

Plurilateral Negotiations in the WTO on Services Domestic Regulation and Investment Facilitation for Development

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8.1 Introduction

At the 11th WTO Ministerial Conference (MC11) in December 2017, several so-called joint statement initiatives (JSIs) were launched. These JSIs are a result of the stalemate in the Doha Round negotiations, which came to the fore at the 10th WTO Ministerial Conference (MC10) in December 2015. The Ministerial Declaration adopted at MC10 acknowledged that WTO members were divided as regards the Doha mandate and approach to these negotiations, while also expressing a strong commitment to advance the negotiations on the remaining Doha issues.¹ As those negotiations did not make any substantial progress until MC11, however, various groups of WTO members decided at MC11 to begin plurilateral negotiations and structured discussions, respectively, including on Services Domestic Regulation² (SDR) and Investment Facilitation for Development (IFD).³ The plurilateral negotiations on SDR were wrapped up by the end of 2021 and resulted in a “Reference Paper” on SDR,⁴

¹ WTO, ‘Nairobi Ministerial Declaration’, WT/MIN(15)/DEC, 21 December 2015, paras. 30–31, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=225910,225713&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023).

² WTO, ‘Joint Ministerial Statement on Services Domestic Regulation’, WT/MIN(17)/61, 13 December 2017, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/61.pdf&Open=True> (last accessed 13 June 2023).

³ WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’, WT/MIN(17)/59, 13 December 2017, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870 (last accessed 13 June 2023).

⁴ WTO, ‘Declaration on the Conclusion of Negotiations on Services Domestic Regulation’, WT/L1129, 2 December 2021, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True> (last accessed 13 June 2023). This

whereas the negotiations of the plurilateral IFD Agreement have been concluded in July 2023.

Although a considerable number of WTO members participate or have participated in both initiatives, their backgrounds differ quite significantly. The SDR initiative was borne out of the negotiations on disciplines for domestic regulation of services, which were conducted until 2011 before being paused and then revived again in 2016.⁵ Since no breakthrough was achieved in these negotiations in the run-up to MC11, interested WTO members then decided to start the SDR initiative at MC11. In contrast, the IFD initiative is not as firmly anchored in a previous WTO negotiating process as the SDR initiative. While the Doha work program stated that negotiations on trade and investment would take place after the 5th Ministerial Conference,⁶ WTO members were unable to find the required “explicit consensus” on the negotiating modalities at that conference.⁷ But in 2017, a group of WTO members started an informal process to advance discussions on that subject.⁸ This informal process eventually led to the decision at MC11 to commence “structured discussions” with the aim of developing a multilateral framework on investment facilitation.⁹ These discussions have moved into a formal negotiating

declaration was signed by sixty-seven WTO members. The Reference Paper on SDR is contained in annex 1 to the declaration.

⁵ WTO, ‘WTO Negotiations on Domestic Regulation Disciplines’, 2022, online at: www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm (last accessed 13 June 2023).

⁶ WTO, ‘Doha Work Programme’, WT/MIN(01)/DEC/1, 20 November 2001, para. 20, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=37246&CurrentCatalogueIdIndex=0 (last accessed 13 June 2023). It should be noted that investment was not understood as investment facilitation but as comprising market access (see, Doha Work Programme, para. 22) which is excluded from the scope of the plurilateral negotiations on investment facilitation.

⁷ See WTO, ‘Day 5: Conference Ends without Consensus’, Summary of 14 September 2003, online at: www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last accessed 13 June 2023).

⁸ WTO, ‘Workshop on Trade and Investment’, 20 March 2017, online at: www.wto.org/english/forums_e/business_e/miktamar17_e.htm (accessed 13 June 2023); WTO, ‘Workshop on Investment Facilitation for Development’, 10 July 2017, online at: www.wto.org/english/tratop_e/invest_e/workshopinvestjuly17_e.htm (last accessed 13 June 2023); WTO, ‘Seminar on E-commerce and Investment Facilitation’, 24 July 2017, online at: www.wto.org/english/tratop_e/invest_e/seminar_invest_240717_e.htm (last accessed 13 June 2023).

⁹ WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’ WT/MIN(17)/59, para. 4.

mode in September 2020.¹⁰ Last but not least, it should be noted that developed and developing country members play or have played somewhat different roles in both initiatives: Whereas developed country members were the driving force behind the SDR initiative, the opposite is true in the IFD initiative. This may help to explain the starkly different stance taken by both initiatives on the issue of special and differential treatment for developing country and least developed country (LDC) members.

Irrespective of their distinct origins, both JSIs overlap in two important respects: First, services are strongly interrelated with foreign direct investment (FDI), given that services sectors account for approximately two-thirds of the global FDI stock.¹¹ GATS mode 3 is an important vehicle for enabling FDI.¹² Second, both JSIs address regulatory procedures and requirements at WTO members' domestic level, albeit to varying degrees. The SDR initiative focuses exclusively on "domestic regulation" by seeking to develop certain regulatory disciplines for administrative procedures governing the authorization of the supply of services in all modes.¹³ In contrast, the focus of the IFD initiative goes beyond domestic regulation, but the streamlining and speeding up of administrative procedures constitutes a key element of that initiative.¹⁴ This particular element of the IFD initiative would also cover

¹⁰ See WTO News, 'Structured Discussions on Investment Facilitation for Development Move into Negotiating Mode', 25 September 2020, online at: www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm (last accessed 13 June 2023).

¹¹ M. Roy, 'Elevating Services: Services Trade Policy, WTO Commitments, and Their Role in Economic Development and Trade Integration', WTO Staff Working Paper ERSD-2019-01, 8 March 2019, at 14, online at: www.wto.org/english/res_e/reser_e/ersd201901_e.pdf (last accessed 13 June 2023).

¹² H. Mamdouh, 'Trade and Investment: Why the WTO?', Presentation at the MIKTA Workshop on Trade and Investment, 20 March 2017, slide 5, online at: www.wto.org/english/forums_e/business_e/services_trade_and_investment_hm_march17.pdf (last accessed 13 June 2023).

¹³ WTO, 'Services Domestic Regulation: Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements', November 2021, at 2, online at: https://worldtradesscanner.com/sdr_factsheet_e_oct21.pdf (last accessed 13 June 2023); See also M. Jelitto, 'Services Domestic Regulation – Current Discussions in the WTO', Presentation at the MIKTA Workshop on Regulatory Frameworks to Facilitate Trade in Services, slide 4, 14 November 2019, online at: www.wto.org/english/tratop_e/serv_e/mikta_workshop_141119_e/markus_jelitto.pdf (last accessed 13 June 2023).

¹⁴ WTO Secretariat, 'Investment Facilitation for Development in the WTO', January 2023, at 2, online at: www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (last accessed 13 June 2023); See also, R. Azevêdo, 'DG Azevêdo Welcomes Progress in

administrative procedures pertaining to the supply of services through mode 3, that is, FDI in services.¹⁵ In other words, insofar as regulatory procedures and requirements affecting FDI in services are concerned, both initiatives cover, in principle, a similar, if not the same, subject matter.

In view of this partial but significant overlap of these two JSIs, it appears appropriate to compare their respective approaches. Since both JSIs are or were pursued in different negotiating groups with partially different memberships and policy goals, it cannot be excluded that both initiatives adopt or have adopted different approaches. This could present a risk for the security and predictability of the WTO legal framework¹⁶ and create confusion among WTO members as to the correct and sound implementation of the outcomes of both JSIs.¹⁷ That risk appears all the more likely in view of the fact that the disciplines set out in the Reference Paper on SDR have to be inscribed in WTO members' GATS schedules of specific commitments (GATS schedules) to become legally effective,¹⁸ whereas the IFD initiative seeks to come up with a stand-

Discussions on Investment Facilitation', 18 July 2019, online at: www.wto.org/english/news_e/news19_e/infac_18jul19_e.htm (last accessed 13 June 2023).

¹⁵ Note that the IFD initiative would not only apply to FDI in services but also to FDI in non-services sectors, see, N. Bernasconi-Osterwalder, S. Leal Campos, and C. van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation: An Analysis of Its Relationship to International Trade and Investment Agreements', International Institute for Sustainable Development & CUTS International, Geneva, August 2020, at 25, online at: www.iisd.org/system/files/2020-09/multilateral-framework-investment-facilitation-en.pdf (last accessed 13 June 2023).

¹⁶ See article 3.2 DSU and the corresponding case law of WTO adjudicatory bodies, e.g. panel report, *US – Section 301 Trade Act*, para. 7.75; AB report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

¹⁷ Bernasconi-Osterwalder, Leal Campos, and van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation', at 20.

