

The Joint Initiative on Investment Facilitation for Development:

Evolution from 2022 and the road to MC13

February 2023

Rashmi Jose

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Written by Rashmi Jose

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IISD HEAD OFFICE

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: www.iisd.org

Twitter: @IISD_news

CUTS INTERNATIONAL, GENEVA

37-39, Rue de Vermont
1202 Geneva, Switzerland

Tel: +41 (0) 22 734 60 80

Fax: +41 (0) 22 734 39 14

Email: geneva@cuts.org

Website: cuts-geneva.org

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1.0 Introduction

Although global foreign direct investment flows have finally recovered to reach pre-pandemic levels, this recovery is expected to remain fragile. Countries will have to navigate different stresses from “the fallout of the war in Ukraine with the triple food, fuel, and finance crises, along with the ongoing COVID-19 pandemic and climate disruption,” among other types of risks, which are expected to be especially burdensome for developing and least-developed economies (United Nations Conference on Trade and Development [UNCTAD], 2022).

It is in this context that over 110 World Trade Organization (WTO) members, representing more than two-thirds of the membership, are currently in the process of negotiating a new agreement on disciplines for investment facilitation measures. The hope is that the potential agreement will be useful for improving investment and business climates, and make it easier for investors to invest and expand their operations, especially for the benefit of developing and least-developed country (LDC) members.

The negotiations have progressed considerably since their formal launch in September 2020. Not only have more members signed on to participate in the negotiations over time, but there has also been substantial progress on the text of the agreement.

While negotiators had initially hoped to conclude negotiating the agreement by the end of 2022, some important outstanding issues remained unresolved at the end of the year. The co-coordinators (Chile and the Republic of Korea) have therefore indicated that July 2023 is the new target deadline for the conclusion of the text-based negotiations.

This briefing paper provides an update on how the negotiating text has evolved, summarizing the content of the draft agreement as it stands. It also highlights the main changes to the text from 2022 and the issues that members have yet to align on. The negotiating text is made up of “clean” and “bracketed” provisions. Brackets around a provision mean that the provision, or certain words within it, are still being debated. When language is not bracketed, it is referred to as “clean text,” which means members have agreed—in principle—to the language of the article, and no more changes are expected. That said, the negotiations follow the principle that “nothing is agreed until everything is agreed,” so clean text can still be changed if necessary.

In addition to explaining the main body of the negotiating text, the paper will also provide an overview of outstanding proposals that remain in the annex segment of the agreement. The annex was created as a repository for proposals of articles that had not garnered full membership support and therefore could not be included in the main part of the text. As long as the proponent of the proposal wants to continue discussions on its proposal with the other participants of the agreement, the text remains in the annex.

Having explained the content of the negotiating text, the paper will conclude with an overview of what might be expected of the process going forward.

2.0 The Draft Investment Facilitation for Development Agreement

2.1 Section I: Scope and General Principles

This first section of the agreement introduces its objectives and provides important clarifications on the agreement's coverage and application, as well as information on how the agreement will relate to other international investment agreements (IIAs).

The section starts by clarifying the objectives of the agreement (Article 1 on Objectives), which are to improve the transparency of investment measures, streamline administrative procedures, and adopt other investment facilitation measures. These, together with the promotion of international cooperation, are expected to facilitate the flow of foreign direct investment, particularly to developing country and LDC members, with the aim of fostering sustainable development.

The objectives are followed by a discussion of the scope of the agreement. Article 2 on Scope clarifies what kinds of government measures the different obligations of the agreement would apply to. The article essentially clarifies that the obligations of the agreement will apply to government measures that “affect or relate to” the investment activities of foreign investors investing in a member's territory or jurisdiction. This applies at central, regional, and local levels of government, as well as to non-government bodies if they are exercising delegated power of these levels of government. There is an important set of brackets remaining within this provision. Members have yet to agree on whether the agreement should apply to measures that “affect” investments or, more narrowly, to measures “related to” investments. Some members prefer a clearer and narrower approach, under which measures would have to be explicitly related to investments to be covered. Others prefer a wider approach, under which any measure that might have a direct or indirect impact on investments would be covered and subject to the obligations of the agreement.

Article 2 also excludes certain kinds of measures from the application of the agreement. The obligations of the agreement do not apply to government procurement, nor to subsidies or grants that are not granted to other members' investors due to domestic laws. Article 2 also clarifies that nothing in the agreement creates or modifies existing commitments relating to market access, investment protection, or investor–state dispute settlement. These latter clarifications are part of the effort of building a firewall to prevent interpretative overlap between this agreement and international investment agreements (more on that below).

To provide additional clarity on what the framework would apply to, key terms have been defined, including “investment activities,” “measure,” “authorization,” “investor of another member,” and “juridical person.” However, the definitions of “competent authority,” “market access,” and

“relevant provisions,” which are included as footnotes, remain in brackets, indicating that they have yet to be agreed.

Given that the agreement tackles the topic of foreign direct investment, there is a potential for interpretative links being drawn between the commitments members make under this treaty with the commitments that a member may undertake under other international investment treaties. The article on Relation to International Investment agreements (Article 3) includes provisions—informally referred to as “firewall “provisions”—that seek to address the risks that obligations undertaken under this treaty might be used to interpret obligations undertaken in other investment agreements under those agreements’ dispute settlement provisions. The article clarifies that the interpretation of this agreement and the interpretation of other international investment agreements must be kept entirely distinct and separate. It emphasizes that a failure to implement obligations under this agreement cannot be used as evidence to prove that a member has failed to fulfill their commitments under other IIAs. Essentially, the article aims to prevent investors from using the breach of an obligation under this treaty as a basis for an investor–state claim against a government under an IIA’s dispute settlement mechanism.

The final article in the section establishes a most-favoured nation (MFN) treatment obligation. Article 4 clarifies that, in implementing the obligations of this agreement, a member will do so by providing no less favourable treatment, in like circumstances, to investors of any other member and their investments.¹ In other words, participants agree to extend the benefits of the obligations they undertake under the agreement to all WTO members, not just other participants. However, the article also clarifies that this requirement cannot be construed as an obligation to extend to members any additional advantages a member may grant to investors of some members through separate IIAs, investment-related chapters, or other relevant provisions in regional trade agreements (RTAs). In other words, parties to this agreement must treat investors of all WTO members equally when they implement the obligations of *this* agreement, but they can continue to provide additional benefits under other investment and trade agreements to parties to *those other* agreements. Other exceptions to the MFN obligation apply as well, such as for mutual recognition agreements.

There are some brackets that remain to be resolved in this article. Members plan to discuss, at a later stage, whether to remove the brackets around a footnote that clarifies that the Investment Facilitation for Development Agreement (IFDA) does not create an obligation for WTO members that are not parties to this agreement, and that those non-parties cannot refer to this agreement in any WTO dispute proceedings.

Significant Changes in 2022

The articles in this section benefited from intense discussion in 2022, and therefore several changes took place to the main text during this period.

¹ Please see the below discussion on treaty architecture, for additional clarity on how the term “member” is being interpreted in this agreement.

