

Investment Facilitation for Development Agreement

A reader's guide

IISD REPORT

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WORLD TRADE ORGANIZATION
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Investment Facilitation for Development Agreement: A reader's guide

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Table of Contents

Introduction.....	1
Section I. Scope and General Principles.....	2
Objectives and Scope of the Agreement.....	2
Relation to Other International Treaties.....	3
Applying the Principle of Non-Discrimination.....	4
Section II. Transparency of Investment Measures	6
Publishing Relevant Government Information Related to FDI.....	6
Improving the Development of Regulatory Measures	7
Fees and Notification Requirements.....	7
Section III. Streamlining and Speeding Up Administrative Procedures	10
Principles for Implementing FDI-Related Administrative Procedures	10
Application Requirements.....	10
Improving Trust in, and Integrity of, Administrative Decisions.....	12
Section IV. Focal Points, Domestic Regulatory Coherence, and Cross-Border Cooperation	14
Improved Cooperation Between Investors and Governments.....	14
Improved Cooperation Among Parties.....	15
Domestic Regulatory Coherence	15
Section V. Special and Differential Treatment for Developing and Least Developed Country Parties	17
Longer Implementation Periods and Capacity-Building Support for Implementation.....	17
Delays, Changes in Category Designation, and Grace Periods	20
Requirements on Donors	21
Section VI. Sustainable Investment	25
Section VII. Institutional Arrangements and Final Provisions	27
A Dedicated Committee on Investment Facilitation.....	27
An Issue to Pay Attention to From a Development Perspective	27
Horizontal Exceptions.....	28
Dispute Settlement and Final Provisions.....	28
What's Next in the IFDA Negotiating Process.....	31
A Deep Dive Into the Legal Architecture Challenge.....	31
Ensuring the WTO System Remains Relevant	32
The Implementation Burden and the Risk of Disputes.....	33
Accessing More Technical Assistance and Capacity-Building Support.....	33
References	35



Introduction

World Trade Organization (WTO) members first formally expressed interest in new rules on investment facilitation at the 11th Ministerial Conference in Buenos Aires in 2017. At that conference, a group of 70 members from developed, developing, and least developed countries (LDCs) agreed to launch a Joint Statement Initiative (JSI), through which they could engage in structured discussions at the WTO with the aim of creating multilateral rules on investment facilitation. After 3 years of exploratory discussions, formal negotiations began in September 2020.¹ On July 6, 2023, following nearly 3 years of formal talks, the participants announced a major milestone—the substantial conclusion of the core legal text of the Investment Facilitation for Development Agreement (IFDA).

While participation in the negotiating meetings is open to all WTO members, a subset of WTO members has stated that they are formally participating in the JSI. Since its launch, participation in the JSI has grown substantially, with close to 120 members² participating and one member engaging as an observer as of December 2023. The participation is diverse. Of the 36 members designated as LDCs at the WTO, 21 are formal participants in the IFDA. Of the 90 members that had designated themselves as a developing country under the Trade Facilitation Agreement (TFA), 59 have formally joined the IFDA JSI, and one is engaging as an observer. Of the 38 countries that had designated themselves as developed country members under the TFA, 37 are participating, with the only exception being the United States.

If the IFDA were to be eventually integrated into the WTO's treaty architecture, it would become the second investment-related agreement in that framework, following the 1995 Agreement on Trade-Related Investment Measures. The WTO has not been the usual forum for negotiating investment facilitation provisions. Rather, these types of provisions are usually integrated into bilateral investment treaties or in the form of trade-related investment provisions in free trade agreements. While investment facilitation provisions were usually absent in international investment agreements (IIAs), these provisions have become more common, diverse, and deeper in terms of commitments since 2015 (United Nations Conference on Trade and Development [UNCTAD], 2023).

This reader's guide will focus on the WTO IFDA, aiming to provide an overview of its core legal text.³ It describes the rules and legal provisions that have been agreed and explains succinctly what the disciplines require. This guide is based on previous updates and analysis produced by IISD (Balino et al., 2020; Bernasconi-Osterwalder et al., 2020; Jose, 2023; Jose & Oeschger, 2022).

¹ Baliño et al. (2020) provide a detailed overview of the IFDA's JSI process, describing how it was set up, and how the earlier phases of the discussions evolved. It is well worth reviewing to understand the genesis of the negotiations and to understand the role of the IFDA within the broader investment governance landscape.

² Status as of October, 2023.

³ The reader's guide will review the IFDA finalized legal text of November 27, 2023 (INF/IFD/W/52) (WTO, 2023a). This text is not yet public, so this guide does not cite or quote directly from it. Rather, this guide aims to explain in general terms the obligations that have been agreed so that both WTO members (participants in the negotiations and others) and stakeholders have a clear sense of what the treaty entails.



Section I. Scope and General Principles

This section introduces the objectives of the agreement and clarifies its scope by outlining the types of domestic policies to which the obligations of the agreement would apply. The section also explains how the agreement will relate to other international treaties and provides insight on how the most-favoured-nation (MFN) principle, a key principle of the WTO treaty system and of the agreement, should be applied.