¹⁸ WTO, 'Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation', INF/SDR/2, 26 November 2021, section I, para. 7, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/2.pdf&Open=True> (last accessed 13 June 2023); See also, WTO, 'Services Domestic Regulation', at 2; Jelitto, 'Services Domestic Regulation', slide 8; EU Commission, 'EU Trade Policy: WTO Negotiations on Domestic Regulation in Services', Civil Society Dialogue, 15 January 2020, slide 8, online at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158593.pdf (last accessed 13 June 2023). This approach has already been previously used in services trade, namely WTO, 'Telecommunications Services: Reference Paper on Basic Telecommunications Services', 24 April 1996, online at: www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last accessed 13 June 2023); See D. Roseman, 'Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS', in A. Mattoo and P. Sauvé (eds.), *Domestic*

alone agreement, which would have to be included in one of the annexes to the WTO Agreement as a condition for its entry into force.¹⁹

Against this backdrop, the remainder of this article is structured as follows: The second section looks into the objective pursued by the SDR and IFD initiatives (see Section 8.2.), while the third section provides a comparative overview of the regulatory disciplines that were agreed upon under the SDR initiative and are currently discussed under the IFD initiative (see Section 8.3.). The final section offers some conclusions (see Section 8.4.).

8.2 Common Objective Pursued by the JSIs on SDR and IFD

Both JSIs pursue a common objective, namely that of *facilitating* services trade, in the case of SDR,²⁰ and *facilitating* investment, in particular FDI, in the case of IFD.²¹ This “facilitation” objective is not entirely new in the WTO context, as is demonstrated by the Trade Facilitation Agreement (TFA) in particular.²² The reason for choosing this particular objective is

Regulation & Services Trade Liberalization (New York: World Bank & Oxford University Press, 2003), at 88–89; WTO, ‘World Trade Report 2019: The Future of the Services Trade’, at 175–176, online at: <https://repository.gheli.harvard.edu/repository/13138/> (last accessed 13 June 2023).

¹⁹ For a discussion of the legal options for integrating an IFD Agreement into the WTO legal framework, see H. Mamdouh, *Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure* (Geneva: International Trade Centre, 2021), at 8 *et seq.*, online at: <https://intracen.org/media/file/10407> (20 December 2022).

²⁰ WTO, ‘Services Domestic Regulation’; see also, R. Azevêdo, ‘Businesses Want More Transparent and Predictable Services Regulation’, 14 November 2019, at 2, online at: www.wto.org/english/news_e/spra_e/spra294_e.htm (last accessed 13 June 2023).

²¹ WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’ WT/MIN(17)/59, para. 4; WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’, WT/L1072/Rev. 1, 22 November 2019, para. 2, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=259087,258531&CurrentCatalogueIdIndex=0 (last accessed 13 June 2023); WTO, ‘Joint Statement on Investment Facilitation for Development’, para. 2. See also, Azevêdo, ‘Businesses Want More Transparent and Predictable Services Regulation’, at 2.

²² Azevêdo, ‘DG Azevêdo Welcomes Progress in Discussions on Investment Facilitation’, at 3; N. J. Calamita, ‘Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value’ (2020) 23 *Journal of International Economic Law* 973–988. For a discussion of how the lessons of the TFA and the negotiations leading to that agreement could be applied to the IFD initiative see, B. Hoekman, *From Trade to Investment Facilitation: Parallels and Differences* (Geneva: International Trade Centre, 2021), at 13 *et seq.*, at 16 *et seq.*, online at: <https://intracen.org/es/media/10409> (last accessed 13 June 2023); M. Saeed, ‘Implementing an Investment Facilitation Framework for Development: Lessons from the Trade Facilitation Agreement’, Columbia FDI Perspectives,

motivated by the fact that both initiatives do not address market access as such; in fact, the IFD initiative explicitly excludes market access from its scope.²³ Rather, they seek to create an “enabling environment” that would make it easier for service suppliers and foreign investors to engage in economic activities in WTO members’ markets.²⁴ Thereby, both initiatives intend to increase the contestability of those markets.²⁵

The said objective is to be achieved by enhancing the quality of WTO members’ regulatory governance: regulatory quality – or “better regulation”²⁶ – is a crucial element of both initiatives.²⁷ The main tool for improving WTO members’ regulatory governance is the systematic

Perspectives on Topical Foreign Direct Investment Issues No. 322, 10 January 2022, *passim*, online at: <https://ccsi.columbia.edu/sites/default/files/content/docs/fdi20percent20perspectives20percent20322percent20percent20Saeedpercent20percent20FINAL.pdf> (last accessed 13 June 2023).

²³ WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’ WT/MIN(17)/59, para. 4; WTO, ‘Joint Ministerial Statement on Investment Facilitation for Development’, WT/L1072/Rev. 1, para. 3; WTO, ‘Joint Statement on Investment Facilitation for Development’, para. 5.

²⁴ See B. Hoekman, ‘Trade in Services: Opening Markets to Create Opportunities’, WIDER Working Paper 2017/31, at 11–12, online at: www.wider.unu.edu/sites/default/files/wp2017-31.pdf (last accessed 13 June 2023), on the relationship between good economic governance and the potential gains from services trade liberalization.

²⁵ WTO, ‘World Trade Report 2012: Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century’, at 213 (as regards SDR), online at: www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2a_e.pdf (last accessed 13 June 2023); in a similar vein Azevêdo, ‘DG Azevêdo Welcomes Progress in Discussions on Investment Facilitation’, at 3 (as regards IFD). See also A. H. Lim and B. De Meester, ‘Addressing the Domestic Regulation and Services Trade Interface: Reflections on the Way Ahead’ in A. H. Lim and B. De Meester (eds.), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (New York: Cambridge University Press, 2014), at 347.

²⁶ See WTO, ‘Disciplines on Domestic Regulation Pursuant to GATS Article VI.4’, June 2011, para. 11. The EU pursues a “better regulation agenda”, see European Commission, ‘Completing the Better Regulation Agenda: Better Solutions for Better Results’, COM(2017) 651 final, 24 October 2017, online at: https://commission.europa.eu/system/files/2017-10/completing-the-better-regulation-agenda-better-solutions-for-better-results_en.pdf (last accessed 13 June 2023).

²⁷ WTO, ‘Services Domestic Regulation’, at 2; Azevêdo, ‘Businesses Want More Transparent and Predictable Services Regulation’, at 2 (with respect to SDR); WTO Secretariat, ‘Investment Facilitation for Development in the WTO’, at 2; Azevêdo, ‘DG Azevêdo Welcomes Progress in Discussions on Investment Facilitation’, at 2. See also A. Berger and A. Dadkhah, ‘Challenges of Negotiating and Implementing An International Investment Facilitation Framework’, discussion note (2019), at 2 (as regards IFD), online at: www.idos-research.de/fileadmin/user_upload/pdfs/Sonstige/Challenges_of_negotiating_and_implementing_an_international_investment_facilitation_framework_5.12.2019.pdf (last accessed 13 June 2023).

adoption and application of good regulatory principles, often referred to as good regulatory practices.²⁸ Good regulatory principles are not a novel feature in the WTO legal system: The GATT, as well as the TBT, SPS, and TFA, contains rules that seek to foster the application of good regulatory principles in relation to goods trade,²⁹ whereas the GATS includes rules – partially modeled on the GATT – that seek to contribute to the systematic application of good regulatory principles in connection with services trade.³⁰ The JSIs on SDR and IFD draw upon those rules as well as on corresponding international guidelines, recommendations, and indicators with a view to developing similar disciplines that would provide a basis for systematically adopting and applying good regulatory principles in relation to services trade and investment.³¹

²⁸ See WTO, 'World Trade Report 2012', at 177, 186–187.

²⁹ See WTO, 'Committee on Technical Barriers to Trade: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995', G/TBT/1/Rev. 14, 24 September 2019, at 6–9, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBT/1R14.pdf&Open=True> (last accessed 13 June 2023); OECD/WTO, 'Facilitating Trade through Regulatory Cooperation: The Case of the WTO's TBT/SPS Agreements and Committees', 2019, at 9, online at: www.wto.org/english/res_e/booksp_e/tbtsp19_e.pdf (last accessed 13 June 2023).