One of the main changes was the removal of the brackets around the words “foreign direct” in the Objectives article, which suggests that foreign direct investment will be covered by the agreement. Discussion of whether the scope also includes other forms of investment is ongoing.

Members hold different perspectives on the matter of whether the agreement should address broader types of investment or foreign direct investment (FDI) more narrowly. Some capital-exporting countries (typically developed economies) are advocating for the broader scope, to gain transparency and procedural predictability benefits for the broader types of investments with which their investors are often involved. Some other members (typically developing countries and LDCs) are wary of committing to the objective of facilitating equity-based investments, which they view as short-term investments that are speculative in nature. Furthermore, they prefer the focus of the agreement to be on foreign direct investments, which they regard as higher-priority investments that deliver better development benefits for their local economies.

Several proposals were also shifted from the annex to the main text in the course of 2022. Members agreed on a number of exceptions, notably on government procurement and subsidies or grants, and moved them to the main text. The exception on taxation measures was made narrower in terms of its scope, and members agreed to include it as a clarificatory footnote within the Transparency section, although it is still bracketed. The definitions of “investor of another member” and “juridical person” were also moved from the annex to the main text and agreed. The language on MFN also moved into the main text and was eventually agreed.

Outstanding Proposals in the Annex

Two provisions relating to the scope and application of the agreement remain in the annex. The first is a proposed exclusion, introduced in November 2022, that the obligations of this agreement will not apply to measures that affect electronic commerce. The proponent of the proposal included the exception due to concerns regarding how its domestic measures relating to e-commerce would, in particular, interact with the authorization obligations for foreign investors. Some members have noted the potential usefulness of the exception to address broader concerns relating to policy space to ensure that this agreement does not place any constraints on a member’s policy choices as it develops its digital economy. Other members, however, are concerned that such an exception would result in a broad carve-out of a range of government measures from the operation of the agreement. They argue that including e-commerce measures in the operation of the agreement is important not only for attracting investments into e-commerce and digital infrastructure for developing countries but also facilitating other kinds of investments that rely on e-commerce.

The second provision that remains outstanding in the annex is whether to include the definition of “enterprise” within the main text. This is because questions over the coverage of portfolio investment are still under discussion. If the scope is explicitly narrowed to only FDI, then including a definition of “Enterprises” would be useful. However, if, in the end, the agreement can also cover portfolio-based investments, then including a definition on “Enterprises” may no longer be appropriate.

2.2 Section II: Transparency of Investment Measures

The first main pillar of the agreement is Section II on Transparency of Investment Measures. This section focuses on obligations to publish information to improve the transparency of investment-oriented regulatory measures and access to other types of information that could be of particular importance to investors. Members believe such improvements in transparency of government measures could help to provide a predictable and stable investment environment, which can play an important role in facilitating investments, especially to developing countries and LDCs (WTO, 2019a).

Under this section, members agree to publish information on relevant measures of general application that fall within the scope of the agreement (Article 5 on Publication and Availability of Measures and Information). This means that a member must publish,² or make publicly available through other means, all its government measures that would have an effect on investments carried out by foreign investors that are entering and operating in its territory. The agreement clarifies that a measure can be a law, regulation, rule, procedure, decision, administrative action, or any form implemented by a government authority at the central, regional, or local level, or by a non-governmental body exercising powers delegated by such authorities. In addition, members agree that if they publish information about a new or amended law or regulation, they must try to provide clarity on the rationale and purpose behind such a measure. Members are also expected to publish information on international agreements that affect investment. The information on measures and agreements is to be published at the latest by the time of their entry into force.

Beyond publishing information on enacted measures, members agree to publish information on new or amended laws and regulations that are in the process of being developed (Article 9 on Publication in Advance and Opportunity to Comment on Proposed Measures). When providing this information, members are expected to share sufficient detail about the measures being developed to allow investors, interested persons, and other members to determine whether and how their interests will be affected.³ Similar expectations would also apply to procedures and administrative rulings that are in the process of being developed. However, for such measures, the obligation is expressed on a best-efforts basis rather than as a requirement.

Members also agree to publish, via electronic means, other types of information that could be of particular importance to investors and to make sure this information is kept up to date (Article 5). The information can range from practical information relating to requirements and procedures (e.g., information on construction permits or the payment of taxes), to laws and regulations focused on FDI, to information on sectors that are open or restricted for foreign direct investments. Members also agree that for instances when authorization is required for the

² Except in situations of emergency.

³ A footnote for a provision in this article remains in brackets. Members are debating whether to clarify that the requirement to facilitate stakeholder comments, and regarding information sharing of relevant documents, will not apply in the case of taxation measures.

investment to take place within its territory, it will promptly publish⁴ (ideally online) information of relevance, for example on processes, forms, time frames, fees (Article 6 on Information to Be Made Publicly Available if an Authorization is Required for an Investment).

Members agree not to collect fees when providing access to the various information and are encouraged to have information covered by Articles 5 and 6 updated and shared via a single information portal. Contact information on the focal point for investors and appropriate contact mechanisms should also be included in such a portal (Article 7 on Single Information Portal and Article 8 on No Fees Imposed for Access to Information).

While most of the publication disciplines apply to host states (states whose territory an investor enters), the agreement also includes a transparency provision targeted to home states (states that are the home base for investors). Members that adopt measures to facilitate outward investments are encouraged to publish such measures (including via electronic means). This provision is applied on a best-endeavours basis (Article 5).

Beyond making information accessible, members are encouraged under Article 9 of the draft text to adopt certain good regulatory practices that aim to improve the quality of the processes by which an investment-relating regulation is developed. For example, when publishing information on new or amended laws and regulations, members are encouraged to provide a reasonable period of time between the publication of the measure and when businesses are expected to comply with the new measure. In the case of laws and regulations that are under development, members agree to provide an opportunity for investors, interested persons or other members, to comment on the proposed measures or documents. While members are required to consider the comments, they are not obliged to accept them.

Beyond the publication disciplines, members also commit to certain notification measures, including notifying relevant changes to laws and regulations, websites, and contact information. This information would be promptly notified to the agreement's Committee on Investment Facilitation (Article 10 on Notification to the WTO). Finally, the section includes an exemption from the various obligations of the section when it comes to governments sharing confidential information (Article 11 on Disclosure of Confidential Information).

Significant Changes in 2022

The section benefited from intense discussions in the early part of the negotiating process, and, as a result, coming into 2022, most of the articles in the section had already been agreed upon. There is, however, one notable change to the section that took place in 2022. Members agreed to shift the provisions on home state transparency measures from the annex's Section VI to the main text. To get the support needed for such a shift, the proponents streamlined their proposal. Some provisions were removed, including those that recognized the important role of home state measures to facilitate investments and encouraging members to use such measures. Other

⁴ Or made publicly available in written form.

suggestions removed were to have home states encouraged to share information on the operations of their investors, including with respect to responsible business conduct and sustainable investing. Of the two provisions remaining in the streamlined proposal, the publication-focused obligation (described above) was included in this section, while the second provision (which will be described later) was shifted to Section VII on Institutional Arrangements and Final Provisions.