Objectives and Scope of the Agreement

The objectives of the agreement are to facilitate the flow of foreign direct investment (FDI), particularly to developing country Parties and LDC Parties, to foster sustainable development. To do this, the agreement encourages governments to adopt and maintain policies and practices that support investment facilitation, including improving the transparency of investment measures, streamlining administrative procedures, promoting international cooperation, and adopting other types of investment facilitation measures (Article 1).

Next, clarity is provided on the scope of the agreement (Article 2). The Parties⁴ agree that the rules of the agreement would apply to domestic measures adopted or maintained by governments that relate to the investment activities of foreign investors directly investing in the Party's territory or jurisdiction. The IFDA Parties agreed to focus on FDI-related measures rather than also measures relating to purely financial investments, like portfolio investments, due to the view held by some developing country Parties, who argued direct investments are better at promoting the long-term productive capabilities of the domestic industry than portfolio investments, which are viewed as more short-term and speculative by nature.

The agreement would apply to any FDI-related government measure, such as a law, regulation, rule, procedure, decision, administrative action, or any other form of a measure. Such measures could target a broad range of foreign investment activities, including the establishment, acquisition, expansion, operation, management, maintenance, and sale, or other disposal of an investment. It would apply to measures adopted or implemented by authorities at different levels of government, including central, regional, or local levels or by a non-governmental body exercising powers delegated by such authorities.

Further to defining what falls under the umbrella of the agreement, the article also clarifies what issues it does not cover. It emphasizes that nothing in the agreement creates or modifies existing commitments relating to market access or the rules of investment protection or investor–state dispute settlement (ISDS). This clarification on market access emphasizes that the agreement focuses only on facilitation measures and that liberalization provisions, i.e., those requiring a government to allow foreign participation or investment in a particular sector, are outside the agreement's ambit. These exemptions are also part of building a

⁴ The Reader's Guide will use the term "Parties" when referring to WTO members participating in the IFDA. This is how the participants refer to themselves in the latest version of the IFDA text (INF/IFD/W/52-released November 27, 2023), given their decision to prioritize advocating for the integration of the IFDA as a plurilateral agreement in the WTO framework.



firewall to prevent interpretative overlap between this agreement and IIAs (more on that below). Parties also agree that the agreement will not apply to government procurement or to subsidies or grants that are not granted to foreign investors due to domestic laws and regulations.

Key terms are defined, including “investment activities,” “measure,” “authorization,” “investor of another Party,” “juridical person,” and “competent authority” to provide additional clarity on what the overall framework would apply to (Article 3). The definitions relating to foreign investors clarify that the term “investors” includes natural persons or a legal entity with substantive business operations.

The scope and the definitions make it clear that the agreement’s obligations apply to a wide breadth of domestic measures adopted by government bodies at different levels across different agencies and ministries. Any government measure that directly relates to the FDI activity, spanning across its life cycle, of a foreign investor would need to be consistent with the rules set out in the agreement.

Relation to Other International Treaties

Some experts, during the earlier phases of the negotiating process, raised the concern that because this agreement covers investment issues, there is a potential for foreign investors who have access to dispute settlement proceedings (the ISDS mechanism) to leverage the IFDA as a justification for making claims under investment treaties (Bernasconi-Osterwalder et al., 2020). The weak and vague language of specific clauses, such as the umbrella, fair, and equitable treatment (FET), or MFN clauses,⁵ in older-generation international investment treaties,⁶ opens up the possibility that investors could argue that a failure to implement the obligations of the IFDA meant that the host state had failed to comply with their investment protection obligations undertaken in the older-generation investment treaty, thereby justifying a claim.

Such concerns resulted in the incorporation of an article that clarifies how this agreement should be interpreted in relation to the other IIAs (Article 4). The article aims to function as a “firewall provision” in the IFDA by emphasizing that the interpretation of the IFDA and IIAs must be kept separate and distinct. It stresses that a failure to implement obligations under this agreement cannot be used as evidence to prove that a Party has failed to fulfill their commitments under other IIAs.

While the article is valuable in addressing the interpretative overlap risk, it does not absolve that risk entirely. Experts have contended that for the risk to no longer exist, changes to the old-generation investment treaties themselves would be necessary (Bernasconi-Osterwalder et al., 2020). It is, therefore, of particular importance that Parties’ investment treaty negotiators be aware of the IFDA and assess whether the potential of an interpretative overlap risk exists, considering their existing investment treaty portfolio. It should also be noted that a

⁵ For an understanding of these clauses and how they interact to the IFDA context, please see Bernasconi-Osterwalder & Bonnitcha, 2020.

⁶ The investment treaty regime landscape is still largely dominated by old-generation IIAs.



WTO agreement cannot necessarily impose interpretive obligations on panels or tribunals constituted under IIAs and, as such, the IFDA has no real control over how such a panel or tribunal may interpret any overlap between these agreements and the IFDA.