³⁰ G. Fekete-kuty, 'Regulatory Reform and Trade Liberalization in Services', in P. Sauvé and R. M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington, DC: Brookings Institution Press, 2000), at 225, 228; A. H. Lim and B. De Meester, 'An Introduction to Domestic Regulation and GATS' in A. H. Lim and B. De Meester (eds.), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (New York: Cambridge University Press, 2014), at 9; A. Mattoo and P. Sauvé, *Domestic Regulation & Services Trade Liberalization* (New York: World Bank & Oxford University Press, 2003), at 3 and 5. For a comparison between regulatory disciplines found in WTO rules on goods and services trade, see J. P. Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation', in A. Mattoo and P. Sauvé (eds.), *Domestic Regulation & Services Trade Liberalization* (New York: World Bank & Oxford University Press, 2003), at 57 *et seq.*; see also R. Basedow and C. Kauffmann, 'International Trade and Good Regulatory Practices: Assessing the Trade Impacts of Regulation', OECD Regulatory Policy Working Papers, No. 4, 20 July 2016, online at: www.oecd-ilibrary.org/docserver/5jlv59hdgtf5-en.pdf?expires=1671858669&id=id&accname=guest&checksum=1E21FA2C50F453399FF71432BC8F1A7D (last accessed 13 June 2023) for a review of how good regulatory principles may contribute to mainstreaming international trade considerations in regulatory decision-making and addressing regulatory divergence.

³¹ OECD/WTO, 'Services Domestic Regulation in the WTO: Cutting Red Tape, Slashing Trade Costs, and Facilitating Services Trade', Trade Policy Brief, 26 November 2021, at 2, online at: www.wto.org/english/tratop_e/serv_e/oecd_wto_trade_policy_2021.pdf (last accessed 13 June 2023); WTO, 'Services Domestic Regulation', at 3.

8.3 Good Regulatory Principles as a Means for Facilitating Services Trade and Investment

8.3.1 *Good Regulatory Principles in Services Trade*

8.3.1.1 GATS Article VI:4 as a Starting Point

The JSI on SDR has to be seen in light of GATS article VI, in particular the negotiating mandate enshrined in paragraph 4 of that provision. The Reference Paper on SDR makes the link to GATS article VI:4 crystal clear by stating that its disciplines pursue the objective of elaborating upon the GATS provisions, “pursuant to paragraph 4 of Article VI of the Agreement”.³²

GATS article VI is about domestic regulation of services trade and imposes a number of general disciplines on WTO members. These disciplines affect neither WTO members’ right to regulate, which is expressly acknowledged in the GATS preamble, nor the public policy objectives for the attainment of which they choose to regulate.³³ Moreover, the regulation’s *substantive* content remains outside of the disciplines’ scope.³⁴ These disciplines represent a “minimum standard” and reflect the fact that services trade is subject to a higher regulatory intensity than goods trade, which leads to significantly higher (compliance) costs in services trade than in goods trade.³⁵ They are primarily meant to ensure that WTO members’ regulatory measures do not have an adverse effect on the potential benefits deriving from specific commitments on market access

³² WTO, ‘Joint Initiative on Services Domestic Regulation’, section I, para. 1.

³³ WTO, ‘Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services’, S/C/W/96, Council for Trade in Services, 1 March 1999, para. 8, online at: <https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=tpercent3Apercent2Fpercent2Fpercent2Fw96.doc&> (last accessed 13 June 2023); WTO, ‘Disciplines on Domestic Regulation Pursuant to GATS Article VI.4’, paras. 3 and 9; Lim and De Meester, ‘Addressing the Domestic Regulation and Services Trade Interface’, at 332 and 347.

³⁴ M. Krajewski, ‘Domestic Regulation and Services Trade: Lessons from Regional and Bilateral Free Trade Agreements’, in P. Sauvé and M. Roy (eds.), *Research Handbook on International Trade in Services* (Cheltenham: Edward Elgar Publishing, 2016), at 4. See also WTO, ‘World Trade Report 2019’, at 180.

³⁵ WTO, ‘Disciplines on Domestic Regulation Pursuant to GATS Article VI.4’, para. 11; WTO, ‘World Trade Report 2012’, at 183–184; WTO, ‘World Trade Report 2019’, at 84; OECD/WTO, ‘Services Domestic Regulation in the WTO’, at 1; Lim and De Meester, ‘An Introduction to Domestic Regulation and GATS’, at 2. On the negative effect of regulatory differences on services trade see H. K. Nordås, ‘Services Trade Restrictiveness Index (STRI): The Trade Effect of Regulatory Differences’, OECD Trade Policy Papers, No. 189, 13 May 2016, online at: www.oecd-ilibrary.org/trade/services-trade-restrictiveness-index_5jlz9z022plp-en (last accessed 13 June 2023).

and national treatment.³⁶ The same reasoning applies to the disciplines set forth in the Reference Paper on SDR.³⁷

Given the limited ambit of the aforementioned disciplines, GATS article VI:4 mandates the Council on Trade for Services to develop any necessary disciplines concerning measures relating to requirements and procedures regarding the qualification and licensing of service suppliers as well as technical standards.³⁸ Such disciplines should ensure that said measures “do not constitute unnecessary barriers to trade in services”.³⁹ This sentence embodies the overall rationale of future disciplines developed according to GATS article VI:4: ensuring that said regulatory measures do not restrict services trade beyond what is necessary to achieve the public policy objective pursued by those measures.⁴⁰ It follows that those disciplines should strike an appropriate balance between WTO members’ right to regulate and the public policy objectives pursued, on the one hand, and their specific commitments on market access and national treatment in the service sector concerned, on the other. Although GATS article VI:4 does not explicitly link the disciplines to be developed to WTO members’ specific commitments,⁴¹ the standstill obligation pursuant to GATS article VI:5, which applies pending the entry into force of future disciplines,⁴² only extends to

³⁶ See WTO, ‘Article VI:4 of the GATS’, para. 9; WTO, ‘Disciplines on Domestic Regulation Pursuant to GATS Article VI.4’, para. 8. See also G. Feketeekuty, ‘Assessing and Improving the Architecture of GATS’, in P. Sauvé and R. M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington, DC: Brookings Institution Press, 2000), at 101; A. Mattoo and P. Sauvé (eds.), *Domestic Regulation & Services Trade Liberalization* (New York: World Bank & Oxford University Press, 2003), at 3; WTO, ‘World Trade Report 2012’, at 212.

³⁷ WTO, ‘Services Domestic Regulation’, at 2.

³⁸ WTO, ‘World Trade Report 2019’, at 175. For an explanation of these regulatory measures, see M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Hague: Kluwer Law International, 2003), at 136.

³⁹ The second sentence of paragraph 4 sets forth three criteria which serve as guidance for the development of future regulatory disciplines, see Lim and De Meester, ‘An Introduction to Domestic Regulation and GATS’, at 8–9; WTO, ‘Disciplines on Domestic Regulation Pursuant to GATS Article VI.4’, para. 16.

⁴⁰ The same rationale is reflected in, e.g., article 2.2 TBT, see Krajewski, *National Regulation and Trade Liberalization in Services*, at 141 *et seq.*, for a discussion of the concept of necessity in this context.

⁴¹ WTO, ‘Article VI:4 of the GATS’, para. 15.

⁴² Lim and De Meester, ‘An Introduction to Domestic Regulation and GATS’, at 9; Krajewski, ‘Domestic Regulation and Services Trade’, at 5; Trachtman, ‘Lessons for the GATS from Existing WTO Rules on Domestic Regulation’, at 67.

sectors where specific commitments have been undertaken. The same logic should prevail once such disciplines have been developed. Otherwise, the relationship between liberalization and regulation under the GATS, as expressed by its preamble, would become unbalanced.⁴³

8.3.1.2 Negotiations on Good Regulatory Principles in Services Trade

At MC11, 59 WTO members issued a “Joint Ministerial Statement on Services Domestic Regulation”, which marked the start for plurilateral negotiations on SDR disciplines. This was followed by a second joint statement on SDR in 2019. It is noteworthy that both joint statements refer to “the mandate” in GATS article VI:4. This reference confirms that the disciplines under discussion target the regulatory measures set out in GATS article VI:4 and pursue the objective of improving the “regulatory environment for trade in services globally”.⁴⁴

At the same time, the developmental perspective is conspicuously absent from both joint statements. This stands in stark contrast to the joint statements on IFD. More importantly, it contravenes the necessity to strengthen developing countries’ regulatory capacity through appropriate technical assistance and capacity building to enable them to undertake domestic regulatory reforms.⁴⁵

8.3.1.3 Reference Paper on SDR

The negotiations on SDR were successfully concluded by the end of 2021. The declaration on the conclusion of these negotiations explicitly recognizes the “importance of good regulatory practice in facilitating trade in services”,⁴⁶ thereby capturing both the main objective, that is, facilitating

⁴³ See M. Krajewski, ‘Article VI GATS’, in R. Wolfrum, P. Stoll, and C. Feinäugle (eds.), *WTO – Trade in Services* (Leiden: Martinus Nijhoff Publishers, 2008), para. 44; Krajewski, ‘Domestic Regulation and Services Trade’, at 8.

⁴⁴ WTO, ‘Joint Statement on Services Domestic Regulation’, WT/L/1059, 23 May 2019, para. 4, online at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1059.pdf&Open=True> (last accessed 13 June 2023). See WTO, ‘Services Domestic Regulation’, at 2–3.