The home state measures provisions are important, as they were among the only obligations in the text that required action of members that are the source of outward investments—and in particular of developed countries. The clean text that was ultimately included sought to balance differing perspectives. Proponents argued home state measures could play an important role in facilitating global FDI, especially in requiring responsible conduct of foreign investors to ensure FDI contributed to sustainable development objectives. In addition, it was viewed that home states (which are often developed or higher-income countries) could play a more important role in sharing sustainability-focused information, notably on their investors' sustainability-focused behaviours, which could be helpful to host states in their efforts to promote higher-quality investments. These views had to be balanced against the concerns of some members that such measures did not fall within the mandate of the agreement, which they saw as focused on host state measures. Furthermore, some members argued that obligations or efforts to collect sustainability-focused information would be too prescriptive a measure for such an agreement. In addition, concerns were raised that collecting and relaying such information could be a violation of privacy considerations. The text that was ultimately included, although lower in ambition than originally proposed, seems to have been a means to maintain the issue of home state measures as an agenda item within the overall framework.

Outstanding Proposals in the Annex

While most of the provisions in this section are clean and therefore appear to be stabilized, there is one article outstanding: that related to “entry and temporary stay of business persons for investment purposes.” The proposals relating to this article are still included in the annex and are discussed below.

2.3 Section III: Streamlining and Speeding up Administrative Procedures

Another core pillar of the agreement is Section III on Streamlining and Speeding up Administrative Procedures. For instances when an authorization is required for an investment, this section clarifies how the measures for such an authorization should be developed, and, more specifically, provides guidance on how competent authorities should treat applications that may be submitted as a part of authorization procedures.

The expectation among members is that implementing the obligations in this section will promote a more predictable regulatory environment as well as efficient administrative procedures (WTO, 2019b). By removing excessive bureaucratic impediments and red tape, proponents of

this section have argued these measures can be of use to improve host states’ investment climates, which in turn can facilitate the flow and operations of investments.

Under this section, members agree that authorization procedures are conducted in a reasonable, objective, and impartial manner (Article 12 on Reasonable, Objective, and Impartial Administration of Measures). In addition, they agree that certain principles must be applied when adopting or maintaining procedures, including ensuring the procedures are not too complicated and burdensome, impartial, and based on objective and transparent criteria. In essence, the procedures should not be used to unjustifiably prevent an applicant from fulfilling the authorization requirements (Article 13 on General Principles for Authorization Procedures).

Having set out the principles, the section mainly focuses on requirements for how authorities are expected to treat applications that may be required as part of the authorization process of an investment. Table 1 summarizes the range of requirements relating to applications.

Table 1. Application requirements when authorizing an investment

Application requirements	
Submission periods for application	All year round, if feasible. If a specific submission period exists, the member will ensure it is reasonable.
Treatment of authenticated copies	Ideally, these should be accepted in lieu of original copies, especially if another competent authority is holding the original. ⁵
Processing of applications	Indicative timeline for processing, status, and decision of application should be communicated to the applicant. Processing of application should be done within a reasonable time frame.
Treatment of incomplete applications	Applicants should be informed of the incomplete nature of the application and be provided with guidance ⁶ and an opportunity to submit the missing information. If such steps are not practicable, the competent authority must inform applicant of rejection of its application within a reasonable time period.
Treatment of rejected application	If feasible, authorities should provide an explanation as to why the application is being rejected and the procedures for resubmission. An applicant cannot be prevented from submitting future applications due solely to a previously rejected application.
Treatment of approved application	Authorizations, once granted, should come into effect without undue delay, based on terms or conditions.

⁵ Unless it is deemed that the original version is necessary for safeguarding integrity of authorization process.

⁶ Some bracketed words remain. Members have yet to agree whether the guidance should be provided upon the competent authority’s own initiative or as a response to a request from the applicant.

Application requirements

Treatment in case of multiple applications	If feasible, authorities should avoid requirements that would result in the applicant having to approach multiple competent authorities for authorization of investment. If multiple applications are required due to the involvement of different jurisdictions, the coordination of applications is encouraged through use of a single-entry point/information portal.
Treatment of online applications	If feasible, and subject to resource availabilities, competent authorities will undertake efforts to accept electronic applications.
Treatment of fees	Should authorization fees exist, they should be reasonable and transparent and not in themselves restrictive. Should new or amended fees be implemented, they should only come into force within reasonable time frames and will not be in effect unless information has been published. In the case of fees for financial services applications, information on fees schedules or details relating to how fee amounts are determined should be provided. If feasible, electronic payments of fees should be accepted.

Source: Article 14 on Authorization Procedures; Article 15 on Multiple Applications; Article 16 on Authorization Fees; and Article 17 on Use of ICT/E-government.

Beyond application and fee requirements, the section also includes other articles that aim to improve the reliability of administrative decision making. This includes ensuring the independence of competent authorities (Article 18 on Independence of competent authorities), as well as maintaining an appeal and review process that would allow applicants to appeal administrative decisions that could have an effect on investments (Article 19 on Appeal and Review). The implementation of such processes, however, does not require the establishment of tribunals or procedures that are inconsistent with domestic legal structures. Finally, the member is also encouraged to periodically review (including by considering stakeholder feedback) its authorization procedures and fees in a bid to ensure that they remain effective in achieving the stated public policy objectives (Article 20 on Periodic Review).

Significant Changes in 2022

This is another section that benefited from intense discussions in the early part of the negotiating process. Here too, coming into 2022, many of the articles in the section were already agreed upon. Regardless, some changes did take place in 2022, the most important of which was the withdrawal of the proposal on “Transfers and Payments.” The proposal had sought to include requirements to ensure that government measures related to capital transfer and payments measures were developed using objective and transparent criteria. The proponent argued such an article would be important for improving the facilitation of broader types of investments. However, the proposal did not get the support needed due to concerns that the article did not belong within the scope of the agreement.

The other change is the inclusion of a definition of “applicant” as a footnote, providing clarity that an applicant is another member’s natural or juridical person (that is, an individual or a company or other legal entity), that is applying for an authorization to invest in the host state.

Outstanding Proposals in the Annex

While many of the articles in the section are stabilized and not expected to change in the future, there is one that remains outstanding and remains parked in the annexes of Sections II and III. This is the article on “Entry and Temporary Stay of Business Persons for Investment Purposes.” The debate on this article focuses on two types of proposals. The first type focuses on transparency provisions and encourages members to make publicly available online the information on procedures and requirements for the entry and temporary stay of natural persons. The article clarifies that the transparency measures are only applicable for temporary stay-related matters and not to issues relating to citizenship or permanent employment.

The other type of proposal includes not only transparency measures but also procedural facilitation measures, such as ensuring that temporary stay-related applications are expeditiously processed, procedures to ensure that applicants are informed of the progress of their application, and ensuring that application fees are reasonable, among other steps. The transparency provisions included in this type of proposal are also more prescriptive. Here too, the proposals clarify that the measures do not apply to issues relating to citizenship or permanent employment.