Applying the Principle of Non-Discrimination

The final article in the section clarifies the application of the MFN treatment obligation, a non-discrimination principle (Article 5). It clarifies that when implementing the substantive obligations of this agreement an IFDA Party will do so by providing no less favourable treatment, in like circumstances, to investors of any other WTO members (including non-Parties) and their investments. Essentially, the agreement's benefits must be applied equally to all WTO members. Although the benefits are accessible, the agreement clarifies that non-Parties do not have access to any rights under the agreement, notably the right to bring a dispute proceeding should there be a failure to extend benefits to their investors. This balance is probably realistic; proponents have argued that implementation of investment facilitation provisions, which are mostly procedural improvements, can only be applied generally, making it difficult to exclude non-participants from benefits. They note that since benefits cannot be carved out, non-Parties stand to gain without being bound to the obligations, and this, in turn, is a good reason for them to provide their support to integrate the treaty as a plurilateral agreement within the WTO treaty framework by consensus. This argument is part of the legal architecture debate, which will be explained in a subsequent section.

This article also tackles the interaction between the benefits provided to investors under this agreement and the benefits provided under other investment agreements. It clarifies that the MFN requirement cannot be construed as an obligation to extend additional advantages a Party may grant to investors of some Parties through separate IIAs, investment-related chapters, or other relevant provisions in regional trade agreements. In other words, a Party to this agreement must treat investors of IFDA Parties equally when implementing 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.

Interestingly, the agreement does not include an article on national treatment, a non-discrimination principle often required in most WTO agreements. Parties are, therefore, not bound by the obligation to extend benefits on matters relating to this agreement that are provided to its domestic investors and having to extend those benefits equally to foreign investors. In other words, Parties are allowed to apply investment facilitation efforts on more favourable terms to their domestic investors, should they wish to do so.



Summary of Section I (Scope and General Principles)

Article 1 Objectives

- aims to improve the transparency of measures, streamline administrative procedures, adopt other investment facilitation measures, and promote international cooperation to facilitate FDI flow among Parties, especially developing and LDC Parties, for sustainable development.

Article 2 Scope

- applies to all domestic measures that relate to the FDI activities of foreign investors. The domestic measures can be those undertaken by governments at the central, regional, and local levels, as well as by NGOs with delegated legal authority.
- does not modify commitments on market access and rules on investment protection or ISDS.
- does not apply to government procurement and domestic subsidies and grants not granted to foreign investors by law and regulation.

Article 3 Definitions

- defines investment activities," "measure," "authorization," "investor of another Party/Party," "juridical person," and "competent authority."

Article 4 Relation to IIAs

- excludes the use of IIAs to interpret or apply IFDA
- excludes the use of IFDA to interpret provisions in IIAs or as a basis for a claim under ISDS

Article 5 MFN treatment

- equal treatment to investors of all WTO members on matters relating to the agreement
- MFN principle not interpreted as a requirement to extend benefits negotiated through other IIAs, measures, or provisions in other relevant treaties
- provisions agreed to in other international agreements cannot be used to argue breach of "treatment" under this agreement
- agreement does not create obligations or rights for non-Parties



Section II. Transparency of Investment Measures

Section II is the first of the substantive sections of the agreement. This section includes publication obligations aimed at improving the transparency of FDI regulatory measures and increasing access to other types of information that could be of particular importance to investors. The objective is to lower the information-gathering costs that foreign investors often face when familiarizing themselves with a foreign market and expanding access to such information; this, in turn, can help foreign investors make decisions relating to FDI activities. IFDA participants believe such improvements in transparency could help provide a predictable and stable investment environment, which can play an important role in facilitating FDI, especially to developing countries and LDCs (WTO, 2019a).

Publishing Relevant Government Information Related to FDI

Parties agree to **publish or make publicly available information on relevant measures of general application** that fall within the scope of the agreement (Article 6.1).⁷ This means that they must publish information on all government measures that have been adopted or maintained that would relate to the FDI activities of foreign investors entering or operating in its territory. The term “general application” is important, as it clarifies that not all government measures would fall under such an obligation, but only those that apply to a range of situations, cases, or unidentified operators (WTO, 2023b). Measures that apply to specific situations or operators do not need to be published under such an obligation.

Beyond publishing enacted measures, Parties are also expected to **publish information on laws and regulations that are still being developed** on a best-endeavour basis (Article 10). When providing information on proposals for new laws and regulations, they should also share documents with sufficient detail about those measures to allow investors, interested persons, and other Parties to determine whether and how their interests will be significantly affected. Similar expectations apply to procedures and administrative rulings that are in the process of being developed, and the obligation is similarly on a best-endeavours basis rather than as a requirement.

Parties also agree to publish or make publicly available the procedures and requirements for **authorization of the FDI activity** (Article 7), as well as information on international agreements that affect investment to which they are a party (Article 6.1). Although not a requirement, Parties who put in place measures that facilitate the flow of **outward FDI** are encouraged to publish information on these measures (Article 6.5).

