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Session on: Promoting and facilitating investment and the WTO Structured Discussions on Investment Facilitation

Experiences of developing countries revealed that what they need to facilitate investment rests to a big extent in building national capacities, through technical assistance, in order to enhance informed decision-making processes, to properly analyze investment proposals, and to foster better collaborative processes to understand investments investors and their needs.

So, when discussing the new plurilateral rulemaking process on investment facilitation at the WTO, it is important to clarify what added value it brings in comparison to the existing efforts pertaining to investment facilitation that are ongoing nationally, regionally and multilaterally, including those done for years by UNCTAD.

Crucial to linking investment to sustainable development is the ability to target those investments that add value to the host countries' economy and contribute to developmental objectives. We know that many countries have been trying to address this through revisiting the scope and definition of protected investments and investors under their IIAs and to target those to investments with developmental added value, and not any investments.

What is known so far about the content of the plurilateral joint initiative on IF at the WTO is that the proposed scope remains open covering all and any investors and investments. While the stated objectives of the joint initiative do not seem intended to facilitate speculative investments, the legal design of the proposed framework do not seem to be geared towards operationalizing that stated objective.

Furthermore, the approach proposed would be unlike the familiar approach adopted at the WTO, such as that under GATS, which is based on a positive list approach where Member States actively and selectively choose the sectors in which to undertake commitments.

The scope is intended to cover facilitation measures of all FDI in all sectors, which would include measures of general application and others sector specific measures, which directly or indirectly relate to investors and investments at the national level of government, but also requiring States to take active steps to ensure observance at regional and local levels. 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 proceedings, among others.

It is also proposed that this initiative cover different stages of the investment cycle, including admission, establishment, acquisition and expansion of investment. From this, it is clear that the initiative is not limited to the post-establishment stage. For those reasons, several countries have been concerned about the potential implications of the initiative in regard to pre-establishment issues, and to its implications on market access.

While the proposed framework does not apply to market access directly, the eventual effect on market access ought to be assessed taking into consideration the totality of the proposed rules and disciplines, including the specifics of the non-discrimination provisions proposed in the context of this framework, and how all of this will interact with the national institutional and regulatory frameworks and capacities in place.

For those reasons, the similarities of this proposed initiative to the WTO Trade Facilitation Agreement may be much less than the fundamental differences between the two, particularly because of scope, and consequently the potential implications on national regulatory space and authorities. Unlike the movement of goods, an investment is an ongoing project that extends over a period of time and the regulation and reregulation process extends over the whole cycle of the investment. Consequently, the extent of institutional burden and potential impact of the proposed rules on the role of regulatory authorities would be much deeper in comparison to the TFA.

The proposed framework includes a deep transparency regime that extends beyond notifications to the WTO and requirements to publish the covered measures and regulations. It includes proposed obligations pertaining to publishing in advance and giving opportunity to comment on the broad scope of measures to be covered under the scope, as well as a proposed obligation to organize consultations when developing a technical regulation or procedures that would be available to the general public including persons of the other Members.

While, at the face of it, 'transparency' is a useful principle, the extent to which it could potentially be intrusive on regulatory space is closely related to the scope and depth of its application and the scope of laws and regulations that would be covered. We also already know that transparency requirements under WTO law have been actively enforced under the dispute settlement understanding, whereby Members have already faced multiple dispute settlement cases regarding their obligations under Article X GATT on publication and administration of trade regulations

The proposed framework suggests multilateral standards for assessing and disciplining the regulatory process of investments at multiple conjunctures, such as at the stage of designing of the measures, the criteria adopted in the regulatory process, as well as administration of covered measures and national administrative procedures.

For example, it is proposed that the standards of consistency, reasonableness, objectiveness and impartiality be applied to the administration of measures. It is also proposed that measures adopted or maintained by Members be pre-established, and based on criteria that is objective and transparent.

So even where a country is at a stage of development that allows it to easily comply with obligations pertaining to institutional changes and transparency requirements, countries could still be subject to unforeseen consequences under such a framework because the standards for assessing the regulatory measures and processes would be interpreted and applied on a case by case basis by the international dispute settlement body that would oversee implementation. We also know from WTO jurisprudence that the interpretation and application of such open subjective standards would entail a balancing exercise between the interests of the private entity impacted by the regulation versus the interests of the Member undertaking the regulation.

This would potentially be highly intrusive on the regulatory authorities and processes in the area of investment.

Regarding the interaction of this initiative with reform of existing IIAs

The joint ministerial statement underlying this initiative on investment facilitation spoke of "clarifying the framework's relationship with current investment commitments among Members". The initiative does not seem geared to serve as a successive agreement that could potentially help amend existing commitments. So as of now, one cannot expect that this initiative would add value to stage 2 of reforming IIAs.

However, there is a need to pay attention to how such a new framework, if agreed, could potentially filter into the world of IIAs and ISDS especially where countries are party to IIAs that include umbrella clauses or broad FET clauses, through which future undertakings on IF could be brought under the protective 'umbrella' of the international investment treaty. This would potentially make those commitments arbitrable through ISDS. If so, instead of helping with reforming the existing regime of international investment rules, it could entrench a lot of challenges that already exist.

In sum, the value added of the proposed rules on investment facilitation is unclear, the grounds and legal tools for targeting investment for development are so far not evident in the mix of proposals being discussed, and the exact policy and regulatory tools that countries need to actively and dynamically link FDI to developmental goals could potentially be undermined by the set of proposed disciplines.