When discussing these two types of proposals, members are looking to balance differing perspectives. Proponents of the more ambitious type of proposal have argued that both transparency and procedural elements are important to facilitate the temporary movement of businesspersons who tend to play an important role in establishing and operationalizing investments. The developing countries proposing these additional obligations have an interest in facilitating access by their businesspersons to the territory of other members. By facilitating the movement of such persons, they argue, the agreement would in turn play an important role in facilitating investments. Other members, representing both developed and developing participants, are more reluctant to include procedural requirements relating to the movement of businesspersons, which appears to stem from the fact that for some members, policies relating to movement of businesspersons fall within the purview of migration-focused agencies, which they prefer not to bring into the ambit of this agreement. In addition, some members have raised concerns on the prescriptive nature of the procedural obligations as well as on the content of these obligations, and noted they would cause important inconsistencies with their own procedural regimes.

2.4 Section IV: Focal Points, Domestic Regulatory Coherence, and Cross-Border Cooperation

This section includes a range of obligations to improve how investors can access information both about the implementation of the agreement and information that can improve their ability to source suppliers from the host country. It also includes articles focused on regulatory coherence and cooperation practices. These different types of cooperation efforts are viewed as important for promoting a transparent and predictable regulatory environment, seen as key features for facilitating investments (WTO, 2019c).

The section includes three articles related to improving access to information and sourcing linkages for investors. Under Article 21 on Focal Points members agree to establish or maintain at least one focal point (or an equivalent appropriate mechanism) to respond to enquiries from investors on matters relating to the measures covered by the agreement. Members are encouraged not to collect fees when responding to focal point enquiries. If needed, that focal point can also assist investors in obtaining relevant information from the competent authorities responsible for implementing the measures of the agreement. Some language in this latter provision is still bracketed; members need to decide if they want to clarify that support by the focal point in reaching competent authorities will only be limited to matters falling within the scope of the agreement. Other functions can also be attributed to the focal point; however, members have yet to agree on whether examples of the additional functions (such as resolving problems for investors or providing recommendations to improve the investment environment) should be included in the agreement.

Another article to improve access to relevant information and to facilitate sourcing linkages is Article 23 on the Domestic Supplier Database. Under Article 23, members are encouraged to establish one or more domestic supplier databases, which would make it easier for investors to find information on domestic suppliers for sourcing purposes. The database can have different features, including for example, being searchable online and being searchable according to certain characteristics such as sector, industry, certifications and so on. The establishment of such a database can be allocated to public or private entities, and members would not be held liable for the information in the database. A final article related to access to information and sourcing, is the article on Supplier Development Programmes (Section IV bis). Members are encouraged (in accordance with their legal systems and obligations) to implement programs that can strengthen the capabilities of local suppliers so that they can better meet the sourcing demands of investors.

A second type of article included in the section relates to those regarding domestic regulatory coherence (Article 22 on Domestic Regulatory Coherence). Under Article 22, when developing major regulatory measures, members agree to implement certain good regulatory practices that aim to improve the quality of the regulation under development. In particular, members agree to conduct regulatory impact assessments when they develop regulations that might affect investors. The assessments should assess what impact a proposed regulation would have on investors, and micro-, small-, and medium-sized enterprises (MSMEs) in particular. When conducting such

assessments, the agreement suggests that members may consider analyzing aspects relating to the economic, social, and environmental impacts of the measure under consideration.

A final type of article in this section is Article 24 on Cross-border Cooperation on Investment Facilitation. Cross-border cooperation efforts include requirements to respond to enquiries from other members on matters falling within the scope of the agreement. To do so, members may set up an enquiry point or use the focal point (or other appropriate mechanism) that it had set up as a contact point for investor enquiries. In addition, members are expected to encourage cooperation among relevant competent authorities, in the form of sharing of experiences, exchanging information relating to domestic investors, and collaborating on facilitation agendas that can help increase investments for development and for the benefit of MSMEs. Members are encouraged to inform the Committee on Investment Facilitation of such cooperation efforts.

Significant Changes in 2022

This is another section that did not undergo many changes in 2022. The only significant change is the inclusion of the Supplier Development Programme article in the main text. To gather enough support to include the article in the main text of the agreement, the proponent submitted a streamlined proposal. Some provisions were removed, the first of which focused on providing more clarity on the characteristics that supplier development programs could exhibit to strengthen the competitiveness of local companies to FDI sourcing demands. Another was a requirement for technical assistance to support developing countries and LDCs to establish and operationalize such programmes. The remaining provision, the best-endeavour provision that is included, encourages members to implement supplier development programs that strengthen the capabilities of local suppliers to meet the sourcing demands of investors.

The clean text sought to balance differing perspectives. Proponents of a more ambitious set of obligations argued that supplier development programs are valuable for developing linkages between investors and the local economy, and these improvements in sourcing linkages can play an important role in facilitating investments. Such views, however, had to be balanced against concerns that the more ambitious provisions could inadvertently lead to governments adopting local content requirements within their investment regulations, and therefore to inconsistencies with the WTO's Trade-Related Investment Measures agreement. Furthermore, it was argued supplier development programs are questions of domestic policy not strictly related to the facilitation of investments and therefore should not be included in an international treaty (WTO, 2020). The resulting text, although lower in ambition than originally proposed, maintains supplier development programs as an agenda item within the overall framework.

Outstanding Proposals in the Annex

At present, there are no new or outstanding proposals that remain to be agreed on for this section.

2.5 Section V: Special and Differential Treatment for Developing and Least-Developed Country Members

This section focuses on the provisions in the draft agreement that relate to special and differential treatment (S&DT) for developing country and LDC members. The provisions provide developing country and LDC members with special rights, in the form of benefits and flexibilities, when implementing the overall rules of the agreement and are often regarded as critical for addressing capacity and development concerns of members participating. The underlying understanding is that developing country and LDC members, due to technical and resource capacity-related challenges, may not be able to implement all the obligations of an agreement right away. Therefore, these members may need more time, and even targeted capacity-building support, to help them with the implementation of their obligations.

A range of articles in the section set out how developing country and LDC members are expected to notify their needs for flexibilities and support in implementing the agreement. The section not only clarifies requirements relating to developing country and LDC members, but also sets out what is expected of donor members in terms of support to poorer countries in implementing the agreement. Importantly, the agreement clarifies that donor members includes both developed economies and developing country members that are in a position to provide assistance.

The section is modelled on the S&DT approach that had been developed under the Trade Facilitation Agreement (TFA), which is often regarded as an innovative approach to S&DT at the WTO. Under the TFA, rather than committing to uniform exemptions or standard implementation periods (as had been the case with past WTO agreements), developing country and LDC members could determine for themselves the specific conditions and transition periods that they would need to implement the various obligations contained in the agreement and negotiate these conditions and transition periods with other members.

As in the TFA, under the S&DT system of this agreement set out in Article 26, provisions that could be implemented immediately upon ratification are listed by each member under Category A (unconditional commitments) of a special schedule. Provisions that developing country and LDC members could only commit to implement after a transition period could be scheduled under Category B. Finally, provisions that can only be implemented when capacity-building and technical assistance had been received (and after a certain transition period) are scheduled as Category C commitments.