The final publication requirement is that information on requirements and procedures for the **temporary stay and entry of natural persons** is readily available (Article 12). The idea is to ensure that foreign businesspeople know what travel policies they would need to comply with if they ever need to enter the territory to support establishing or operationalizing

⁷ This obligation does not apply during situations of emergency.



the investment activity. The agreement makes it clear that this requirement does not apply to providing information on broader immigration policies relating to the permanent entry of people.

While most of the articles emphasize that information must be published via official publications, Parties also agree to make sure that certain **key information is to be provided via electronic means**, which usually is assumed to mean that it should be available online (Article 6.4). The information, which is expected to be kept up to date, includes 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 FDI. Other items that should be published online are the requirements and procedures relating to authorizations (Article 7.1).

Parties are encouraged to make the above information (along with the measures published under Article 6.1) available in a **single information portal** and try their best to ensure the information is kept up to date (Article 8).⁸

Improving the Development of Regulatory Measures

Parties are also encouraged to undertake **good regulatory practice-type efforts**, which are improvements in how regulatory measures are developed and implemented. They are encouraged to provide a reasonable period between the publication of laws and regulations and when compliance is expected, as well as try to offer clarity on the rationale and purpose behind the law or regulation (Articles 6.2 and 6.3). These types of improvements are seen as valuable for helping investors know what is expected of them and adapt in time for compliance.

For regulatory measures that are under development, Parties shall also, to the extent practicable, facilitate **stakeholder comments** from investors and interested persons on such proposed measures (Article 10.3). While Parties are required to consider these comments, they are not obliged to incorporate them. There is also a footnote caveat, which notes that proposed taxation measures relating to FDI activities are exempt from such a commenting requirement.⁹

Fees and Notification Requirements

Other requirements include ensuring that Parties **do not impose fees** when foreign investors seek to access the relevant information within the scope of this agreement (Article 9). Finally, to help with transparency efforts through the WTO itself, they must **notify to the WTO** of new and important changes to laws and regulations that relate to FDI activities, together with relevant linkages and contact information (Article 11).

⁸ Generally, Parties can either input the information directly or indirectly by including links to the relevant websites on which the measures and information are published (WTO, 2023b).

⁹ Provisions that focus on improving stakeholder engagement are viewed as valuable for ensuring regulations consider the needs and concerns of those who are ultimately impacted by the policies (OECD, 2012). However, critics argue that these engagement efforts often cede influence to foreign parties on domestic policy matters and that the views of business stakeholders are prioritized over stakeholders with limited resources (Trew, 2019).



Summary of Section II (Transparency of Investment Measures)

Article 6 Publication and Availability of Measures and Information

- publish or make publicly available (except in emergency situations) all enacted measures of general application relating to inward FDI activities
- publish international agreements that affect investments to which the IFDA participant is a party
- allow reasonable time between the publication of laws and regulations and when compliance is required
- explain the rationale behind new or amended laws and regulations
- ensure particular information of value for foreign investors is available via electronic means
- publish or make publicly available all measures of general application relating to outward FDI activities

Article 7 Information to Be Made Publicly Available if an Authorization Is Required for an Investment

- publish or make publicly available information on requirements and procedures relating to FDI authorizations

Article 8 Single Information Portal

- make the information of Articles 6.1, 6.4, and 7.1 available through a single information portal, and try to keep this information up to date. When publishing information on 6.4 and 7.1 specifically, do so in one of the WTO official languages
- provide information on focal points established as a part of this agreement

Article 9 No Fees Imposed for Access to Information

- impose no fees for access to information on the measures under this section

Article 10 Publication in Advance and Opportunity to Comment on Proposed Measures

- publish in advance new or amended laws and regulations of general application relating to FDI activities. Provide documents with relevant details on proposed laws and regulations
- publish in advance new or amended procedures and administrative rulings of general application relating to FDI activities
- provide investors and interested stakeholders an opportunity to comment on proposed regulations and laws, and proposed procedures and administrative rulings of general application

Article 11 Notification to the WTO

- notify new or significant amendments to laws and regulations of general application relating to inward FDI activities



- notify official places where the information is published, the websites, and contact information of competent authorities and focal points

Article 12 Information to Be Made Publicly Available on the Entry and Temporary Stay of National Persons for the Purpose of Conducting Investment Activities

- make information publicly available online on requirements and procedures relating to business travel to establish or operationalize FDI activities



Section III. Streamlining and Speeding Up Administrative Procedures

Another core pillar of the agreement is Section III on Streamlining and Speeding Up Administrative Procedures. The obligations of this section focus on removing excessive bureaucratic impediments and red tape relating to administrative procedures. The expectation is that this will promote a more reliable and predictable regulatory environment and efficient administrative procedures (WTO, 2019b). Proponents have argued that these reforms can improve investment climates, which, in turn, can facilitate the flow and operations of investments.

Principles for Implementing FDI-Related Administrative Procedures

When implementing administrative procedures relating to FDI activities, the Parties agree to meet certain standards. They agree to ensure that measures of general application are **administered in a reasonable, objective, and impartial manner** (Article 13). When authorizations are required for the FDI activity to take place, the Parties will make sure that the authorization-related procedures are not too complicated and burdensome, are impartial, and are based on objective and transparent criteria. These procedures should not be used to unjustifiably prevent an applicant from fulfilling the authorization requirements (Article 14).