⁴⁵ WTO, ‘World Trade Report 2012’, at 216; WTO, ‘World Trade Report 2019’, at 186; see also P. Low, *Rethinking Services in a Changing World*, E15 Expert Group on Services-Policy Options Paper (Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, 2016), at 20, online at: www3.weforum.org/docs/E15/WEF_Services_report_2015_1401.pdf (last accessed 13 June 2023).

⁴⁶ WTO, ‘Declaration on the Conclusion of Negotiations on Services Domestic Regulation’, para. 1.

services trade, and the key tool, that is, good regulatory practice, for achieving this objective. The Reference Paper on SDR, which represents the outcome of said negotiations,⁴⁷ notes at the outset that its disciplines on SDR reflect the intention of negotiating WTO members to elaborate upon the GATS provisions “pursuant to paragraph 4 of Article VI of the Agreement”.⁴⁸

8.3.1.3.1 Regulatory Requirements and Procedures The disciplines on SDR in the Reference Paper’s section II apply to measures by WTO members relating to the regulatory requirements and procedures listed in GATS article VI:4,⁴⁹ provided that those regulatory measures affect trade in services⁵⁰ in sectors where the WTO members concerned have undertaken specific commitments.⁵¹

The regulatory measures in question share a common characteristic: They are relevant for obtaining an *authorization* to supply a service. Accordingly, most of the Reference Paper’s disciplines apply where WTO members require an authorization for the supply of a service. Authorization is understood by the Reference Paper as a procedure to which an applicant must adhere to demonstrate compliance with the applicable regulatory measures.⁵² Accordingly, most of the Reference Paper’s disciplines are of a *procedural* nature.⁵³

8.3.1.3.2 Disciplines Broadly speaking, the Reference Paper’s disciplines in section II fall into three categories.⁵⁴ (i) The first category of

⁴⁷ Ibid., para. 2.

⁴⁸ WTO, ‘Joint Initiative on Services Domestic Regulation’, section I, para. 1. (the word “Agreement” in the reference paper means the GATS, see para. 1). Footnote 1 to the Reference Paper’s first paragraph in section I clarifies that “further disciplines may be developed”, pursuant to the negotiating mandate of GATS article VI:4.

⁴⁹ Ibid., See also Jelitto, ‘Services Domestic Regulation’, slide 4.

⁵⁰ WTO, ‘Joint Initiative on Services Domestic Regulation’, section II, para. 1. The term “affecting trade in services” is also found in GATS article I:1, which determines GATS’ scope of application, and has been interpreted to mean a “broad scope of application”, AB report, *EC – Bananas III*, para. 220. The term “affecting” in the national treatment provision of GATT article III:4 has been interpreted in a similar manner, AB report, *US – FSC (Art. 21.5 – EC)*, paras. 208–209.

⁵¹ WTO, ‘Joint Initiative on Services Domestic Regulation’, section I, para. 8. Nonetheless, WTO members are encouraged to apply the disciplines also to uncommitted sectors, *ibid.*

⁵² Ibid., section II, para. 3.

⁵³ WTO, ‘Services Domestic Regulation’, at 2.

⁵⁴ Section III of the Reference Paper sets out alternative disciplines on SDR for *financial* services. These alternative disciplines are thus *sectoral* disciplines whereas the disciplines

disciplines aims at guaranteeing that “due process”⁵⁵ is observed in authorization procedures; (ii) the second category of disciplines is concerned with the development of regulatory measures relating to authorization procedures; (iii) and the third category of disciplines seeks to ensure the transparency of regulatory measures and the laws and regulations of general application affecting such measures. The thrust of these disciplines is the application of good regulatory principles, such as legal certainty and predictability, to regulatory measures by WTO members affecting services trade.⁵⁶

The first set of disciplines concerns various issues in relation to *authorization procedures*, namely the submission of applications to competent authorities, the relevant time frames for submitting applications, the acceptance by competent authorities of electronic submissions of applications and copies, the processing of applications by competent authorities, authorization fees charged by competent authorities, and the independence of competent authorities in reaching and administering their decisions authorizing the supply of a service.⁵⁷ These disciplines considerably expand GATS article VI:3 regarding the application process for an authorization to supply a service and seek to give meaning to GATS article VI:4, lit. (c), pursuant to which licensing procedures should not in themselves restrict the supply of a service.

Next, two disciplines pertain to the assessment and recognition of *professional qualifications*.⁵⁸ These disciplines complement GATS article VI:6 concerning the verification of the competence of professional service suppliers and GATS article VII, in particular its paragraph 5 on the establishment and adoption of common international standards and criteria for recognition, in cooperation with relevant intergovernmental and nongovernmental organizations.

in section II are of a *horizontal* nature. Contrary to the disciplines in reference paper’s section II, WTO members are not obliged to inscribe these alternative disciplines in their GATS schedules, WTO, ‘Joint Initiative on Services Domestic Regulation’, section I, para. 7.

⁵⁵ Ensuring due process in relation to customs matters is a basic object and purpose of the GATT, see AB report, *Thailand – Cigarettes (Philippines)*, para. 202.

⁵⁶ WTO, ‘Services Domestic Regulation’, at 2.

⁵⁷ WTO, ‘Joint Initiative on Services Domestic Regulation’, section II, paras. 4–9, 12. The discipline on the independence of competent authorities is somewhat different from the other disciplines regarding the application process in that it is primarily *institutional* in nature.

⁵⁸ *Ibid.*, section II, paras. 10–11.

The second set of disciplines consists of one discipline of an overarching nature regarding the *development* of regulatory measures relating to the authorization for the supply of a service.⁵⁹ This discipline is of a different nature than the aforementioned disciplines in that it influences the *substance* of regulatory measures by requiring that they be developed in conformity with good regulatory principles, in particular the principles of objectivity and impartiality⁶⁰ and the equality of men and women.⁶¹ To this end, the discipline incorporates the criteria set out by GATS article VI:4 (a) and (c) but does not include a “necessity test” in terms of GATS article VI:4 (b).⁶² The absence of a necessity test means that the discipline does not address the trade restrictiveness of the regulatory measures at issue.⁶³

The third set of disciplines relates to *transparency* of regulatory measures. These transparency disciplines complement GATS articles III and IV and deal with the publication of relevant information on regulatory measures regarding authorization procedures, the publication in advance of and the opportunity to comment on proposed laws and regulations of general application, and the establishment or maintenance of enquiry points.⁶⁴

8.3.1.3.3 Regulatory Policy Space The Reference Paper’s disciplines are mindful of WTO members’ regulatory sovereignty and seek to

⁵⁹ Ibid., section II, para. 22.

⁶⁰ On the principles of reasonableness, objectivity and impartiality, which also underly GATS article VI:1, see A. Mitchell and T. Voon, ‘Reasonableness, Impartiality and Objectivity’ in A. H. Lim and B. De Meester (eds.), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (New York: Cambridge University Press, 2014), at 65, 72 *et seq.*

⁶¹ Paragraph 22 of the Joint Initiative on Services Domestic Regulation, Reference Paper on Services Domestic Regulation is the first WTO provision on non-discrimination between men and women and is intended to support women’s economic empowerment and increase their participation in services trade, WTO, ‘Services Domestic Regulation’, at 2.

⁶² See P. Delimatsis, ‘Who’s Afraid of Necessity? And Why It Matters?’, in A. H. Lim and B. De Meester (eds.), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (New York: Cambridge University Press, 2014), at 104–106. See also Lim and De Meester, ‘Addressing the Domestic Regulation and Services Trade Interface’, at 332 and 347.

⁶³ Mattoo argues that introducing a “necessity test” in regulatory disciplines could create a “hold back” problem because it could inhibit WTO members’ willingness to enter into new specific commitments as long as current commitments do not cover all sectors and measures, at 4–5.

⁶⁴ WTO, ‘Joint Initiative on Services Domestic Regulation’, section II, paras. 13–20.

preserve their regulatory policy space.⁶⁵ This is not only apparent from the mostly procedural nature of these disciplines but also reflected by the provisions in Reference Paper's section I regarding the right to regulate and the implementation of the disciplines, on the one hand, and the wording of the disciplines in section II, on the other.

8.3.1.3.3.1 Right to Regulate The Reference Paper on SDR recognizes WTO members' right to regulate and introduce new regulations,⁶⁶ on the supply of services, to meet their policy objectives, thereby restating recital four of the GATS preamble. WTO members are thus free to choose the policy objectives they wish to achieve and adopt regulatory measures they deem appropriate and necessary for achieving those policy objectives. The Reference Paper on SDR does not interfere with this right to regulate. It neither includes disciplines that would somehow restrict WTO members' choice of policy objectives that they wish to pursue nor does it prescribe the substantive content of the regulatory measures adopted by WTO members in pursuit of the chosen policy objectives. That being said, one discipline has an impact on the substantive content of WTO members' regulatory measures, namely the discipline concerning the development of regulatory measures. Moreover, while not impinging on WTO members' right to regulate, the Reference Paper's procedural disciplines determine how regulatory measures related to an authorization for the supply of a service ought to be exercised for the sake of "due process".

