

The Investment Facilitation Framework & Most Favoured Nation (MFN) Treatment

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1. Introduction

1.1 Joint Initiatives

At the 11th Ministerial Conference in December 2017, groups of World Trade Organization (WTO) Members issued joint statements on advancing discussions on e-commerce, on developing a multilateral framework on investment facilitation (IF), on launching a working group on micro, small and medium-sized enterprises (MSMEs) and on advancing ongoing talks on domestic regulation in services trade. In November 2020, a group of WTO Members announced their intention to intensify work on trade and environmental sustainability at the WTO by organizing 'structured discussions'. These

Joint (Statement) Initiatives, referred to as JSIs or JIs, are not part of a multilaterally agreed WTO process.

The Joint Initiatives, including the one of investment facilitation, raise various legal and systemic questions, such as the scope of the negotiations within the WTO, the role of consensus decision making, how to bring a negotiated outcome into the WTO and the applicability of the Dispute Settlement Understanding (DSU) to such outcomes.

A paper by India and South Africa highlights that 'further negotiations' including on investment facilitation would require agreement by all WTO Members, as per the provisions of Art. III.2 and Art. X of the Marrakesh Agree-

Abstract

The issue of Investment Facilitation (IF) is one of the 'Joint Statement Initiatives' which has been under negotiation for a number of years between certain World Trade Organization (WTO) Members. It has not been without controversy as there is no multilateral mandate at the WTO for these negotiations. Questions have been raised about how the outcomes of these IF negotiations can be brought into the WTO framework. Despite these uncertainties, there is a draft Investment Facilitation Framework (IFF) text. This Policy Brief discusses the Most Favoured Nation (MFN) treatment as contained in Article 2 of the Investment Facilitation Framework (IFF), also referred to as the Investment Facilitation for Development Agreement (IFDA). This brief highlights the potential implications of the proposed text and proposes some options.

La question de la facilitation des investissements figure parmi les « initiatives de déclaration conjointe » faisant l'objet, depuis plusieurs années, de négociations entre certains membres de l'Organisation mondiale du commerce (OMC). Elle n'a pas été sans controverse, car l'OMC ne dispose d'aucun mandat multilatéral à cet égard. Par ailleurs, des questions ont été soulevées quant à la manière dont les résultats de ces négociations peuvent être intégrés au cadre juridique établi par les règles de l'OMC. Malgré ces incertitudes, un projet a été élaboré de cadre multilatéral pour la facilitation de l'investissement. Ce rapport sur les politiques analyse les dispositions relatives à la clause de la nation la plus favorisée contenues dans l'article 2 du projet, également appelé accord sur la facilitation de l'investissement pour le développement. Il passe en revue les conséquences potentielles liées à la mise en œuvre de cette clause et formule quelques recommandations.

Algunos Miembros de la Organización Mundial del Comercio (OMC) llevan años negociando la "iniciativa conjunta" de la facilitación de las inversiones. Este debate no ha estado exento de controversias, ya que la OMC carece de un mandato multilateral para estas negociaciones. Se han planteado cuestiones acerca del modo en que los resultados de estas negociaciones relativas a la facilitación de las inversiones pueden incorporarse al marco de la OMC. Pese a estas incertidumbres, existe un proyecto de texto de un marco de facilitación de las inversiones. En este informe sobre políticas se debate el trato de la nación más favorecida, tal como se refleja en el artículo 2 del marco de facilitación de las inversiones, también conocido como acuerdo sobre la facilitación de las inversiones para el desarrollo. En este informe se ponen de relieve las posibles consecuencias del proyecto de texto y se proponen algunas alternativas.

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ment. Furthermore, they note that “[i]n the broadest sense of the word, investment goes much beyond trade, and thus it is questionable whether investment is part of ‘multilateral trade relations’ (Marrakesh Agreement Art. III.2). Further, July Framework of 2004, as adopted by the General Council, also mandates that ‘no work towards negotiations on any of these issues (including investment) will take place within the WTO during the Doha Round’. The Doha Round to date has not been concluded.” The paper concludes that negating the decisions of the Ministerial Conference or the General Council by the decision of a group of Ministers taken on the side-lines of the Ministerial Conference or any other event would be detrimental to the very existence of the rule-based multilateral trading system under the WTO.¹ Despite all these systemic legal uncertainties, IF proponents are proceeding in their negotiations, leaving open the questions of if and how the text can be brought into the WTO.