Under the TFA, members had specific deadlines by which they were required to notify how they plan to categorize the different obligations of the agreement and when they would implement their commitments depending on those categories. Members are at present debating whether to replicate the same notification dates of the TFA in the IFDA or whether different timelines are required. Some members have put forward an alternative proposal with longer notification deadlines, arguing that most developing country and LDC members have yet to conduct self-assessments (referred to as needs assessments) that would help them determine the extent to which their domestic regulatory framework is already in alignment with the IFDA's provisions. Without carrying out such analysis, they argue it is not possible to determine how they should

categorize the various commitments of the agreement. This is especially problematic when it comes to the scheduling of Category A designations, which are provisions that developing country members are expected to have implemented by the time the IFDA enters into force. In Table 2, we provide a summary of the different notification deadlines that have been proposed.

Beyond the difference in notification deadlines, other bracketed elements that members have yet to agree on include whether to make the scheduling of provisions dependent on carrying out the self-assessment analyses and whether donor country members are required to provide assistance to developing country and LDC members so that they may carry out such assessments before they are expected to notify when the commitments would begin to apply to them.

Table 2. Different proposals on categories of provisions, notification, and implementation (Article 26)

Article 26	Based on TFA model		Alternative proposal		Comments
	Developing country	LDC member	Developing country	LDC member	
Notification and implementation of Category A provisions	Upon entry into force of agreement	1 year after entry into force of agreement	1.5 years after entry into force of agreement	2 years after entry into force of agreement	
Notification of Category B provisions	Upon entry into force	Notify 1 year after entry into force and confirm designations 2 years after entry into force	1.5 years after entry into force	3 years after entry into force	
Notification of timeline for implementation of Category B provisions	<ul style="list-style-type: none"> Indicative timeline submitted upon entry into force Definitive timeline submitted 1 year after entry into force 	<ul style="list-style-type: none"> Indicative timeline submitted 1 year after entry into force Definitive timeline submitted 2 years after entry into force 	<ul style="list-style-type: none"> Indicative timeline submitted 1.5 years after entry into force Definitive timeline submitted 2.5 years after entry into force 	<ul style="list-style-type: none"> Indicative timeline submitted 3 years after entry into force Definitive timeline—no specific deadline proposed 	Additional time to notify definitive timeline can be requested of the committee
Notification of Category C provisions	Upon entry into force	1 year after entry into force	1.5 years after entry into force	3 years after entry into force	

Article 26	Based on TFA model		Alternative proposal		Comments
Provision	Developing country	LDC member	Developing country	LDC member	
Notification of timeline for implementation of Category C provisions	<ul style="list-style-type: none"> Indicative timeline submitted upon entry into force Definitive timeline submitted 1.5 years after entry into force 	<ul style="list-style-type: none"> Indicative timelines submitted 2 years after notification of support needs Definitive timelines submitted 18 months after notification of implementation arrangements 	<ul style="list-style-type: none"> Indicative timeline submitted 1.5 years after entry into force Definitive timeline—no specific deadline proposed 	Indicative and definitive timelines— no specific deadlines proposed	Additional time to notify definitive timeline can be requested of the Committee
Provision of information on technical assistance capacity-building support, for implementation of Category C provisions	<ul style="list-style-type: none"> Notify technical assistance/ capacity-building needs upon entry into force 1 year after entry into force, donor and recipient members will submit information on implementation arrangements to the committee 	<ul style="list-style-type: none"> Notify technical assistance/ capacity-building (support) needs 1 year after notification of Category C provisions 	<ul style="list-style-type: none"> Notify technical assistance/ capacity-building needs 1.5 years after entry into force 	Timelines for provision of support needs— no specific deadline proposed	<ul style="list-style-type: none"> Arrangements can be undertaken on bilateral basis or through international organizations. Donors not party to the IFDA are also invited to provide information on existing or concluded arrangements

Article 26	Based on TFA model		Alternative proposal		Comments
Provision	Developing country	LDC member	Developing country	LDC member	
<p>Provision of information on technical assistance capacity-building support, for implementation of Category C provisions (continued)</p>	<ul style="list-style-type: none"> • 1.5 years after support arrangements have been notified, donor and recipient members will provide implementation updates, to the committee 	<ul style="list-style-type: none"> • 2 years after notification of support needs, donor and recipient members will submit information on implementation arrangements to the committee • 1.5 years after support arrangements have been notified, donor and recipient members will provide implementation updates, to the committee 	<ul style="list-style-type: none"> • 2.5 years after entry into force, donor and recipient members will submit information on implementation arrangements to the committee • Timeline for progress update—no specific deadline proposed 		<ul style="list-style-type: none"> • Members may also include information on implementation plans or projects, the agencies responsible for implementation, and the donors with whom arrangements are already in place

The section also includes other S&DT provisions that clarify what needs to be done in case there is a need to delay implementation or adapt schedules, as well as the grace periods that are available to developing country and LDC members before a claim of non-compliance can be brought under the WTO's dispute settlement mechanism (Article 27 on Other Special and Differential Treatment Provisions). These types of provisions provide valuable additional flexibility to developing country and LDC members in case they face struggles with fulfilling their initial commitments.

In case developing country members are unable to meet the implementation timelines that were initially scheduled for Categories B and C obligations, that difficulty must be notified to the Investment Facilitation Committee at least 4 months before the expiration of the deadline. In the case of LDCs, that difficulty would have to be alerted 3 months beforehand. After providing an explanation for the delay, if the developing country member requests an extension lasting less than a year and a half (and, in the case of LDCs, less than 3 years) then those requests for extensions will be automatically granted. If, however the request for extension is longer, then it will be up to the committee to determine whether the request should be approved. In case such extension requests are not granted, the committee will then set up an expert group,⁷ who will then provide recommendations within three months on how best to address the implementation challenges. During the expert review process, dispute settlement proceedings under the WTO's dispute settlement system cannot be brought against the member being reviewed (this is called a "grace period").⁸

If, instead of notifying a delay, the member would like to shift designations of some obligations from Category B to Category C, it must do so by notifying the committee. For the new Category C provisions, information must be provided on the support and assistance that would be needed to build capacity to implement the obligations. If additional time is needed to implement the new Category C provisions, the developing or LDC member has the option of requesting the automatic extension deadlines described above and can also request the setting up of an expert group to provide recommendations for implementation.

Finally, for instances in which provisions designated under Category A cannot be met, developing country or LDC members would enjoy a grace period shielding them from disputes for a period of time. Members are debating whether this grace period should last 2 years or 5 years, in the case of developing country members. As for LDC members, that grace period would last 6 years. LDCs would also have access to a grace period for Category B and C provisions, lasting 8 years after implementation. Beyond such grace periods, members are in general expected to exercise due restraint when it comes to bringing dispute proceedings against LDCs. To date, no WTO dispute has ever been brought against an LDC member.

⁷ The expert group will consist of five independent persons, representing different regions, who are experts in the field of investment facilitation and capacity building.