Furthermore, the Reference Paper on SDR further reinforces WTO members' right to regulate by not curtailing their freedom as to how they implement the Reference Paper's disciplines. Indeed, the Reference Paper underscores that the disciplines are *not* to be construed to prescribe or impose any particular regulatory provisions regarding their implementation.⁶⁷ WTO members thus retain unfettered discretion how they transpose the disciplines in their domestic legal systems as long as their regulatory measures, authorization procedures, and laws and regulations of general application affecting such measures and procedures comply with the Reference Paper's disciplines and do not diminish WTO members' rights and obligations under the GATS.⁶⁸

⁶⁵ WTO, 'Services Domestic Regulation', at 2.

⁶⁶ Ibid.; WTO, 'Joint Initiative on Services Domestic Regulation', section I, para. 3.

⁶⁷ WTO, 'Joint Initiative on Services Domestic Regulation', section I, para. 5.

⁶⁸ Ibid., section I, para. 6. This provision only refers to WTO members' obligations but it would have been more correct to also refer to WTO members' rights, cf. DSU articles 3.2 and 19.2.

8.3.1.3.3.2 Regulatory Flexibility Many of the Reference Paper's disciplines provide for a large degree of flexibility. This flexibility is conveyed by formulations such as "to the extent practicable", "to the extent possible", and "endeavor to". The flexibility conferred by such wording is not unlimited, however, since the disciplines often combine it with the word "shall". Even more flexibility is conferred by formulations such as "are encouraged to" or "should", which are not combined with the word "shall". This flexibility is intended to preserve WTO members' regulatory policy space and take account of their differing regulatory systems and capacities.⁶⁹ This "hybrid" approach, which combines mandatory and hortatory language, that is, hard and soft law, reflects WTO members' desire to improve their regulatory governance while maintaining the regulatory policy space.⁷⁰

While it is comprehensible that WTO members wish to preserve their regulatory policy space, too much flexibility would undermine the effectiveness of the Reference Paper's disciplines and thus fail to achieve the ultimate objective of facilitating services trade. It should also be borne in mind that the disciplines have, for the most part, a procedural character and affect neither the policy objectives pursued nor regulatory measures' substantive content. Therefore, WTO members will need to strike a careful balance between safeguarding their regulatory policy space and ensuring the effectiveness of the Reference Paper's disciplines when implementing the latter in their domestic legal system. Otherwise, the economic benefits that are expected from a full implementation of the Reference Paper on SDR, in particular an estimated significant reduction of costs in services trade,⁷¹ will not (fully) materialize.

8.3.1.3.4 Special and Differential Treatment The Reference Paper's disciplines devote a subsection to the topic of development, that is, special and differential treatment for developing country and LDC members.⁷² The disciplines differentiate between developing country members and LDC members. The former may avail themselves of a

⁶⁹ WTO, 'Services Domestic Regulation', at 2; see also Jelitto, 'Services Domestic Regulation', slide 4.

⁷⁰ For a discussion on balancing legal certainty and regulatory flexibility, see M. Krajewski, 'Balancing Legal Certainty with Regulatory Flexibility', in A. H. Lim and B. De Meester (eds.), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (New York: Cambridge University Press, 2014), at 91–92.

⁷¹ OECD/WTO, 'Services Domestic Regulation in the WTO', at 1.

⁷² WTO, 'Joint Initiative on Services Domestic Regulation', section I, paras. 10–12.

transitional period of seven years for implementing “specific” disciplines.⁷³ In contrast, LDC members are exempt from the disciplines but are encouraged to apply them, consistent with their individual implementation capacity.⁷⁴ Once LDC members graduate, they may designate a transitional period of seven years for specific disciplines.⁷⁵ In view of LDC members’ limited institutional and regulatory capacities, it appears rather unlikely that they would be able to apply the disciplines before graduating from LDC status, unless they could count on receiving appropriate technical assistance and capacity building.⁷⁶ However, developed and developing country members, in a position to do so, are simply “encouraged” to provide technical assistance and capacity building to developing country and LDC members, upon their request and on mutually agreed terms and conditions.⁷⁷ Such assistance should, among others, aim at developing and strengthening the institutional and regulatory capacities to regulate the supply of services and to implement the disciplines.⁷⁸

As can be gleaned from the foregoing, the Reference Paper’s disciplines adopt a rather traditional approach to special and differential treatment, which does not mirror the enhanced framework for special and differential treatment established by the TFA. Apart from the fact that the negotiations on SDR were largely driven by developed countries, this is possibly due to two factors: One factor may be the flexibility provided for by many disciplines. A second factor may be the “Reference Paper” approach according to which the disciplines will become legally binding on a WTO member only once they are inscribed in that member’s GATS schedule.⁷⁹ Whether and when to do so is a decision left to WTO members’ unfettered discretion.

⁷³ Ibid., para. 10. An extension of a transitional period may be requested; such a request is to be granted sympathetic consideration, taking account of the specific circumstances of the developing country member submitting the request.

⁷⁴ Ibid., para. 11.

⁷⁵ Ibid.

⁷⁶ As emphasized by Lim and De Meester, ‘Addressing the Domestic Regulation and Services Trade Interface’, at 332 and 351: “Finally, capacity-building is a vital element . . . Finding ways to support regulatory capacity-building and cooperation so as to complement services policy reform and minimize the effects of regulatory diversity across jurisdictions could do much to foster trade and development.”

⁷⁷ WTO, ‘Joint Initiative on Services Domestic Regulation’, section I, para. 12.

⁷⁸ Ibid.

⁷⁹ Ibid., section I, para. 7. See Lim and De Meester, ‘Addressing the Domestic Regulation and Services Trade Interface’, at 332 and 349; WTO, ‘World Trade Report 2012’, at 213.

Yet stronger rules on special and differential treatment in the Reference Paper might have positively influenced developing country and LDC members' willingness to inscribe the disciplines in their GATS schedules. This appears to be a missed chance. Against this backdrop, it is an open question whether developing country and LDC members will be eager to inscribe the Reference Paper's disciplines in their GATS schedules. Their willingness could be enhanced by the provision of adequate technical assistance and capacity building. Given that the IFD Agreement takes a much more forceful approach to special and differential treatment by linking implementation with the acquisition of implementation capacity, developing country and LDC members may be well advised to await the conclusion of the IFD negotiations and avail themselves of technical assistance and capacity building, which will become available under a future IFD Agreement, to also implement the disciplines of the Reference Paper on SDR.

8.3.1.3.5 Outlook for the Reference Paper on SDR Sixty-seven WTO members, representing 90 percent of world trade in services,⁸⁰ have signed the declaration and committed to inscribe the Reference Paper's disciplines on SDR as additional commitments in their GATS schedules.⁸¹ The modified GATS schedules are to be submitted for certification.⁸² Fifty-nine WTO members have done so on December 20, 2022, thereby triggering the certification process.⁸³ The certification process allows for a technical verification of the modified GATS schedules within forty-five days following their submission.⁸⁴ Accordingly, any WTO member making an objection to the certification of the modified GATS schedules should identify the specific elements of the modification that give rise to the objection.⁸⁵ Despite the purely technical nature of the

⁸⁰ WTO, 'Services Domestic Regulation', at 1.

⁸¹ WTO, 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation', para. 4; WTO, 'Joint Initiative on Services Domestic Regulation', section I, para. 7. At MC12, three more WTO members joined the JSI on SDR, online at: www.wto.org/english/news_e/news22_e/serv_13jun22_e.htm (last accessed 13 June 2023).

⁸² WTO, 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation', para. 5.

⁸³ See online at: www.wto.org/english/news_e/news22_e/jssdr_20dec22_e.htm (last accessed 13 June 2023).

⁸⁴ See Mamdouh, *Legal Options for Integrating a New Investment Facilitation Agreement*, at 9.