1.2 Investment Facilitation Framework (IFF) & Most Favoured Nation (MFN) Treatment

This Policy Brief discusses Most Favoured Nation (MFN) treatment as contained in the consolidated text of the Investment Facilitation Framework (IFF), also referred to as the Investment Facilitation for Development Agreement (IFDA).² This brief contains the following:

- Section 1 discusses the potential implications of the proposed text and suggests some options to deal with such implications.
- Section 2 discusses the rationale and application of MFN in the WTO and the IFF.
- Section 3 discusses the proposed MFN treatment provision of the IFF.
- Section 4 provides several examples of how certain obligations contained in existing treaties could be imported into the IFF and as a consequence, be multilateralized.
- Section 5 questions whether there is a need for a generic MFN provision as has been suggested.
- Section 6 briefly discusses the implications of ‘exporting’ IFF obligations into investment treaties.
- Finally, Section 7 provides some possible options for the MFN treatment clause in the IFF.

2. Rationale and application of MFN in the WTO and the IFF

MFN treatment is essentially a means of providing for non-discrimination between a Member’s trading partners. It is regarded as a central obligation of the multilateral trading system. In the WTO, it applies in the areas of goods, services and intellectual property rights (IPRs). However, many exceptions exist to this general rule. Exceptions for customs unions and free trade are-

as, for safeguards and other trade remedies, listed MFN exemptions in services, as well as general exceptions and provisions for special and differential treatment (S&D) all limit the actual scope of MFN treatment under the WTO agreements.

The relevance of the economic rationale for MFN treatment beyond the field of trade in goods to trade in services, investment, and other areas, is a matter of controversy. It has been argued that whereas in the field of trade, non-discrimination provides for more equal competitive opportunities, in the field of investment the purpose of non-discrimination is to protect investors’ rights.³ In practice an MFN clause allows investors to engage in ‘treaty shopping’ to rely on more favorable (substantive or procedural) provisions not contemplated in the treaty on which their claims are based.⁴

3. The proposed MFN treatment provision of the IFF

The core MFN treatment provision reads: “With respect to any measure covered by this framework, each Member shall accord immediately and unconditionally to investments and investors of any other Member treatment no less favourable than that it accords to like investments and investors of any other country.” (Article 2.1)⁵

This MFN treatment obligation would be limited by exempting “advantages to investors of any other Member and their investments ‘in the context of’ a free trade area, customs union, common market or economic union” (Article 2.2)⁶

3.1 Core MFN treatment provision

The language of the proposed MFN treatment provision in the IFF seems to be borrowed from the General Agreement on Trade in Services (GATS) substituting “services” with “investments” and “service suppliers” with “investors”. Under Article II of the GATS, WTO Members are to extend immediately and unconditionally to services and service suppliers of all other members “treatment no less favourable than that accorded to like services and service suppliers of any other country”. It applies to treatment resulting from existing and future agreements, i.e. there is no temporal scope.

The GATS provides for various exemptions from MFN such as:

- Article II exemptions which could be scheduled at the time of entry into force of the GATS
- Economic integration agreements (Article V)
- Labour market integration agreements (Article V bis)
- Mutual recognition agreements (Article VII)

Similar exemptions are currently not contemplated in the IFF, except for Article 2.2 which contains some elements also found in Article V of GATS.

The word ‘investment’ is defined differently across in-

ternational investment agreements (IIAs), even those signed by the same country. The IFF text has not settled on a definition of investment, which ranges from foreign direct investment (FDI, which is turn is defined as (at least) “ownership of 10 per cent of the ordinary shares or voting stock”) to very broad asset-based definitions which also includes intellectual property rights, claims to money and rights conferred pursuant to laws and regulations or contracts such as concessions, licenses, authorizations, and permits. The wider the definition of investment, the wider its area of application.

