

**NUS-NYU Investment Law Reform in Asia Seminar Series**

# **Reforming the International Law of Foreign Investment – State of Play in International Organizations**

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## Background: Why IFF4D?

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- **Failed efforts** of incorporating investment rules in the WTO rulebook. Singapore issues of 1996, dropped in 2003.
- **Why:** Today's integrated global economy, expanding investment flows growingly depend on simplifying, speeding up and coordinating processes, which calls for IF measures. The bottlenecks, inefficiencies and uncertainties that IF seeks to address arise from unnecessary red tape, bureaucratic overlap or out-of-date procedures which can become costly impediments to investment. It is particularly the case in LDCs and DCs.
- **What:** Several contentious investment issues were excluded from the outset for IF: market access, investment protection, and ISDS. IF negotiations aims at improving transparency, predictability, efficiency and consistency of national investment regulatory regimes. This implies that the IFF4D would be a major deviation from almost all existing IIAs.

- **On 13 December 2017**, during, three proponent groups announced new initiatives to advance talks at the WTO on the issues of electronic commerce, investment facilitation (IF) and micro, small and medium size enterprises (MSMEs). Over 70 WTO members joined the initiative.
- **On 22 November 2019**, 98 members expressed support for the 2017 joint ministerial statement, and committed to intensifying work to further develop the framework for facilitating foreign direct investment, and to work towards a concrete outcome on investment facilitation for development at MC12.
- **On 25 September 2020**, participants in the structured discussions on began formal negotiations on a multilateral agreement on this issue, with a view to achieving a concrete outcome by MC12 in 2021. Over 106 members participated in the negotiations.
- Many members have submitted proposals, and several rounds of negotiations on IFF4D have been held, “good progress” has been made. Especially, participating members have discussed various provisions on the Easter consolidated text delivered this April.

# Outstanding issues

## **Identification of IF obligations/measures**

### **Internal/WTO:**

**IFF4D integration- (1) IF obligation incorporation GATS (compatibility) – (2) Non-Service IF obligation Incorporation (consensus)**

### **External/IIA**

**Incorporation of IF obligations in IIAs -  
Insulation from IIA enforcement (ISA)**

# Major issue: Identification

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- There is no fixed and globally unanimous definition of IF, the first challenge is identifying IF rules that could and should be incorporated in the IFF4D. It is not only an issue of consensus building among interested WTO Members, but also a conceptualization process of clarifying IF.
- It is largely agreed that certain rules that can be used for improving transparency, predictability, efficiency and consistency of national investment regulatory regimes, can be deemed as IF rules. Thus, in a sense, IF “result/ effect-based”.
- A large portion of discussion and negotiation documents are classified in the WTO website. It has been widely viewed that major IF rules should cover transparency, simplified and streamlined administrative procedures, focal points, cooperation, CSR, Anti-corruption, SME, S&D for DC and LDC, capacity building, etc.

## Major issue: Integration (Internal)

1. The Joint Ministerial Statement envisages that the IFF4D should be a **multilateral** framework, this impliedly rules out plurilateral treaty, such as the WTO GPA. The IFF4D, as a multilateral agreement, would need to be endorsed by all WTO members.
2. Form of treaty: The WTO TFA, the IFF4D may bind only a critical mass of signatories that are ready to accept the policy constraints involved and willing to extend the agreement's benefits to all Members, including those not assuming reciprocal obligations.
3. Compatibility with GATS: relationship between GATS and IFF4D, as GATS covers investment, GATS and IFF4D obligations should be consistent, e.g. transparency, consistency and predictability of relevant measures.
4. Incorporation of new IF obligations: as to non-service obligations, not subject to existing WTO disciplines, a consensus decision is needed to integrate such obligations in the WTO rulebook. The Nairobi Ministerial Declaration of 2015 explicitly confirmed that a decision to launch multilateral negotiations on new issues would need to be agreed by all Members.

## Major issue: Insulation (External)

1. While IF could be said as a novel issue in WTO rulebook, it is not new to IIAs, recent ones in particular. IF elements have been widely incorporated in many IIAs, such as transparency. RCEP contains an article explicitly entitled IF. The relation between IIAs and IFF4D?
2. Normative interface: Treaty-bridging clauses in IIAs, MFN and umbrella clauses potentially could be used to import and IFF4D treatment or commitment to an IIA system.
3. Adjudicative interface: In ISA, importation of an IFF4D clause could be possible not only through MFN and umbrella clauses, but also through interpretation and application of indirect expropriation and fair and equitable treatment clauses, as both actually target on state regulatory measures, which are also the essence of IF measures.

# Potential reform impacts

1. What impact the IFF4D, if successfully negotiated, could bring to the WTO and IIL?
2. The existing IIA focus shift: Brazil's 2016 model, shift to IFC. IFF4D play a level the playing group effect (lay down a basic rules of IFF4D) while RTAs and IIAs will be able to focus on higher level of IF obligations?
3. Dispute settlement: IF obligations are deep in government conducts, IE and FET, will mean greater possibility for review and erosion of state regulatory.
4. Consistency: as IIAs remain decentralized, the application and interpretation of IIF4D rules will help harmonize or unify IF rules? Will this provide a *de facto* option for “revising bilateral treaties through multilateral agreement”/BEPS?