⁸⁵ WTO, 'Procedures for the Certification or Rectifications or Improvements to Schedules of Specific Commitments', S/L/84, Council for Trade in Services, 18 April 2000, para. 2, online

certification process, some WTO members might object to the certification of the modified GATS schedules on the grounds that outcomes of plurilateral initiatives, such as the Reference Paper on SDR, should be added to the WTO rule book through the amendment procedure according to article X WTO Agreement.⁸⁶ If this were the case, it would risk to delay the entry into force of the modified GATS schedules, that is, the Reference Paper's disciplines on SDR.⁸⁷

Once the certification process of the modified GATS schedules has been completed, these modified schedules – and hence their additional commitments incorporating the Reference Paper's disciplines on SDR – will take legal effect.⁸⁸ The Reference Paper's disciplines on SDR will then be binding on those WTO members that have submitted their modified GATS schedules. However, the Reference Paper's disciplines on SDR will benefit all WTO members and their services and service suppliers by virtue of the most-favored-nation treatment obligation, established by GATS article II:1.⁸⁹ There is nothing in the Reference Paper on SDR that would suggest that its disciplines and, by extension, additional commitments incorporating these disciplines would not be subject to the unconditional MFN obligation.

The implementation of the additional commitments incorporating the Reference Paper's disciplines on SDR is thought to generate economic benefits, including annual cost savings on services trade, an increase in services trade, and enhanced participation in global value chains.⁹⁰ Most of these economic benefits will accrue to those WTO members that implement the Reference Paper's disciplines on SDR, but due to the most-favored-nation nature of the SDR disciplines, services exports from other WTO members will also benefit from cost savings, albeit to a much lesser extent.⁹¹

at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=25887&CurrentCatalogueIdIndex=0 (last accessed 13 June 2023).

⁸⁶ WTO, 'The Legal Status of 'Joint Statement Initiatives' and Their Negotiated Outcomes' Communication by India and South Africa', WT/GC/W/819, 19 February 2021, paras. 3, 5 and 8.

⁸⁷ If objections made in the certification process are not withdrawn, WTO members wishing to modify their GATS schedules have to resort to a modification of their GATS schedules in accordance with article XXI GATS and the procedures for the implementation of article XXI GATS, S/L/84, para. 4.

⁸⁸ Ibid., para. 1.

⁸⁹ WTO, 'Services Domestic Regulation', at 2.

⁹⁰ OECD/WTO, 'Services Domestic Regulation in the WTO', at 3–6.

⁹¹ Ibid., at 5.

8.3.2 *Good Regulatory Principles in Investment Facilitation*

8.3.2.1 A New Instrument in International Investment Policy

There are several reasons why negotiations on the IFD Agreement took longer than the SDR negotiations. To start with, negotiations on IFD have a broader scope than those on SDR. Moreover, negotiations on IFD are politically more sensitive than those on SDR because of the nexus between investment facilitation, on the one hand, and investment liberalization (market access), investment protection, and investor–state dispute settlement, on the other, even though the latter subject matters are specifically excluded from the scope of negotiations on IFD.⁹² Additionally, the explicit objective of the negotiations on IFD to devise rules that would contribute to a greater participation of developing countries in global investment flows⁹³ adds an additional layer of complexity since it requires elaborating appropriate rules in this regard. It is no wonder, therefore, that the JSI on IFD is critically scrutinized: Apart from questions regarding its interaction with international investment agreements, investor–state dispute settlement and contribution to sustainable investment,⁹⁴ its overlap with the Reference Paper on SDR has raised concerns that the rules under both initiatives could be incoherent or even inconsistent.⁹⁵

The JSI on IFD is based on the general understanding that trade, investment, and development are interlinked and that a more transparent, efficient, and predictable environment is needed to facilitate cross-border investment.⁹⁶ Facilitating cross-border investment is considered

⁹² WTO, 'Joint Ministerial Statement on Investment Facilitation for Development' WT/MIN(17)/59, para. 4; WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/L1072/Rev. 1, para. 3; WTO, 'Joint Statement on Investment Facilitation for Development', para. 5.

⁹³ WTO, 'Joint Ministerial Statement on Investment Facilitation for Development' WT/MIN(17)/59, para. 6; WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/L1072/Rev. 1, para. 3; WTO, 'Joint Statement on Investment Facilitation for Development', para. 3.

⁹⁴ See Bernasconi-Osterwalder, Leal Campos, and van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation', at 48; Calamita, 'Multilateralizing Investment Facilitation at the WTO', at 979.

⁹⁵ Bernasconi-Osterwalder, Leal Campos, and van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation', at 44. See also Feketekuty, 'Assessing and Improving the Architecture of GATS', who has advocated early on for consistency between new WTO rules on investment and existing GATS rules, at 85 and 109.

⁹⁶ WTO, 'Joint Ministerial Statement on Investment Facilitation for Development' WT/MIN(17)/59, para. 1; WTO, 'Joint Ministerial Statement on Investment Facilitation for

crucial for increasing FDI flows, in particular to developing countries and LDCs, as a precondition for achieving the SDGs.⁹⁷ However, until recently, investment facilitation has received relatively little attention and been identified as a “systemic gap” in national and international investment policies.⁹⁸ Therefore, the JSI on IFD could contribute to closing this gap and “add value” by developing – potentially multilateral – rules on investment facilitation that would provide a baseline for WTO members’ investment facilitation policies.⁹⁹

8.3.2.2 Scope of IFD Disciplines Regarding FDI in Services

The IFD disciplines are meant to apply to services and non-services sectors while excluding from their scope investment liberalization in terms of market access and the right to establish, investment protection, and investor–state dispute settlement.¹⁰⁰ As mentioned in the Introduction, the nexus with FDI in services is common to both the IFD and SDR disciplines and creates an overlap between these two sets of disciplines. Nonetheless, this overlap is a partial one, for two reasons: First, the IFD disciplines would apply, in principle, to *all* services sectors,

Development’, WT/L1072/Rev. 1, para. 2; WTO, ‘Joint Statement on Investment Facilitation for Development’, paras. 1–2. See WTO Secretariat, ‘Investment Facilitation for Development in the WTO’, at 2.

⁹⁷ UNCTAD, ‘Global Action Menu for Investment Facilitation’, May 2017, at 4, online at: https://investmentpolicy.unctad.org/uploaded-files/document/Actionpercent20Menupercent2023–05–2017_7pm_web.pdf (last accessed 13 June 2023). See also A. Novik and A. de Crombrughe, ‘Towards an International Framework for Investment Facilitation’, OECD Investment Insights, April 2018, at 1, online at: www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf (last accessed 13 June 2023).

⁹⁸ UNCTAD, ‘Global Action Menu for Investment Facilitation’, at 4; J. Zhan, ‘Investment Facilitation: Scene-Setting on Investment Facilitation’, 10 July 2017, slide 3, online at: www.wto.org/english/tratop_e/invest_e/05_session_3_james_zhan_unctad.pdf (last accessed 13 June 2023). On the other hand, it is argued that countries have adopted a record number of investment facilitation measures over the past decade, acting upon policy guidance emanating from several international organizations, Calamita, ‘Multilateralizing Investment Facilitation at the WTO’, at 977–979.

⁹⁹ See WTO Secretariat, ‘Investment Facilitation for Development in the WTO’, at 2. See also Novik and de Crombrughe, ‘Towards an International Framework for Investment Facilitation’, at 8–9.

¹⁰⁰ WTO, ‘WTO Structured Discussions on Investment Facilitation for Development’, Consolidated Document by the Coordinator (“Easter Text”), INF / IFD / RD / 74 / Rev. 1, 23 July 2021, at 8–9, online at: www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf (last accessed 13 June 2023).

irrespective of WTO members' specific commitments.¹⁰¹ In contrast, the SDR disciplines apply only to committed services sectors of a WTO member who inscribes those disciplines in its GATS schedule.¹⁰² In this respect, the SDR disciplines' scope will be more limited than that of the IFD disciplines. This would be particularly true in the case of developing country and LDC members which have, on average, undertaken considerably fewer specific commitments under GATS than developed countries.¹⁰³

Second, the IFD and SDR disciplines entertain different understandings of FDI in services. According to the IFD disciplines' current working definition of FDI, ownership of 10 percent of the ordinary shares or voting stock is decisive for determining the existence of a direct investment relationship.¹⁰⁴ The criterion of "ownership of 10 percent of ordinary shares or voting stock" is apparently linked to an entity constituted as a juridical person in the jurisdiction where the investment is made. That criterion may be said to be roughly equivalent to the usual criterion for defining FDI, namely a lasting and direct link between a foreign investor and an undertaking to which the investment is made available.¹⁰⁵ By comparison, the GATS does not contain the notion of FDI but speaks of "commercial presence", which is broadly defined as "any type of business or professional establishment".¹⁰⁶ This includes not only the constitution, acquisition, or maintenance of a juridical person but also the creation or maintenance of a branch or a representative office. It follows that commercial presence, as defined by the GATS, is both wider and narrower than the IFD disciplines' working definition of FDI: It is wider insofar as it does not presuppose a juridical person since a branch or a representative office is not incorporated as a juridical person in the host state.¹⁰⁷ At the same time, it is narrower since the wording "constitution, acquisition or maintenance of a juridical person" implies ownership or control by the service supplier concerned over the juridical

¹⁰¹ It is conceivable that WTO members may be allowed to exclude certain (services and non-services) sectors from the scope of the IFD disciplines.