3.2 Limitation of the MFN treatment obligation

The MFN treatment obligations would be limited through a “regional economic integration organization” (REIO) exemption which is commonly included in the MFN provisions of bilateral investment treaties (BITs).⁷ An older United Nations Conference on Trade and Development (UNCTAD) paper on such exemptions, published in 2004 concluded that:

- While BITs usually contain a broad REIO exception, there is a trend in more recent regional and multilateral IIAs to narrow the conditions under which the REIO exception applies.
- To this end, some recent REIO clauses deal explicitly with the issues of definition of a REIO, exception from the MFN principle (or IIA obligations in general), permissibility requirements, and the modification of commitments.⁸

More recently, the International Institute for Sustainable Development (IISD, 2017) notes that the current trend is to limit the application of MFN in BITs, including through exclusion of procedural provisions from other agreements and/or exclusion of the entire contents of past treaties or, in some cases and mostly seen

in model treaties rather than concluded treaties, the non-inclusion of an MFN treatment clause.⁹

The objective of Article 2.2 is similar to Article V of GATS. However, Article V of GATS requires a higher threshold in order for WTO Members to be able to diverge from MFN. There must be an agreement liberalizing trade in services, which *inter alia* should have substantial sector coverage. In Article 2.2 there is no need to have an agreement but any ‘advantage’, “in the context of” a free trade area, customs union, common market or economic union. There are several proposals to finetune the types of agreements. Brazil proposes to replace ‘economic union’ with ‘other forms of economic integration’, Morocco deletes ‘a free trade area’ but adds ‘a bilateral investment facilitation agreement’ and ‘economic and monetary union’. Chinese Taipei deletes free trade area and substitutes it for IIAs both in the form of a chapter of a free trade agreement (FTA) or as stand-alone investment agreement.

From the proposals which have emerged, it is clear that JSI participants questioned whether BITs or IIAs themselves would be covered by any of the terms in Article 2.2. In the WTO context, the terms ‘free trade area’ and ‘customs union’ are clarified through Article XXIV of the General Agreement on Tariffs and Trade (GATT). Still questions remain. IIAs can come in different forms: as stand-alone BITs or as a chapter of an FTA. Would this imply that an IIA as a chapter of an FTA would be covered by Article 2.2 but a stand-alone BIT would not?

The terms ‘common market’, ‘economic union’ or ‘other forms of economic integration’ would need to be elaborated upon. These are terms commonly used in BITs and they are not defined (yet) in the IFF. The umbrella term for these three terms might be ‘economic integration agreement’ (EIA). The Energy Charter Treaty (Article 25) defines an EIA as “an agreement substantially liberalising, inter

Table I: Exemption of certain types of agreements from MFN treatment obligation

Article 2.2 of IFF	Proposal by		
	Brazil	Morocco	Chinese Taipei
advantages to investors of any other Member and their investments in the context of:			
a free trade area	a free trade area	a bilateral investment facilitation agreement	an investment agreement, whether it is a separate agreement or included as an investment chapter in a free trade area
a customs union	a customs union	a customs union	customs union provided under GATT Article XXIV or the Enabling Clause
a common market	a common market	a common market	economic integration under GATS Article V
or an economic union	other forms of economic integration	an economic union	
		economic and monetary union	

alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.”¹⁰ Whether or not this would include BITs or a particular subset of BITs is not clear. At any rate, in BITs a common market, economic union or economic integration agreements refer to agreements or arrangements other than the BIT itself. The intention of JSI participants might very well be to exclude any international investment agreement but currently that is not clearly reflected in the text.

Article V of the GATS includes several safeguards for non-REIO members. They relate to transparency and reporting obligations (Article V.7 (a) (b) (c)), and the protection of established service suppliers in the REIO. Article V.6 stipulates that a service supplier of any other GATS Party that is a juridical person constituted under the laws of a Party to a REIO agreement shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the REIO.¹¹

Article V.3(b) provides for an S&D for developing countries: “Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement”. This acts as a limited MFN exemption which could be explored by developing countries participating in the JSI.

4. Importation of obligations of other treaties into the IFF: some examples

The main function of the MFN treatment obligation is to multilateralize commitments which are made in a bilateral or regional context and within its scope. As such it can lead to a higher overall level of obligation than the current IFF text suggests, now as well as in the future. This is a serious concern that has been raised in the IFF negotiations.

The IFF’s MFN treatment obligation interacts with provisions in existing treaties when they deal with a similar subject matter as envisaged under the IFF. This is particularly the case for investment treaties (BITs) or investment chapters of FTAs but would also apply to services agreements, such as domestic regulation chapters of FTAs and provisions/commitments under GATS. Some examples are provided below.