⁸ In the case of LDCs, the proceedings will not apply for 24 months after the expert review process.

Some Specific Requirements on Donors

Beyond scheduling and implementation flexibilities for developing country and LDC members, the section also provides clarity on what is expected from donor countries in terms of providing capacity building to developing country and LDC members to support them in their implementation of the agreement (Article 28 on Provision of assistance and support for capacity building). The main provision in the article states that donor country members will agree to facilitate technical assistance and support on terms that are mutually agreed with developing country and LDC member counterparts. More targeted support is expected to be provided to LDCs, with the objective of helping them build their sustainable capacity to implement commitments. The nature of this support, however, is still under debate. Members are debating whether support programs “shall,” “should be,” or “are to be” provided to LDCs. The words “shall” or “are to be” are understood to designate a more stringent requirement on the donors than “should.”

When providing support, the agreement sets out certain principles that should be applied to ensure that activities are efficient and effective. Examples include making sure to consider the overall development framework and existing reform efforts of the recipient country, as well as making sure that private sector needs are factored in when implementing support activities. Regional and sub-regional integration facilitation needs must also be considered, and efforts to coordinate between agencies, institutions, and structures are also expected to be built upon. The Investment Facilitation Committee to be established under the agreement will hold at least one dedicated session each year to monitor the progress of support activities.

Beyond the principles, the agreement also tries to clarify what types of technical assistance may be provided. Examples include assistance to build expertise of relevant authorities so that they may maximize positive impacts of investment, as well as building capacity for the preparation of feasibility studies for investment projects. Some important brackets remain in relation to this provision, however. Members have yet to agree on whether the assistance could also focus on building capacity of developing country and LDC members to better understand and implement the requirements of the agreement, as well as support to meet their notification deadlines.

The final article of the S&DT section focuses on information requirements that must be provided by both donor and recipient countries for the purpose of ensuring transparency and improved coordination of support activities (Article 29 on Information on Assistance and Support for Capacity Building to Be Submitted to the Committee). Donor members are expected to submit information on their processes and mechanisms for requesting support, as well as disbursement-focused information (e.g., amounts, descriptions of activities, recipients) once the support activities are underway. Recipient members, on the other hand, are expected to submit up-to-date contact information on agencies and offices that are responsible for coordinating such activities at the recipient end. Having provided relevant contact and procedural information, the WTO Secretariat is expected to help make this information publicly available. In addition, it is expected that collaborations with other international and regional organizations are to be

maximized for the purpose of carrying out evaluations of investment facilitation needs and for the implementation of support activities. These partner organizations may also be invited to share relevant information during committee meetings.

Significant Changes in 2022

Only one change took place in this section in 2022, and that was the removal of brackets around certain examples of assistance that could be provided (except for the example that technical assistance may be provided to support the understanding and implementation of the agreement). Beyond this subtle change, most of the bracketed elements that are peppered throughout the section—including, notably, those regarding the notification deadlines for scheduling the categories—remain the same as the start of the year. Proponents have maintained that removing some of these brackets, especially those around notification deadlines, will remain difficult as long as developing country and LDC members are delayed in conducting their needs assessments.

The fact that most bracketed elements remain the same does not mean that the development-focused dimension did not benefit from additional discussions and progress.

A working group comprised of representatives from six international organizations was set up to develop a self-assessment guide to support the needs assessment process. The guide would help developing country and LDC members in determining their current state of implementation of the different obligations of the agreement. It could also help such members identify the different categories into which they want to schedule commitments to benefit from extended implementation time frames.

The assessment template is expected to be finalized in early 2023. A dedicated launch session will take place on April 2023 to present the guide and the funding options available to developing country and LDC members for carrying out the needs assessments (WTO, 2022).

Outstanding Proposals in the Annex

At present, there are no new or outstanding proposals that remain to be agreed on for this section.

2.6 Section VI: Sustainable Investment

While the overall agreement is supposed to facilitate the flow of FDI, since the start of the process members have stressed that the framework is meant to be especially useful to facilitate investments that can advance the development dimension (WTO, 2019c). The articles in this section are regarded as important for the achievement of that objective. They focus on facilitating sustainable investments (also referred to as “higher-quality investments”) which are investments that deliver higher value for development objectives. Two types of articles are included: the first on responsible business conduct (RBC) and the other on measures against corruption.

Under Article 30 on Responsible Business Conduct, members agree to encourage investors and enterprises operating in their jurisdictions to voluntarily incorporate internationally recognized principles, guidelines, and standards on responsible business conduct into their internal policies and business practices. In addition, the host state is also expected to encourage investors to maintain meaningful engagement and dialogue with Indigenous, traditional, and local communities to support the responsible conduct of their business.⁹ Members agree to share their experiences and best practices regarding such efforts through the Committee on Investment facilitation. Finally, members are encouraged to recognize the important role of due diligence in ensuring responsible business conduct in international supply chains.

Article 31 sets out requirements to implement Measures Against Corruption. Under this article, host states agree (in line with their legal systems and internationally recognized standards and commitments) to implement measures that prevent and fight corruption that falls within the scope of the agreement. Members are still debating whether the requirement to implement measures should extend specifically to targeting money-laundering activities, so this text remains in brackets. The article also recognizes that certain key principles should be applied when developing anticorruption policies, such as accountability, transparency, and integrity. Finally, members are expected to exchange information on best practices and identify opportunities for collaboration in fighting corruption in their discussions in the committee that would be established under this agreement.

Significant Changes in 2022

The main change to the section in 2022 was the inclusion of an updated responsible business conduct proposal in the main text. Although the proposal had gone through various iterations throughout the year, it ultimately landed on a text with only subtle changes compared to the start of the year. That change removed references to an indicative list of sustainability dimensions that the international standards, principles, guidelines (that host states should encourage investors to adhere to) could address. The dimensions referred to in that list included labour, environment, and gender equality, among others. While some members argued the list provided valuable additional clarity on development dimensions that RBC can address, others opposed its inclusion, arguing that the list made the obligation for host states too prescriptive. Although the list has been removed from the current treaty text, its inclusion is still under negotiation, and it could eventually make its way back in. Without the list, the agreement would not include any specific references to gender as a sustainability dimension to be addressed under the agreement. Other social inclusion issues are included, however, such as the requirement to promote investors' engagement with local communities, including with Indigenous communities.

The resulting clean text balances different perspectives, including those of members who firmly believed including such provisions to be critical for fulfilling sustainable development objectives,

⁹ Some brackets remain for this provision. Members have yet to determine how the implementation of such measures should relate to the domestic legal systems.

with concerns that such provisions should not inadvertently result in binding commitments for private sector actors, given that this agreement is a state-to-state agreement.

Outstanding Proposals in the Annex

As a result of the updated RBC proposal being shifted to the main text, no other proposals remain outstanding in the annex.

2.7 Section VII: Institutional Arrangements and Final Provisions

This section is the final one in the agreement. It addresses institutional questions like the functions of the Committee on Investment Facilitation that would be established to monitor the agreement; horizontal legal provisions containing general, security, and financial exceptions; provisions that clarify when the implementation of the agreement comes into effect; and provisions clarifying how the agreement relates to the agreements of the WTO, including dispute settlement proceedings.