¹⁰² Note that WTO members are encouraged to apply the SDR disciplines to additional sectors, WTO, 'Joint Initiative on Services Domestic Regulation', section I, para. 8.

¹⁰³ WTO, 'World Trade Report 2019', at 168.

¹⁰⁴ WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at 10.

¹⁰⁵ See art. 2.1. EU FDI screening regulation.

¹⁰⁶ GATS article XXVIII (d).

¹⁰⁷ C. Feinäugle, 'Article XXVIII GATS', in R. Wolfrum, P. Stoll, and C. Feinäugle (eds.), *WTO – Trade in Services* (Leiden: Martinus Nijhoff Publishers, 2008), para. 15.

person.¹⁰⁸ Given that FDI is usually made through a legal entity incorporated in a host state, the IFD disciplines would have a more far-reaching understanding of FDI than the GATS because they would not require the investor's control or ownership of the juridical person to which the investment is made available.¹⁰⁹

In sum, the IFD disciplines' scope goes further than that of the SDR disciplines, in two respects: First, the sectoral scope of the IFD disciplines is wider in that they would apply, in principle, to all services sectors and not only those covered by a WTO member's specific commitments. Second, the IFD disciplines would cover a larger spectrum of economic activities in services sectors than the SDR disciplines.

8.3.2.3 Streamlining and Speeding up Administrative Procedures

8.3.2.3.1 Scope of Disciplines The IFD disciplines on transparency of investment measures, on the one hand, and those on streamlining and speeding up administrative procedures, on the other, address by and large the same subject matter as the disciplines on SDR. In the following, only the IFD disciplines on streamlining and speeding up administrative procedures (IFD disciplines on administrative procedures) are considered. These disciplines are a key element of the IFD disciplines since they are paramount for establishing a fair, predictable, and efficient regulatory environment conducive to making cross-border investments.¹¹⁰ Therefore, these disciplines are critical for reducing regulatory risk, which constitutes one of the major causes for the cancellation or withdrawal of FDI.¹¹¹

¹⁰⁸ GATS article XXVIII (m) (ii) requires a juridical person of another member to be "owned or controlled" by (natural or juridical) persons of that member, in the case of the supply of a service through commercial presence. GATS article XXVIII (n) defines the terms "owned" and "controlled". The criterion "owned" requires persons of a member to own more than 50 percent of the equity interest in a juridical person whereas the criterion "controlled" requires persons of a member to have the power to name a majority of the directors or otherwise to legally direct the actions of a juridical person. See also Mamdouh, *Legal Options for Integrating a New Investment Facilitation Agreement*, at 10.

¹⁰⁹ See Bernasconi-Osterwalder, Leal Campos, and van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation', at 23; Mamdouh, *Legal Options for Integrating a New Investment Facilitation Agreement*, at 10.

¹¹⁰ WTO Secretariat, 'Investment Facilitation for Development in the WTO', at 1. See also Berger and Dadkhah, 'Challenges of Negotiating and Implementing an International Investment Facilitation Framework', at 6.

¹¹¹ See World Bank, *Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses: Summary of Research Findings and Policy Implications*

The IFD disciplines do not yet contain a definition of the term “administrative procedures”. But as in the case of the SDR disciplines, most of the IFD disciplines on administrative procedures are linked to “authorization procedures” or an “authorization for an investment”. Yet, the IFD disciplines do not define the term authorization. In analogy to the definition of authorization in the Reference Paper on SDR,¹¹² one may assume that an authorization in the IFD context would mean the permission to make an investment resulting from a procedure, that is, an authorization procedure, to which an applicant (foreign investor) must adhere to demonstrate compliance with applicable requirements.¹¹³ The fact that most IFD disciplines on administrative procedures are closely related to authorization procedures demonstrates their *procedural* nature. Consequently, the vast majority of IFD disciplines on administrative procedures are not concerned with the substantive requirements underlying an authorization procedure.¹¹⁴

8.3.2.3.2 Types of Disciplines The IFD disciplines on administrative procedures fall into three broad categories: (i) The first category of disciplines seeks to ensure that “due process” is respected in authorization procedures; (ii) the second category of disciplines aims at making sure that measures regarding an authorization for an investment are based on certain general principles and administrative decisions affecting investment can be reviewed in objective and impartial procedures; and (iii) the third category of disciplines concerns the administration of measures of general application and their periodic review. The common theme of all these disciplines is to guarantee the application of and compliance with good regulatory principles, in particular legal certainty and predictability, with the aim of reducing regulatory uncertainty,

(Washington, DC: World Bank Group, 2019), at 2, online at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/528401576141837231/political-risk-and-policy-responses-summary-of-research-findings-and-policy-implications> (last accessed 13 June 2023); P. Kher, T. T. Tran, and S. Hebous, ‘Reducing Regulatory Risk to Attract and Retain FDI’, Columbia FDI Perspectives No. 306, May 31 2021, at 1, online at: <https://ccsi.columbia.edu/sites/default/files/content/docs/fdi/percent20perspectives/Nopercent20306percent20-percent20Kher,percent20Tran,percent20andpercent20Hebouspercent20-percent20FINAL.pdf> (last accessed 13 June 2023).

¹¹² WTO, ‘Joint Initiative on Services Domestic Regulation’, section II, para. 1.

¹¹³ See article 13.2.b. of the Easter Text which requires that authorization “procedures are adequate for applicants to demonstrate whether they meet the requirements”.

¹¹⁴ See WTO, ‘Services Domestic Regulation’, at 2.

minimizing transaction costs, and, more generally, making it easier for foreign investors to invest.¹¹⁵

The first and largest category of disciplines deals with different aspects of authorization procedures, such as application periods, acceptance of authenticated copies, processing of applications, treatment of incomplete applications, rejection of applications, multiple applications, authorization fees, the use of ICT, and the independence of competent authorities.¹¹⁶ These disciplines have a purely procedural character and closely resemble the corresponding disciplines in the Reference Paper on SDR. For the most part, and similar to the corresponding SDR disciplines, their wording provides for a certain degree of flexibility by combining mandatory language (“shall”) with hortatory language (“to the extent practicable”, “endeavor”), thus preserving some regulatory policy space for WTO members when they implement and apply these IFD disciplines.

The second category of disciplines is different from the disciplines in the first category, in three respects. First, one discipline has an impact on the *substance* of measures relating to an authorization for an investment because it mandates that those measures as well as the authorization procedures conform to certain requirements. Second, the other discipline calls on WTO members to have mechanisms in place that provide for the prompt, impartial, and objective review of administrative decisions affecting investment. Third, the disciplines’ wording is exclusively mandatory (“shall ensure”, “shall be made”, “shall maintain or institute”), thus leaving no flexibility for WTO members as to the implementation of these disciplines in their domestic legal systems.¹¹⁷

One of the disciplines requires that (i) measures relating to an authorization for an investment be based on objective and transparent criteria, (ii) the authorization procedures for demonstrating applicants’ compliance with relevant requirements be impartial, and (iii) those procedures do not in themselves prevent the fulfillment of said requirements.¹¹⁸ This discipline is almost identical to the discipline on the development of

¹¹⁵ Ibid.; see also UNCTAD, ‘Global Action Menu for Investment Facilitation’, at 4.

¹¹⁶ WTO, ‘WTO Structured Discussions on Investment Facilitation for Development’, at 17–19.

¹¹⁷ An exception applies to the obligation concerning the review of administrative decisions affecting investment, as this obligation is tempered by a paragraph that allows WTO members to refrain from instituting such review mechanisms “where this would be inconsistent with its constitutional character or the nature of its legal system”, *ibid.*, at 20. This constitutional “carve out” is the same as the one in article VI:2b) GATS.

¹¹⁸ WTO, ‘WTO Structured Discussions on Investment Facilitation for Development’, at 17.

measures in the Reference Paper on SDR, except for the requirement not to discriminate between men and women. The other discipline has no counterpart in the Reference Paper on SDR but corresponds to article VI:2 GATS. It obliges WTO members to maintain or institute judicial, arbitral, or administrative tribunals or procedures that provide for the prompt, objective, and impartial review of administrative decisions affecting investment.¹¹⁹ Such a review must provide for appropriate remedies, where justified. This discipline allows investors affected by administrative decisions adopted in authorization procedures to challenge those decisions by claiming that they did not conform to the IFD disciplines on administrative procedures or the domestic rules implementing these disciplines.