4.1 Investment treaties (BITs) or investment chapters of FTAs

i. Opportunity to comment on proposed measure by WTO Members

Article 12.2 of several of Canada’s BITs, including those with Cameroon, Mali, Senegal, Côte d’Ivoire and

Mongolia, stipulates that: “To the extent possible, each Party shall: 1. publish in advance any such measure that it proposes to adopt; and 2. provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.”

Publication in advance and opportunity to comment on proposed measures is also addressed in Article 3.3 of the IFF.

Article 12.2.1 of Canada’s BITs concerns the publication of measures which in itself is an *erga omnes* obligation: if a provision like this is agreed in a bilateral agreement, non-Parties to such an agreement would benefit from it as well. Article 12.2.2, nevertheless, would provide scope for discrimination as “the reasonable opportunity to comment on proposed measures” would not have to be provided to non-Parties under Canada’s BITs. However with the IFF MFN clause, Canada and any other Party to a BIT that contains such a clause would have to provide this reasonable opportunity to any WTO Member.

Whether the IFF’s MFN clause could in this particular example add to obligations in the body of the IFF would depend on the language in Article 3.10(b) of the IFF, in particular whether the currently bracketed text “and other Members” would be unbracketed or deleted.

ii. Dispute prevention

Brazil’s current network of Cooperation and Facilitation Investment Agreements (CFIAs) spans 18 countries including several Latin American and African countries, the United Arab Emirates (UAE) and India.¹² Brazil’s model CFIA contains *inter alia* the obligation for each Party to designate a single agency or authority as its National Focal Point, which shall give prompt replies to notifications and requests by the Government and investors from the other Party (Article 18.6 of Brazil’s model CFIA).¹³ These requests relate to the responsibilities of the National Focal Point and include seeking to prevent differences in investment matters (Article 18.4d) and recommending actions to improve the investment environment based on suggestions and complaints from investors of the other Party or the Party (Article 18.4c).

The MFN treatment obligation under the IFF would imply that investors from any Member should be given prompt replies, be able to make complaints, and avail of dispute avoidance mechanism and other services which are under the responsibility of the National Focal Point, instead of only the investors of the other Parties under the signed CFIAs.

Whether the IFF’s MFN clause could in this particular example add to obligations of a particular Member would depend on the language of Article 18 in Section IV of the IFF which addresses this subject matter. In particular, JSI participants seem to be divided on whether “dispute prevention” should be a responsibility of a contact / focal point / ombudsperson type of mechanism (Article 18.1d of the IFF). If Art 18.1d would be retained, an MFN clause could mean that Brazil and other Parties to a Brazil CFIA

must provide dispute prevention services not only to investors of the other Party but also to investors of any WTO Member.

A similar situation might arise under the Regional Comprehensive Economic Partnership (RCEP), a mega-regional trade and investment agreement in Asia. However, the obligation to “amicably resolve complaints or grievances with government bodies which have arisen during their investment activities” is more circumscribed, by using qualifiers including “subject to its laws and regulations”, “may include” and “to the extent possible” (see Article 10.7 of RCEP, titled “Facilitation of Investment”).

iii. Temporary stay for investment persons

At present, JSI participants are divided on whether to include provisions in the IFF relating to the temporary entry for investment persons and/or the facilitation of movement of business persons for investment purposes. If included, this might bring provisions in other agreements relating to entry and sojourn and the issuance of permits and authorization for personnel within the scope of the IFF.

For instance, most of Korea’s BITs include an article titled “Entry and sojourn of personnel”, stating that “[s]ubject to its laws and regulations regarding the entry and sojourn of aliens, a Contracting Party shall permit natural persons who are investors of the other Contracting Party and personnel employed by investors of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments”. If such provision would be considered to fall within the scope of the IFF, Korea and Parties to Korea’s BITs “shall permit” investors and personnel employed by investors from ALL WTO members to enter and remain in their territories for investment purposes.

Similarly, the Switzerland-Madagascar BIT (Article 3.2, “Encouragement, admission”) stipulates: “When it has admitted an investment in its territory, each Contracting Party shall issue, in accordance with its laws and regulations, all the necessary permits and authorizations in relation to this investment (.), and for the activities of senior executives and specialists chosen by the investor.” If this provision is in the scope of the IFF, it could imply that through the MFN clause of the IFF, Switzerland and Madagascar would be obliged to issue all the necessary permits and authorizations for any investor, including for activities of executives and specialists chosen by an investor from any WTO Member.