A substantial segment of the section is made up of Article 32 establishing a WTO Committee on Investment Facilitation. The committee, meeting at least once or twice a year, is mainly expected to facilitate the sharing of information and experiences on investment facilitation as well as review members' progress in implementing and administering the agreement. The committee has the power to set up subsidiary bodies and is expected to collaborate closely with other international organizations (IOs).

While most of the provisions in the article have been agreed to, there are bracketed elements remaining in some provisions. These include whether the committee's function of preparing an annual report should be included as a requirement or as a suggestion, and whether the requirement to closely collaborate with other IOs, should include a list of examples of such IOs, as well as a requirement to maintain close contact with IOs in the field of RBC.

One key provision is yet to be agreed, and that is whether the committee should explore the option of setting up an Investment Facilitation Facility to manage the voluntary contributions of donor members and to support developing country and LDC members in implementing the agreement. The idea of creating such a facility is based on the experience of the TFA negotiating process. Under that process, a TFA Facility was set up and had become operational prior to the agreement coming into force. Some of the main functions of the Facility included, supporting developing country and LDC members in carrying out needs assessments; providing grants to support members in creating project proposals requesting implementation support (which could then be submitted to identified donors); and, when attracting funding from diverse sources had been exhausted, to provide funding itself for soft infrastructure efforts (WTO, 2014).

Members are at present debating whether such a facility should be set up to support the implementation of the IFDA with the WTO as a coordinating body. While some have argued for the importance of such a facility, especially for carrying out needs assessments and as a valuable body for coordinating funds, some other members are concerned that funding coordination efforts are activities that do not belong within the mandate of the organization and should instead be carried out by other, more relevant, IOs, such as the World Bank.

Setting up such a facility for the IFDA is also complicated by the plurilateral nature of the initiative. Should a facility be set up, it is likely to use Secretariat resources, which raises budget allocation questions. Given that the Joint Statement Initiative (JSI) has not received the backing of all WTO members, and some members remain vocal critics of the process, it is not yet clear how and where a facility might be housed.

The second type of article included in the section focuses on exceptions. Article 33 on General and Security exceptions states that the articles on General and Security exceptions in the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) (having taken into consideration the necessary changes) will apply to the provisions of this agreement as well. Those exceptions, then, apply to the obligations members undertake under this agreement. A financial exception article (Article 34) clarifies that the agreement cannot be used to prevent a member from implementing measures for prudential reasons, for example, for maintaining the stability of the financial system.

This final section also includes an article on Dispute Settlement (Article 35), which clarifies that members that are party to the IFDA can use the WTO's dispute settlement mechanism for any dispute that may arise. Members, however, are not allowed to use the mechanism to bring a claim against another member for failing to comply with the articles in the Sustainable Investment section. The article also encourages members to use alternative dispute resolution solutions that are provided under the Dispute Settlement Understanding (DSU), including good offices, conciliation, and mediation, rather than raising a formal dispute claim as a first solution.

The final type of article in this section sets out Final Provisions (Article 36). There are two provisions in this article. The first provides additional clarity on implementation timelines, and it recognizes that while members are expected to implement the agreement upon its entry into force, developing country and LDC members, should they choose to use the flexibilities granted through the S&DT section, would only have to implement according to the scheduling timeframe agreed to in that section. The second provision clarifies that nothing in the agreement can be construed as detracting from the rights and obligations that members have under the Marrakesh Agreement establishing the WTO.

Significant Changes in 2022

This is a section that benefited from several changes in 2022. The first is the inclusion in the main text of the provision that encourages home states to share in the committee their experiences on implementing outward facilitating measures. Another change was the shift of the anti-

circumvention clause within the financial exception article to the main text. Proponents argue the anti-circumvention clause is important to provide balanced policy space for financial regulation (consistent with GATS and commitments undertaken through RTAs), while some others voiced skepticism on the need for such a provision. While the clause has been shifted to the main section, it remains in bracketed form. The final change is the inclusion of the Final Provisions segment, in which the streamlined proposal that had been included in the annex was moved to the main section.

Outstanding Proposals in the Annex

One provision relating to Financial Exceptions (Article 34) remains in the annex. The bracketed provision seeks an exception for measures of general application in the pursuit of monetary and credit-related policies. The proponent of the proposal argues that the exception is needed to cover measures beyond traditional prudential measures, whereas opposing views argue that the existing prudential carve-out is already sufficiently broad.

3.0 What to Expect From the Joint Initiative Going Forward

At the start of 2022, the co-coordinators of the IFDA negotiations (Chile and the Republic of Korea) highlighted the goal of concluding text negotiations by the end of 2022. While the aspiration was not achieved, the co-coordinators note significant progress did take place over 2022 and have emphasized that participants have engaged in the process with a “sense of purpose and willingness to compromise to advance on the remaining issues” (WTO, 2022).

Table 3 summarizes some of the outstanding issues that members still need to address to reach a single stabilized text. This includes proposals that are in the annex, as well as some of the notable bracketed elements in the main text, which have yet to be agreed.

Table 3. Summary of outstanding issues to be discussed in 2023

Section	Outstanding proposals in the annex	Bracketed elements in main text
Section I: Scope and General Principles	<ul style="list-style-type: none"> • Possible exclusion for measures affecting electronic commerce (essentially clarifying whether e-commerce measures are carved out or not). • Definition of Enterprise. 	Brackets remain in various articles, including Article 2 on Scope and Article 4 on MFN. Notable examples include determining whether: <ul style="list-style-type: none"> • obligations apply to governments measures that affect investments or relate to investments. • portfolio investment measures are excluded. • dispute settlement would be available to non-participants, as well as the clarification that non-participants are not taking on obligations (if this ends up being an Annex 4 agreement).
Section II: Transparency of Investment Measures	Proposals on the temporary stay of businesspersons for investment purposes (determining whether the article should	Very few brackets remain. Notably, members have yet to determine: <ul style="list-style-type: none"> • Clarity on the application of regulatory development requirements in relation to taxation measures.
Section III: Streamlining and Speeding up Administrative Procedures	focus on transparency provisions, or also include administrative streamlining related provisions as well).	none

Section	Outstanding proposals in the annex	Bracketed elements in main text
Section IV: Focal Points, Domestic Regulatory Coherence and Cross-border Cooperation	none	Article 21 on Focal points includes brackets relating to the additional functions that may be carried out by such mechanisms.
Section V: Special and Differential Treatment for Developing and Least-Developed Country Members	none	Several bracketed elements remain throughout the section. Notable examples include: <ul style="list-style-type: none"> • Duration of transition periods. • Agreeing on notification timelines for determining how to categorize the different provisions. • Agreeing on the level of obligation donors must take on to finance needs assessments, technical assistance, and capacity-building.
Section VI: Sustainable Investment	none	Article 30 on Responsible business conduct. Although not bracketed, some members maintain that the discussion on whether to include the illustrative list or not is still under negotiation.
Section VII: Institutional Arrangements and Final Provisions	Financial exception in pursuit of monetary and credit of exchange rate policies.	Article 32 on WTO Committee on Investment Facilitation includes several bracketed elements. Notable examples include: <ul style="list-style-type: none"> • Whether an anti-circumvention clause is included or not. • Agreeing on whether the committee should explore establishing an Investment Facilitations Facility.

