in the context of liberalisation of services. The investment facilitation initiative is so far discussed as a regulatory framework based on a negative-list approach, and does not directly deal with liberalisation and market access. However, States will still need to consider excluding certain sectors from the commitments to be undertaken under the framework for various policy reasons, including public interest considerations that might not allow them to fulfil the standards of administering regulations in the way proposed under the framework.

Concerns of international organisations (besides UNCTAD's concerns reflected in the text):

The Commonwealth Secretariat:
Has a guide for developing countries to international investment agreements (IIAs) which includes recommendations on investment (including mode 3) liberalisation.[i] It says with regard to a positive list:

- 'A positive approach is less administratively burdensome and more likely in practice to leave the state with greater residual policy-making flexibility.'

- 'Positive listing is a less burdensome approach because it is not necessary to list sectors or measures to avoid the application of the national treatment obligation and may result in a narrower scope of application for the obligation.'

- '[Positive listing] is typically less onerous for host states because it does not require an exhaustive inventory of non-conforming measures to be undertaken to ensure that they are excluded from an IIA by listing them. Such an inventory is required if a negative list approach is followed. As a practical matter, the burden associated with negative listing is significantly mitigated in relation to a particular negotiation where the state has undertaken an identical exercise in relation to a previous negotiation. A disadvantage of positive listing for investors is that the remaining restrictions in sectors that a state has not listed are not disclosed to them.'

- 'The challenge of drafting adequate reservations (a negative list approach) or listing commitments (a positive list approach) to provide sufficient policy flexibility regarding the host state's right to refuse entry of foreign investors consistent with its existing and anticipated future foreign investment policy is significant and will be hard for many host states to meet, especially if their policy on permitting entry of foreign investors is not well developed. As between a positive and a negative list approach, it is administratively simpler to use a positive list.'

- The Guide recommends a positive list in its sample provision.

Concerned governments:

- The Intergovernmental Policy Advisory Committee (IGPAC) is established by US law and its members are from executive and legislative branches of US state, county, and municipal governments to provide overall policy advice on trade policy matters that have a significant relationship to the affairs of US state and local governments. It advises the US Trade Representative (USTR) on trade agreements from the perspective of US subnational governments.
  - Its report on the Trans-Pacific Partnership (TPP) noted that: 'IGPAC members are concerned with the "negative list" approach to scheduling commitments for services trade liberalization and would strongly prefer a positive scheduling approach. The WTO tribunal ruling against the United States in the GATS internet gambling case brought by Antigua and Barbuda illustrates the inherent peril of the "negative list" approach, which risks covering economic activities that were expected to be exempted, either by inadvertence or by lack of knowledge of relevant laws and regulations.'[ii]

- Finnish Ministry of Social Affairs and Health agency:[iii]
  - Re negative list: 'In contrast to knowing what they want to liberalise, governments now need to know what not to liberalise.'
  - 'The focus on negative listing forces governments to anticipate their future regulatory needs, which is usually impossible, in particular, for such sectors which have been recently liberalised. This also makes the ratchet effect a problem as newly liberalised sectors are automatically included as part of agreements. If a government makes a mistake in liberalising a service with adverse consequences, the flexibility to move back is very difficult or in practice no longer a possible option.'[iv]

- The European Committee of the Regions (COR) is a European Union (EU) advisory body of elected representatives from subnational bodies from all 28 EU Member States which gives regions and cities a formal say in EU law-making to ensure that the position and needs of regional and local authorities are respected. In the context of the Transatlantic Trade and Investment Partnership (TTIP) it 'rejects negative listing'.[v]

- The European Parliament resolution of 8 June 2011 on EU-Canada trade relations noted that the negative list in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) 'should be seen as a mere exception and not serve as a precedent for future negotiations'.[vi]

Developed-country law professors:

- German law professor Marcus Krajewski:
    - Noted in his analysis of the services provisions of EUFTAs that 'the negative list approach tends to have a more liberalising effect, because all sectors and measures are subject to the core obligations while a positive list approach requires specific liberalisation commitments. The shift from a positive to a negative list approach requires detailed and careful scheduling disciplines as any "omission" of a measure results in a liberalisation commitment ("list it or lose it"). Furthermore, such a shift complicates the comparison between the different levels of liberalisation commitments. In this context, it is important to recall that the European Parliament in its Resolution on EU-Canada trade relations of 8 June 2011 considered that the negative list approach in the CETA "should be seen as a mere exception and not serve as a precedent for future negotiations".'[vii]
    - 'In conclusion, the distinction between positive and negative list approaches is crucial for the determination of the impact of trade agreements on public services. In particular, while a positive list approach allows countries wishing to maintain a maximum level of regulatory flexibility in a certain sector to refrain from making any commitments in that sector by simply not including it in their schedules, a negative list approach precludes this technique. Instead, countries must list those sectors specifically in their Annexes and also positively mention those measures they wish to maintain or carefully design a regulatory carve-out for future measures.'[viii]
    - 'In the context of a negative-list approach, a public service exemption clause would need to apply to "all sectors" and to reservations for future measures (Annex II).'[ix]
- Canadian law professor Anthony Vanduzer:[x]
    - Noted that compared to a negative list, 'A positive list approach makes it easier in practice for state parties to limit the scope of their obligations to areas they choose and avoid unanticipated consequences of their obligations, including in relation to public services.'
- New Zealand law professor Jane Kelsey wrote that the Trade in Services Agreement (TISA)'s 'negative list approach is profoundly anti-democratic: it forecloses the right of democratically-elected governments to change their policy settings in the future on pain of economic sanctions. Those risks are heightened for the Global South in another example of how they are denied the mandatory development flexibilities built into the GATS, and is why most have resisted using negative lists to date.'[xi]

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i https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf
ii https://ustr.gov/sites/default/files/Intergovernmental-Policy-Advisory-Committee-on-Trade.pdf
iii https://www.thl.fi/en/web/thlfi-en/about-us/what-is-thl-
iv 'Services of General Interest Beyond the Single Market', Markus Krajewski – Editor, Springer, 2015
v http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014IR5385
vi http://www.europarl.europa.eu/document/activities/cont/201106/20110609ATT21080/20110609ATT21080EN.pdf
vii http://www.epsu.org/sites/default/files/article/files/PublicServicesFTAs_FINALnov2011_withCover.pdf
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ix Ibid. Krajewski.
x Supra note viii, Krajewski
xi http://admin.itfglobal.org/media/1635608/the-trouble-with-tisa-report.pdf