Application Requirements

The section includes a range of requirements for how authorities are expected to treat applications submitted as a part of the authorization process of an FDI activity. Table 1 summarizes how Parties agree to treat FDI applications.

**Table 1.** Obligations about treatment of FDI applications

Article	Provision	Obligation
Article 15.1	Submission periods for application	Applications should be allowed all year, if feasible. If a specific submission period exists, the Party will ensure it is reasonable.
	Treatment of authenticated copies	Ideally, authenticated copies should be accepted in lieu of original copies, especially if another competent authority is holding the original.
	Processing of applications	Indicative timelines for processing, status, and application decisions should be communicated to the applicant. Processing of applications 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 and an opportunity to submit the missing information. If such steps are not practicable, the competent authority must inform the applicant of the rejection of its application within a reasonable period.
	Treatment of rejected applications	Authorities should explain why the application is being rejected and the procedures for resubmission. An applicant should not be prevented from submitting future applications due solely to a previously rejected application.
Article 15.2	Treatment of approved applications	Authorizations, once granted, should come into effect without undue delay based on terms or conditions.
Article 16	Treatment in case of multiple applications	Authorities should avoid requirements that would result in the applicant approaching multiple competent authorities for investment authorization. If multiple applications are required due to the involvement of different jurisdictions, the coordination of applications is encouraged through a single entry point/information portal.
Articles 17 and 17 bis	Treatment of fees	Should authorization fees exist, they should be reasonable and transparent and not restrictive. Should new or amended fees be implemented, they should only come into force within reasonable time frames and will only be in effect if information has been published. Regarding fees for financial services applications, information on fee schedules or details relating to how fee amounts are determined should be provided.
Article 18	Use of ICT/E-government	Subject to resource availabilities, competent authorities will undertake efforts to accept electronic applications. If feasible, electronic payments of fees should also be accepted.

Source: Author.



Improving Trust in, and Integrity of, Administrative Decisions

The remaining articles seek to improve the trustworthiness and integrity of the administrative decision-making process. These are regarded as important features for strengthening confidence in the reliability of the investment climate. Parties must ensure that the competent authorities involved in investment authorizations make their decisions independently (Article 19).

More broadly, Parties must also maintain tribunals or procedures that allow for the **review or appeal of administrative decisions** that affect an investment activity, and the review or appeal process should also be carried out in an independent manner that is objective and impartial (Article 20). These processes are expected to provide the affected investor with the right to defend their position and submit relevant information, along with the right to a new decision based on the evidence. The latest decision, should it be positive, must be implemented by the relevant competent authorities. The article, however, includes an important clarification that Parties need not institute the new tribunals or procedures if these processes are inconsistent with domestic legal structures.

Finally, Parties are encouraged to carry out **ex-post review efforts** to ensure that FDI measures remain effective and efficient. They are encouraged to review their measures of general application to make sure they remain effective in achieving the stated public policy objectives and to address the specific needs of micro, small, and medium-sized enterprises (MSMEs). Other efforts should include periodically reviewing authorization fees to reduce their number and diversity. When undertaking these ex-post reviews, the Parties are encouraged to consider stakeholder feedback, as well as international performance indicators. They are also encouraged to share their experiences on ex-post review efforts via the Committee on Investment Facilitation (Article 21).

Summary of Section III (Streamlining and Speeding up Administrative Procedures)

Article 13 Reasonable, Objective, and Impartial Administration of Measures

- administer measures of general application relating to FDI activities in a reasonable, impartial, and objective manner

Article 14 General Principles for Authorization Procedures

- apply principles when implementing authorization procedures, including ensuring procedures are not complicated and burdensome, are impartial, and are based on objective and transparent criteria
- competent authorities will assess authorization applications on the basis of criteria set out in the measure that are in accordance with the Party's legal system



Article 15 Authorization Procedures

- If an authorization is needed for an investment, Parties agree to take specific steps relating to:
 - submission periods
 - authenticated copies
 - processing of applications
 - incomplete applications
 - rejected applications
 - approved applications

Article 16 Multiple Applications

- Avoid requiring multiple applications for investment authorization. If unavoidable, consider using a single entry point for applications.

Article 17 Authorization Fees

- Ensure authorization fees are reasonable, transparent, based on authority set out in measure, and don't seek to restrict investment activities. Ensure a reasonable period between when the fee is published and date for compliance.