Yet another example can be found in the Nigeria-Finland BIT (Article 11.2) which extends the temporary stay to family members as well: “Each Contracting Party shall, subject to its laws and regulations, grant temporary entry and stay and provide any necessary confirming documentation to natural persons who are employed from abroad as executives, managers, specialists or technical personnel in connection with an invest-

ment by an investor of the other Contracting Party, and who are essential for the enterprise as long as these persons continue to meet the requirements of this paragraph, as well as grant temporary entry and stay to members of their families (spouse and minor children) for the same period as to the persons employed.”¹⁴ If this Article would be within the scope of the IFF, Nigeria and Finland would have to implement this article for all investors regardless of origin. Furthermore, since Finland is a European Union (EU) Member State, the EU would have to apply it as well.

4.2 Services chapters in FTAs (Domestic Regulation)

Several proposed obligations in the IFF overlap with Domestic Regulation disciplines in services agreements. While such obligations apply to service suppliers, in most cases a service supplier providing services abroad seeks to make, is making or has made an investment in another country, and would as such appear to fall within the scope of the IFF.

i. Resubmission of a new application after rejection of a previous application

The Association of Southeast Asian Nations (ASEAN)-India Trade in Services Agreement provides that applicants (from the Parties), at their discretion, will have the possibility of resubmitting an application for authorization to supply a service if a previous application was terminated or denied¹⁵ (Paragraph 3(c) of Article 5 on Domestic Regulation).

JSI participants are currently divided upon the need and contents of a right of applicants to submit a new application after rejection of a previous application, as evidenced by the bracketed options in Article 11.4 and the phrase “if applicable, the procedures for resubmission of an application” in Article 11.2(c).

Regardless of the outcome on Articles 11.2 and 11.4, the implication of an MFN obligation in the IFF would be that ASEAN countries and India would have to provide the right of resubmission of applications to all investors (those which are service suppliers), not only to such investors from ASEAN countries or India.

ii. Conditions for authorization / criteria for administrative procedures

The criteria for administrative procedures (Article 9 of the IFF) are another example where services domestic regulation appears to go beyond the IFF disciplines in some agreements. The EU-United Kingdom (UK) Trade and Cooperation Agreement stipulates that “[e]ach Party shall ensure that measures relating to authorisation are based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner”. Subsequently, it lists the following criteria: (a) clear and unambiguous; (b) objective and transparent; (c) pre-established; (d) made public in advance; (e) impartial; and (f) easily accessible.

A major difference between the EU-UK agreement and the draft IFF disciplines is the requirement that criteria must be ‘pre-established’. Under the IFF, this requirement

has been toned down specifying that Members “may establish criteria to invest in its territory according to its national policies and to modify such criteria at any time, in accordance with its international obligations” (Article 9.1 IFF). In other words, criteria need not be ‘pre-established’ under the IFF.

4.3 GATS

The MFN obligation in the IFF would seem to interact with GATS MFN exemptions. For instance, the Philippines subjects the authorization for financial service suppliers of another Member to establish commercial presence or expand existing operations in commercial banking in the Philippines to a reciprocity test.¹⁶

A reciprocity test would appear to be established criteria in the sense of Article 9.2 of the IFF. These shall be “clear, transparent, objective and published beforehand.” As such, the legality of the application of the reciprocity test by Philippines might be contestable under the IFF.

5. Why have a generic MFN provision in the IFF?

Given the concern of unintended multilateralization of commitments in bilateral treaties, what might be the impact of an MFN provision in the IFF?

As mentioned before, the Study Group on the Most-Favoured-Nation clause of the International Law Commission observed that the economic rationale for MFN treatment in investment was controversial and not associated with the protection of competitive opportunities but with the protection of investors’ rights.¹⁷ However, the IFF purportedly does not cover investment protection rules (Article 1.3 of the IFF).