The third category of disciplines deals with measures of general application and addresses two aspects: their administration and periodic review. These disciplines deviate from the rest of the IFD disciplines on administrative procedures in that they are not confined to authorization procedures for an investment or measures relating to such procedures.¹²⁰ Rather, the term “measures of general application”, used by both disciplines in this category, refers to all types of measures covered by the IFD disciplines since that term is qualified by the words “within the scope of this Agreement”. This qualification would have been unnecessary if the term only comprised measures relating to authorization procedures. Moreover, the measures must apply generally, that is, to an *a priori* unlimited number of situations or cases rather than to a single situation or case. Consequently, measures pertaining to a single situation or case, such as an administrative decision concerning an application by a foreign investor for an authorization for an investment, do not amount to “measures of general application”. This reading is corroborated by article VI:1 GATS, which also refers to “measures of general application” and covers all measures coming under the scope of GATS that apply to an unspecified number of situations or cases.¹²¹ Furthermore, the disciplines under this category employ different wordings: The wording of the discipline on the administration of measures of general application is mandatory (“shall ensure”), thus leaving no flexibility as to its

¹¹⁹ Ibid., at 20.

¹²⁰ In light thereof, it would seem more appropriate to place these disciplines in the IFD disciplines’ section I on scope and general principles.

¹²¹ Krajewski, *National Regulation and Trade Liberalization in Services*, at 125; M. Krajewski, ‘Article VI GATS’, para. 8.

implementation in WTO members' domestic laws, whereas the wording of the discipline on the periodic review of measures of general application is merely hortatory ("is encouraged"), thus leaving considerable flexibility to WTO members as regards its implementation in domestic law.

The discipline regarding the administration of measures of general application requires that such measures be administered in a "reasonable, objective and impartial manner".¹²² The discipline addresses the application of measures of general application,¹²³ such as to applications by foreign investors for an authorization for an investment. There is no corresponding provision in the Reference Paper on SDR because article VI:1 GATS already contains such an obligation. The discipline concerning the periodic review of measures of general application seeks to encourage WTO members to carry out periodic reviews of such measures with a view to rendering their investment facilitation regimes more effective.¹²⁴ This discipline has no counterpart in the Reference Paper on SDR or the GATS, which may be one reason for its hortatory language.

8.3.2.4 Special and Differential Treatment

The approach of the IFD disciplines to special and differential treatment for developing country and LDC members differs substantially from that of the Reference Paper on SDR. While the latter devotes only three paragraphs to SDT, which are rather traditional in their approach,¹²⁵ the IFD disciplines include an entire section on special and differential treatment, which encompasses five provisions, spanning over ten pages.¹²⁶ The approach of the IFD disciplines to special and differential treatment is progressive and mirrors the approach adopted by the TFA.¹²⁷ Among others, the section on special and differential treatment provides for three categories of provisions, the possibility for developing

¹²² WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at 17.

¹²³ Cf. AB report, *EC – Selected Customs Matters*, para. 224, where the AB held that the notion "administer" in article X:3(a) GA3ee3TT refers to putting into practical effect, or applying, a legal instrument in terms of article X:1 GATT.

¹²⁴ WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at 20.

¹²⁵ WTO, 'Joint Initiative on Services Domestic Regulation', section I, paras. 10–12.

¹²⁶ WTO, 'WTO Structured Discussions on Investment Facilitation for Development', at 28–39.

¹²⁷ On lessons from the implementation of the TFA for the implementation of IFD disciplines see Saeed, 'Implementing an Investment Facilitation Framework for Development'.

country and LDC members to self-designate the provisions they wish to include under each of the categories, the possibility to shift between different categories, and the possibility to extend implementation periods, a grace period for the application of the WTO dispute settlement understanding as well as technical assistance and capacity building. Importantly, developing country and LDC members would be able, under one of the categories, to link the implementation of provisions in that category to the prior acquisition of implementation capacity through the provision of assistance and support for capacity building.

The emphasis put on special and differential treatment by the IFD disciplines reflects the need of developing country and LDC members for technical assistance and capacity building in implementing the IFD disciplines;¹²⁸ otherwise, the IFD disciplines risk becoming “dead letter”.

8.4 Conclusion

The foregoing review of the disciplines on SDR and IFD, respectively, has focused on a comparison between the SDR disciplines and the IFD disciplines on streamlining and speeding up administrative procedures. This comparison has shown that these two sets of disciplines are largely similar in substance and mostly of a procedural character. They address primarily authorization procedures, either for the supply of a service or an investment, and their wording leaves WTO members a certain degree of flexibility as to their implementation in domestic law. Even though the disciplines predominantly lay down obligations for authorization procedures, they also address the content of regulatory measures related to authorization procedures. They do so by requiring WTO members to respect certain general principles when devising such measures and procedures. Importantly, both the SDR and IFD disciplines use mandatory wording in that respect, thereby leaving no flexibility as to the implementation in WTO members’ domestic laws. In terms of substance, these content-related disciplines are again very similar and safe for the obligation not to discriminate between men and women, which has not yet found its way into the IFD disciplines. In areas where the Reference Paper on SDR does not contain provisions corresponding to the IFD

¹²⁸ Berger and Dadkhah, ‘Challenges of Negotiating and Implementing an International Investment Facilitation Framework’, at 5; A. Berger, A. Dadkhah and Z. Oleksyuk, ‘Quantifying Investment Facilitation at Country Level: Introducing a New Index’, DIE Discussion Paper, 23/2021, at 21.

disciplines – that is, review mechanisms and administration of measures of general application – equivalent provisions are found in the GATS. The only IFD discipline that has no counterpart in either the Reference Paper on SDR or the GATS is the discipline on the periodic review of measures of general application within the scope of the IFD disciplines. It is not surprising that the discipline employs hortatory language, thus granting a large discretion to WTO members as to its implementation in their domestic legal systems. The substantive similarity of the SDR and IFD disciplines may be explained by the fact that they share a common objective: facilitating services trade and cross-border investment through disciplines that foster the implementation and application of good regulatory principles.

Notwithstanding the largely similar character of the SDR and IFD disciplines, their scope is somewhat different. Leaving aside their different understanding of FDI, the SDR disciplines only apply to services sectors, whereas the IFD disciplines will apply to both services and non-services sectors. In addition, the SDR disciplines apply only to those services sectors where WTO members have undertaken specific commitments, but WTO members may voluntarily apply them also to noncommitted services sectors. In contrast, no restriction in terms of sectors is foreseen by the IFD disciplines, but it seems possible that WTO members will be able to exclude certain (services and non-services) sectors from the scope of application of the IFD disciplines. These differences are amplified by the fact that the SDR disciplines have domestic regulation within the meaning of article VI:4 GATS as their sole focus. In contrast, the IFD disciplines cover a much larger spectrum; the streamlining and speeding up of administrative procedures is but one, albeit crucial, element of the IFD disciplines. These differences reflect the distinct origins of both sets of disciplines: The SDR disciplines are anchored in and circumscribed by the negotiating mandate of article VI:4 GATS, whereas the IFD disciplines are the fruit of a relatively recent initiative that did not need to heed any treaty-imposed negotiating mandate on that subject matter.

Another difference between the two initiatives is related to the way in which they address special and differential treatment for developing country and LDC members. The SDR disciplines provide for SDT in a rather limited fashion. This may have to do with the fact that developed country members were the main driving force behind the development of these disciplines. Nonetheless, this somewhat meagre result is likely to stifle the readiness of developing country and LDC members to inscribe

the SDR disciplines in their GATS schedules. The same cannot be said of the IFD disciplines. They copy the “modern” approach of the TFA to special and differential treatment and transpose it to the IFD context. This openness to strong SDT rules is possibly a consequence of a different negotiating dynamic: Developing country members are driving this negotiating process forward. Moreover, without adequate technical assistance and capacity building, the implementation of the IFD disciplines will get stuck as developing country and LDC members have to shoulder the highest implementation burden.¹²⁹

Regardless of the aforementioned differences, the SDR and IFD disciplines face a somewhat uncertain future. This is because of their plurilateral nature. India and South Africa have been vocal in their opposition to all JSIs, including those on SDR and IFD. They might be tempted to object to WTO members’ modified GATS schedules, which incorporate the disciplines of the Reference Paper on SDR as additional commitments, in the certification process of those schedules, irrespective of the purely technical nature of that process. Similarly, India and South Africa may also oppose the integration of the IFD Agreement into the WTO legal architecture. For the sake of the multilateral trading system and sustainable development, it is to be hoped that these concerns are unfounded.

¹²⁹ Berger and Dadkhah, ‘Challenges of Negotiating and Implementing an International Investment Facilitation Framework’, at 3; Berger, Dadkhah, and Oleksyuk, ‘Quantifying Investment Facilitation at Country Level’, at 20.