Article 17 *bis* Authorization Fees—Financial services

- provide the applicant with a schedule of fees or how fee amounts are determined and ensure such fees are not used as a means for avoiding agreement obligations

Article 18 Use of ICT/E-Government

- accept electronic submissions/formats of applications
- allow for electronic payment of authorization fees

Article 19 Independence of Competent Authorities

- ensure authorization decisions by competent authorities are undertaken in an independent manner

Article 20 Appeal or Review

- maintain or institute processes or tribunals that allow affected investors to request an appeal or review of decisions relating to investment activities
- ensure the process provides affected investors with a reasonable opportunity to defend their positions and to make decisions based on evidence and records

Article 21 Periodic Review

- review relevant measures of general application and assess whether they need to be modified to ensure their effectiveness in achieving policy objectives and in meeting the specific needs of MSMEs
- periodically review authorization fees to reduce their number and diversity
- consider stakeholder feedback and relevant international performance indicators during the review process and share experiences with the committee



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

This section focuses on improving cooperation on investment facilitation measures across different levels. First, it seeks to enhance cooperation between governments and investors; second, it aims to strengthen cooperation among the Parties themselves; finally, it aims to strengthen cooperation between domestic regulatory agencies through domestic coherence efforts. The different types of cooperation efforts are considered important for promoting improved linkages with investors and among Parties, for knowledge sharing, and for contributing toward a transparent and predictable regulatory environment, all of which are seen as important features for facilitating investments (WTO, 2019c).

Improved Cooperation Between Investors and Governments

The section includes three articles aimed at enhancing communication between governments and investors. These additional efforts are valuable for addressing ground-level obstacles that investors may face and function as a feedback mechanism for policy-makers to understand the concerns of investors. Parties must establish or maintain at least one focal point (or an equivalent appropriate mechanism) to **respond to investor inquiries** on matters relating to the measures covered by the agreement (Article 22). That focal point can also assist investors in obtaining relevant information from the competent authorities responsible for implementing the measures of the agreement. Parties are encouraged to refrain from collecting fees when responding to such inquiries. Other functions can also be attributed to the focal point, such as helping to resolve investor problems or providing recommendations to improve the investment environment.¹⁰

Another way Parties are encouraged to improve their cooperation with investors is by enhancing opportunities for such investors to be linked to domestic suppliers. The Party is encouraged to set up one or more **databases that provide investors with relevant information on domestic suppliers**, specifically on MSME suppliers (Article 24). The idea behind such databases is to help investors access useful information to help them with sourcing efforts, and to offer local MSMEs the opportunity to access new buyers of their goods and services and be linked into global value chains. The database can have different features, including, for example, being searchable online and being searchable according to specific characteristics, such as sector, industry, certifications, and so on. The job of establishing such a database can be allocated to public or private entities, and

¹⁰ Should Parties designate the additional task of resolving problems to such a body, it is important to remember that such a function can entail different priorities and objectives. For example, the Party can set up the focal point to provide aftercare services that help investors address operational issues, or they could have the focal point serve as a grievance management mechanism focusing on mediating solutions between investors and the government (WTO, 2023b).



Parties would not be held liable for the information in the database. A final article, the **supplier development program** article, encourages Parties to implement programs that can strengthen the capabilities of local suppliers so that they can better meet the sourcing demands of investors (Article 25). Although these two articles are best-endeavour disciplines, they are considered beneficial to implement, given their focus on strengthening the ties between investors and the local economy to extend the FDI benefits within the host economy.

Improved Cooperation Among Parties

The agreement also aims to improve cooperation between Parties that could facilitate investment. **Cross-border cooperation** efforts include requirements to respond to inquiries from other Parties on matters falling within the scope of the agreement (Article 26). To do so, the Party may set up an enquiry point or use the focal point (or another appropriate mechanism) it had set up as a contact point for investor enquiries. In addition, Parties are expected to encourage cooperation among relevant competent authorities by sharing experiences, exchanging information relating to domestic investors, and collaborating on facilitation agendas that can help increase investments for the development and benefit of MSMEs. Parties are encouraged to inform the Committee on Investment Facilitation of such cooperation efforts.

Domestic Regulatory Coherence

Finally, the agreement aims to encourage Parties to improve the coherence of their domestic regulatory practice. In this section, they are encouraged to conduct **regulatory impact assessments (RIAs)**, which are ex-ante evaluations, when developing major regulations that relate to the FDI activities of investors (Article 23). Undertaking ex-ante evaluations is seen as a valuable means to improve the quality of a regulation by assessing whether the regulation helps achieve the state policy goal and identifying potentially alternative means that may serve as a better approach (OECD, 2012). When undertaking the RIAs, Parties are expected to facilitate stakeholder comments during the assessments, as well as take the opportunity to assess what impact a proposed regulation would have on investors (and MSMEs in particular). When conducting such assessments, the agreement suggests that Parties consider analyzing aspects relating to the economic, social, and environmental impacts of the measure under consideration. Finally, Parties must also put in place processes that seek to improve cooperation among competent authorities to coordinate their activities to better facilitate investments.