In the plurilateral negotiations on e-commerce a generic or wide ranging MFN provision has not been proposed: the 90-page draft negotiation text circulated in December 2020 does not contain such a provision.¹⁸ For certain specific issues, some of which might not end up in a final outcome, an MFN obligation has been proposed:

- with respect to the supply of electronic payment services, “each [Party/Member] shall accord to electronic payment services and services suppliers of another [Party/Member] within its territory treatment no less favourable than that it accords to any other like services and services suppliers”.
- with respect to interconnection with major suppliers, “conditions (including technical standards and specifications) and rates and of a quality” shall be provided “no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates”.
- “No [Party/Member] shall accord less favourable treatment to a digital product created, pro-

duced, published, contracted for, commissioned or first made available on commercial terms in the territory of another [Party/Member].”

The first two cases might be considered extensions of the GATS MFN obligation as they concern specific treatment of service suppliers, whereas in the third case, it concerns a new legal characterization (‘digital product’) which is neither a good nor a service. In both cases they ensure market access at most favourable terms. However, supposedly, the IFF “shall not apply to market access and right to establish” (Article 1.2(c) of the IFF).

6. Importation of obligations of the IFF into investment treaties

In the discussions around the IFF’s MFN clause, the concern of importation of obligations of the IFF into existing treaties, in particular investment treaties has been raised as well. This can happen in the following ways:

- 1) Most BITs and other IIAs contain an MFN clause, and most of them have provisions providing for Investor-State Dispute Settlement (ISDS) mostly in the form of arbitration. Any more favorable treatment within the scope of the BIT or other IIA extended by a Party to another party may be invoked and could be litigated by investors through arbitration. In a way, the ISDS provisions in such agreements could become an enforcement mechanism to ensure compliance with IFF provisions (in addition to whatever compliance mechanisms are agreed upon under the IFF). An Investment Facilitation Agreement within the WTO could potentially increase the litigation risks under existing BITs and other IIAs.
- 2) Rules on investment facilitation within the WTO could provide context and support for the interpretation of existing IIAs’ norms such as direct or indirect expropriation and fair and equitable treatment. Complying with the provisions of the IFF could be regarded as legitimate expectations of the investor. As such, non-compliance with IFF obligations could mean that arbitration panels could find a breach of the more generally worded obligations under IIAs.

This issue has been addressed in various submissions on the IFF.

- *Preamble.* “... this framework has been built with the aim to constitute a complete set of rules for investment facilitation measures undertaken by Members, and not to grant market access, rights of establishment nor to create an obligation to grant any treatment to investors or alter existing obligations under IIAs signed by the Members” (Mexico)
- *Scope.* “Any rights and obligations created in this Agreement shall have no legal implications or effects regarding any disputes arising from and conducted under any other bilateral or plurilateral investment agreement” (Chinese Taipei). “This

Agreement shall not be understood or interpreted to affect in any manner international investment agreements that Members have concluded or will conclude for protection and treatment of foreign investors and investment within their respective territories” (Korea)

- *MFN provision.* “For greater certainty, the obligations in this Framework shall not constitute ‘treatment’ under any other treaty” (Indonesia)

This issue could be better addressed in an operational paragraph rather than the preamble. The proposal by Indonesia is interesting as the IFF could be considered a subsequent agreement and its obligations fall under the concept of “treatment” in any other treaty (it probably would need to be confined to IIAs).

The question is the extent to which the IFF, a new treaty, can change the obligations of already existing treaties. Arbitrators might not feel bound to agreements or interpretations reached in another treaty or could be quite arbitrary or inconsistent. Therefore, existing BITs and other IIAs might need to be amended to address this concern.

7. Possible options for the MFN treatment clause in the IFF

IFF Parties could address the current concerns with the MFN article in several ways.

- *Delete the MFN clause.* This is the most effective option to avoid the importation and multilateralization of obligations from international investment agreements. Potential importation through interpretation of IIAs or their awards through the dispute settlement mechanism of the IFF would still remain possible and would need to be addressed separately.
- *Make the MFN clause more targeted.* Either apply MFN for specific sections of the text (e.g. like in e-commerce) or carve out certain sections from the MFN obligation. For instance, MFN could be made non-applicable for provisions relating to movement of business persons. This would increase the chances of an outcome on this usually very sensitive issue.
- *Excluding certain class of agreements from the MFN clause.* ‘BITs’ or ‘international investment agreements’ could be added to the REIO exemption (Article 2.2). In that case, a definition of ‘international investment agreement’ should be added to the IFF. The formulation proposed by Chinese Taipei could be considered in this context.
- *Adjust the temporal scope of the MFN provision.* One way of limiting the impact of MFN would be to apply the provision to more favorable treatment given in the future, as many countries would be reluctant to grant MFN treatment to all

WTO Members.