Source: Author's assessment having compared the Draft IFD Agreement text to Easter Text version 6.

Beyond these outstanding issues, members have also discussed the idea of a future work program. During the negotiating process so far, some topics were identified as not being suitable to be included as an article, but rather highlighted as a useful topic that could be included in a potential future work program for ongoing discussion once the formal agreement is finished. Such topics include risk management techniques for managing approval processes, the “silence is consent” principle (which allows investors to assume that the absence of objections from a government means they can proceed with an action notified), and the “business obstacle alert mechanism” (which would allow investors to notify a host state of a regulatory obstacle affecting their business). Beyond confirming and identifying other subjects of the program, members have yet to agree whether such a program—if there is one—should be included directly within the agreement or expressed through a ministerial declaration or as an agenda of the committee.

The co-coordinators have identified July 2023 as the new deadline for concluding the text. To facilitate this outcome, six meeting rounds have been scheduled to take place between January and July 2023. The latest negotiating text, referred to as the “Draft IFD Agreement,” which was circulated in December 2022, will be used as the basis for the next stage of negotiations. Work is expected to proceed along three separate but complementary tracks (WTO, 2022).

The first track is the review of the overall text. Members are expected to not only address the remaining brackets but also to propose any changes to ensure clarity and coherence of the overall text. Once there is an agreement in principle on the final text of the treaty, there would be a legal scrubbing process.

The second track is to advance on the issue of needs assessments for developing country and LDC members. The co-coordinators recognize that given that a core objective of the IFDA is to facilitate greater participation of developing country and LDC members in global investment flows, it is important to support such members in implementing the measures of the agreement. Needs assessments are important to achieving this objective, as they help these members to identify their different categories of commitment that would need to be notified as a prerequisite for implementing the agreement and in particular allow them to identify Category C obligations that can only be implemented with technical assistance.

The co-coordinators are therefore calling on members to work with “resolve and renewed efforts” to advance work on needs assessments in 2023. As mentioned above, a dedicated launch session of the self-assessment guide is expected in April 2023. Not only will the finalized template be released, but clarity is expected on the funding options that will be available to developing country and LDC members to carry out such assessments. Participants are also encouraged to carry out pilot projects using the guide in the early part of the year. It is not immediately clear where funding might come from to enable developing country and LDC members to conduct these assessments (also given the fact that the facility is not yet operational), so they may need to seek out funding themselves for such projects.

The final track of work is to intensify outreach efforts toward non-members. Given that the participants have stated their aspiration to achieve a multilateral outcome, co-coordinators have underlined the importance of intensifying outreach activities to increase non-members’ understanding of the potential agreement. As a part of such efforts, additional information will be provided highlighting the benefits of the agreement, explaining its pro-development dimension, and providing clarity on the technical assistance and capacity-building support that will be available.

This final track of seeking a multilateral outcome is one of several options that participants are exploring to determine how a new IFDA can fit into the WTO’s existing treaty architecture. At present, members are exploring three options and as part of such efforts are exploring the political and technical feasibility of each option.

When determining how to fit the IFDA within the WTO framework, as a first step, members are assessing whether the framework can be included as a stand-alone agreement or whether the

articles will have to be separated and included instead within existing WTO agreements. If the stand-alone agreement avenue is pursued, the WTO rulebook allows two options for how a new stand-alone agreement can be incorporated within its treaty architecture (Mamdouh, 2022).

The first option is to insert the new agreement within the WTO agreement's **Annex 1**. New agreements that are included in this annex are multilateral by nature.¹⁰ What this means is that, in order for the IFDA to be included under Annex 1, then all 164 members of the WTO will have to sign on to it and agree to be bound by its obligations.

Given that participants have stated their aspiration to achieve a multilateral outcome, integrating the agreement within Annex 1 may be the preferred option. There is, however, recognition that achieving such an outcome will be difficult and perhaps unlikely, especially due to the vocal opposition of some members from the broader WTO membership on their unwillingness to join the initiative (See, for example, Sen, 2022). Success with this option essentially means convincing those vocal opponents, as well as the non-vocal opponents, to sign on to the agreement.

Members are therefore also exploring the option of including the agreement as a non-multilateral initiative (i.e., a plurilateral arrangement). Under this second option, a new agreement would instead be inserted within the WTO agreement's **Annex 4**.¹¹ Under this option, the rights and the obligations of the agreement will **only apply to the participants** (the signatories) of the agreement. Although the participants of the agreement are under no obligation to extend the rights (i.e., the benefits) of the agreement to non-participants, they may choose to do so voluntarily. There seems to be an indication that this extension of rights will be promoted through the IFDA's treaty text. The MFN article seems to include flexible language indicating that the benefits will be accorded to investors of another "member." It can be interpreted that the member in this case refers to members of the WTO agreement, rather than only the members of the IFDA.

However, to insert the agreement into Annex 4, permission needs to be granted on a consensus basis at the multilateral level. This means that, once again, the success of the option will depend on the buy-in of non-signatories as well as the vocal opponents of plurilateral agreements.

Should the above two options not be feasible, members may also explore the option of integrating the framework not as a stand-alone agreement, but instead separating the articles and scheduling the commitments through existing agreements. As explained by Hoekman and Mavroidis (2022), members could explore the option of engaging in **coordinated scheduling**, in which they list the agreed provisions of the IFD framework in their GATS and GATT schedules of commitments. Further to providing a legal understanding of how this can be done, they also assess that there are no limitations, from a donor, developing country, or LDC perspective, to implementing the S&DT approach of the IFD framework, whether it be through unilateral commitments and through the GATS and GATT scheduling. Some members have, however, noted that pursuing

¹⁰ The TFA Agreement is an example of such an agreement that was recently incorporated through Annex 1.

¹¹ Examples of agreements that have been included in this annex are the Agreement on Government Procurement and Trade in Civil Aircraft Agreement.

the coordinated scheduling option will be a challenge. Beyond the difficulties in coordinating such an approach, some members have voiced concerns that the scope of the IFDA far exceeds what can be scheduled through the GATT and GATS agreements (for example, it is unclear where to schedule service-related investments that are not made via Mode 3 under the GATS [through a commercial presence]). In addition, it is unclear where e-commerce-related investment measures would be scheduled, given that WTO members have yet to come to an agreement on whether to define e-commerce activities as a service or as a good.

4.0 Conclusion

In 2022, the members of the IFDA made significant progress in their negotiations. Although they did not achieve their aspiration to reach a single stabilized text by the end of the year, there is optimism that such an ambition can be achieved by July 2023. In addition to deciding how to proceed with outstanding proposals of the annex, as well as the brackets in the main text, members will be seeking to make advancements on issues relating to the needs assessments, the work program, outreach, as well as clarity regarding the legal architecture.

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