Summary of Section IV (Focal Points, Domestic Regulatory Coherence, and Cross-Border Cooperation)

Article 22 Focal Points

- establish or maintain a focal point to respond to investor enquiries on the agreement or to assist such investors in obtaining information from competent authorities
- avoid requiring payments of fees when responding to investor enquiries

Article 23 Domestic Regulatory Coherence

- conduct regulatory impact assessment when preparing major FDI-related regulatory measures
- provide reasonable opportunities for interested persons to comment during the RIA analytical process
- ensure improved cooperation of competent authorities responsible for investment procedures

Article 24 Domestic Supplier Databases

- promote the establishment of one or more databases with relevant and up-to-date information on domestic suppliers, including on MSMEs

Article 25 Supplier Development Programs

- implement programs to strengthen the capabilities of domestic suppliers to better respond to the sourcing demands of investors

Article 26 Cross-Border Cooperation on Investment Facilitation

- designate enquiry point responsible for responding to questions on agreement from other Parties
- encourage cooperation between different Parties' competent authorities
- inform Committee on Investment Facilitation of the cooperation efforts undertaken



Section V. Special and Differential Treatment for Developing and Least Developed Country Parties

While developed country members are expected to implement all the rules of the agreement by the time it enters into force, it is understood that developing and LDC members, due to technical and resource capacity-related challenges, may need more time and the acquisition of capacity to do so. The objective of this section is to provide those countries with special rights in the form of additional benefits and flexibilities when implementing the rules of the agreement.

At the WTO, any member can self-designate themselves as a developing country for a given WTO agreement and avail themselves of the inherent flexibilities outlined through the special and differential treatment (S&DT) provisions. LDCs often have access to additional flexibilities, and the WTO, in this instance, uses the United Nations classification for whether a given economy is an LDC.

The section is modelled on the S&DT approach developed under the TFA, often regarded as an innovative approach to S&DT at the WTO. Rather than benefiting from uniform exemptions or standardized longer implementation periods (as had been the case with past WTO agreements), developing country members and LDC members can determine for themselves the additional time they would need, as well as the capacity-building and financial support required, to implement the various obligations contained in the agreement and negotiate these conditions and transition periods with other members.

Longer Implementation Periods and Capacity-Building Support for Implementation

The first article in this section is dedicated to general principles that build a common understanding on why and how additional flexibilities and benefits are granted to developing and LDC Parties (Article 27). Principles include acknowledging that developing and LDC Parties may face difficulties in implementing the obligations of the agreement right away and that support should be provided to assist them with implementation. In case the necessary capacity is not provided, then developing and LDC Parties will not be required to implement the relevant provision until that capacity has been acquired.

Based on this common understanding, developing and LDC Parties can then schedule the implementation of the rules of the agreement into three different categories (Article 28). Rules that developing country Parties expect can be implemented immediately—or after 1 year, in the case of LDCs—are scheduled as Category A provisions. Provisions that developing and LDC Parties could only implement after a transition period are scheduled under Category B. Finally, provisions that require not only more time but also targeted capacity-building and technical assistance support to be implemented are scheduled as Category C commitments.

The article also notes that self-designations of the substantive provisions into the different categories shall be guided by **self assessments** that assess to what extent a developing and



LDC Party already complies with the IFDA framework. The WTO Secretariat has produced a self-assessment guide to support developing and LDC members to carry out such needs assessment analysis. It is recognized that undertaking such an analysis is highly important to prevent developing and LDC Parties from notifying commitments that are uncertain or inconsistent with domestic realities. A footnote clarifies that assistance should be provided to help developing and LDC Parties carry out these self assessments.

Beyond notifying the designations of the different provisions, developing and LDC Parties must also provide information

on the deadlines for when they assume the articles will be implemented. In the case of Category C commitments, Parties must also provide information on what their capacity-building needs are. Once support has been provided and implementation is underway, the Parties must provide information on the capacity-building arrangements that have been set up and the progress of such arrangements in helping countries to comply with the obligations. Table 2 summarizes the notification and implementation deadlines expected of developing and LDC Parties as a part of the S&DT scheduling process.

Table 2. Notification and implementation requirements of Categories A, B, and C (Articles 29 and 30)

	Requirements	Developing country Party	LDC Party	Comments
Category A	Notification of designation	Upon entry into force of the agreement	Up to 1 year after entry into force of the agreement	Commitments designated under Category A are to be an integral part of the agreement.
	Implementation of provisions	Upon entry into force of the agreement	Up to 1 year after entry into force of the agreement	
Category B	Notification of designation	Upon entry into force of the agreement	<ul style="list-style-type: none"> No later than 1 year after entry into force of the agreement Confirm the designation no later than 2 years after entry into force 	Additional time to notify a definitive timeline can be requested of the committee.
	Notification of deadlines for implementation	<ul style="list-style-type: none"> Indicative deadlines: Upon entry into force Definitive deadlines: No later than 1 year after entry into force 	<ul style="list-style-type: none"> Indicative deadlines: No later than 1 year after entry into force Definitive deadlines: No later than 2 years after entry into force 	