Arguably, such limitation could set countries which currently have a low number of BITs, often developing countries, at a disadvantage compared to countries which already have a high number of BITs. Nonetheless, several developing countries already have a considerable stock of existing treaties, including treaties which are very expansive in scope and level of obligation.

This option has already a precedent in the WTO context, under Article 4(d) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

- *Introduce S&D for developing countries.* The MFN obligation could be exempted for investment agreements involving developing countries only, along the lines of Article V.3(b) GATS. A possible language suggestion to be included under Article 2 of the IFF text could read as follows: “In the case of an arrangement under paragraph 2 (Art 2.2) involving only developing countries, more favourable treatment may be granted to admitted investments or investors owned or controlled by natural persons of the parties to such an arrangement.” This could have a very limited impact, as under this option, MFN treatment would apply to investments from developed countries which remain a major source of FDI. As such, it might need to be combined with (some of) the other options.

8. Conclusion

While the negotiation of an IFF continues to be controversial, particularly as a multilateral mandate has not been given, and it is unclear whether and how JSIs could be incorporated into the WTO rules, this Policy Brief highlights the possible implications of the adoption of an MFN clause in such a framework. It may lead to unintended implications for the Members joining the IFF, particularly developing countries not wishing to expand the scope for investment-related claims. One option is to exclude such clause altogether. Other options, as elaborated on above, may also help to mitigate such implications.

Endnotes:

¹ World Trade Organization, document WT/GC/W/819. Available from <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W819.pdf&Open=True>.

² In this brief, the acronym ‘IFF’ is used.

³ United Nations General Assembly, document A/CN.4/L.852. Available from <https://undocs.org/A/CN.4/L.852>.

⁴ Suzy H. Nikièma, “The Most-Favoured Nation Clause in Investment Treaties”, Best Practices Series (Geneva, International Institute for Sustainable Development, 2017). Available from <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf?q=sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf>.

⁵ Article 2.1 in WTO document INF/IFD/RD/50/Rev.9 (2 March 2021); in WTO document INF/IFD/RD/74 (12 April 2021, a.k.a. the 'Easter Text'), the MFN treatment provision has been put under Section 4 (while maintaining the old numbering for the articles).

⁶ Article 2.2 in WTO document INF/IFD/RD/50/Rev.9 (2 March 2021).

⁷ Article 2.2 reads as follows: "The provisions of this framework shall not be so construed as to prevent any Member from conferring or according advantages to investors of any other Member and their investments in the context of a free trade area, a customs union, a common market or an economic union".

⁸ *The REIO Exemption in MFN treatment Clauses* (United Nations publication, Sales No. 05.II.D.1). Available from https://unctad.org/en/Docs/iteiit20047_en.pdf.

⁹ Nikiéma, "The Most-Favoured Nation Clause in Investment Treaties".

¹⁰ Energy Charter Secretariat, *The consolidated version of the Energy Charter Treaty and related documents* (Brussels, 2016). Available from <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

¹¹ *The REIO Exemption in MFN treatment Clauses*, p. 43.

¹² Brazil: Design and Implementation of Investment (Treaty) Policies, presentation by Abrão Miguel Árabe Neto during the Virtual Executive Training on Investment Treaties and Arbitration for Government Officials, Columbia Center on Sustainable Investment, 13 July 2020.

¹³ See Article 18.6 of Brazil's model Cooperation and Facilitation Investment Agreement. Available from

<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>.

¹⁴ Nigeria-Finland BIT. Available from <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1206/download>.

¹⁵ Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India. Available from https://fta.miti.gov.my/miti-fta/resources/ASEAN-India/ASEAN-India-Trade_In_Service_Agreement.pdf.

¹⁶ World Trade Organization, document GATS/EL/70/Suppl.1. Available from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=18008,5211,10374&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

¹⁷ United Nations General Assembly, document A/CN.4/L.852. Available from <https://undocs.org/A/CN.4/L.852>.

¹⁸ World Trade Organization, document INF/ECOM/62/Rev.1.



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