	Requirements	Developing country Party	LDC Party	Comments
Category C	Notification of designation	Upon entry into force	1 year after entry into force	
	Notification of deadlines for implementation	<ul style="list-style-type: none"> Indicative deadlines: Upon entry into force Definitive deadlines: Within 1.5 years after entry into force 	<ul style="list-style-type: none"> Indicative deadlines: No later than 2 years from when capacity-building needs were notified Definitive deadlines: No later than 1.5 years from the date when capacity-building arrangements were notified 	Additional time to notify a definitive timeline can be requested of the committee.
	Notification of capacity-building needs	Information on needs: Upon entry into force	Information on needs: 1 year after notification of Category C designation	
	Notification of progress of capacity building	<ul style="list-style-type: none"> Information on new or ongoing capacity-building arrangements: Within 1 year after entry into force Updated progress on capacity-building arrangements: Within 1.5 years from the date when arrangements were notified 	<ul style="list-style-type: none"> Information on new or ongoing capacity-building arrangements: No later than 2 years from when capacity-building needs were notified Updated progress on capacity-building arrangements: No later than 1.5 years from the date when arrangements were notified 	<ul style="list-style-type: none"> Arrangements will be on mutually agreed terms, either bilaterally or through international organizations. The committee may invite non-Parties to provide information on relevant capacity-building arrangements. Parties may also include information on implementation plans or projects, the agencies responsible for implementation, and the donors with whom arrangements are already in place.

Source: Author.



Delays, Changes in Category Designation, and Grace Periods

There is a recognition that unforeseen circumstances or difficulties may result in Parties not meeting their implementation deadlines. These Parties can, therefore, benefit from additional flexibilities, such as deadline extensions, the possibility to shift designations between categories, access to expert group recommendations, and grace periods shielding Parties from the potential of WTO disputes.

If developing country Parties are unable to meet the implementation deadlines initially scheduled for Category B and C obligations, that difficulty must be notified to the Investment Facilitation Committee at least 120 days before the expiration of the implementation deadline. In the case of LDCs, that difficulty would have to be notified 90 days beforehand. After explaining the delay, if the developing country Party 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 (Article 31).

If, however, the request for an extension is longer, or if that request is asking for a second extension, then it will be up to the Committee on Investment Facilitation to determine whether the request should be approved. If such extension requests are not granted, the committee will then set up an expert group composed of five independent persons, diverse and qualified in the field of investment facilitation, who will then provide recommendations within 3 months on how best to address the implementation challenges (Article 32). During the expert review process, dispute settlement proceedings under the WTO's dispute settlement system cannot be brought against the Party being reviewed.

Parties have the possibility of shifting designations between Categories B and C. If Parties realize that some of the provisions would require capacity-building support after all, they then have the possibility of shifting the designation of their Category B provisions into Category C (Article 33). For the new Category C provisions, information must be provided on what support and assistance requirements are needed. If additional time is necessary to implement the new Category C provisions, the developing country or LDC Party has the option of requesting the automatic extension deadlines described above. It can also request an examination by the committee and the setting up of an expert group to provide recommendations for implementation. In the case of LDCs, should they request a deadline extension of more than 4 years for these newly designated Category C provisions, that request will have to be approved by the committee.

Following all the above flexibilities, if the developing and LDC Parties continue to fail to implement the different rules of the agreement, then this leaves open the potential for other Parties to raise a dispute claim against the non-compliant Party to enforce compliance. The section, however, provides additional flexibilities in the form of grace periods that shield developing and LDC Parties from the potential of such disputes for a period (Article 34). If a developing country Party fails to implement its Category A provisions, it can access a 2-year grace period following the agreement's entry into force. For LDC Parties, that grace period is extended to 6 years. In the case of Category B and C provisions, while an additional grace period flexibility is not available for developing country Parties, LDC Parties are granted one



lasting 8 years. Beyond such grace periods, Parties 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 Party.

Requirements on Donors

The section also clarifies what is expected from donor Parties when supporting developing and LDC Parties in implementing the agreement (Article 35). There is an important footnote in this article that clarifies that a donor Party can also be a developing country that is in a position to provide support.

The main provision in the article states that donor country Parties will agree to facilitate technical assistance and support on terms mutually agreed with developing and LDC Party counterparts. The support would either be provided bilaterally or via international organizations. More targeted support is expected to be provided to LDCs.

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 subregional 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 will hold at least one dedicated session each year to monitor the progress of support activities. Beyond the principles, the agreement also provides some guidance on what types of technical assistance may be provided. Examples include assistance in building the expertise of relevant authorities to maximize the positive impacts of investment, as well as building capacity to prepare feasibility studies for investment projects.

The final article of the S&DT section focuses on information requirements that both donor and recipient country Parties must provide to ensure transparency and improved coordination of support activities (Article 36). Donor Parties 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 Parties, 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, collaborations with other international and regional organizations are likely to be maximized to carry 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.



Summary of Section V (Special and Differential Treatment for Developing and Least Developed Country Parties)

Article 27 General Principles

- Developing (and especially LDC) Parties may face special difficulties in implementing the agreement and assistance and support should be provided to address such difficulties.
- The extent and timing of commitments should be determined based on implementation capacities. If support is lacking, then implementation of relevant provisions will only be required if capacity support has been provided.
- LDC Parties need only make commitments consistent with their development, financial needs, and administrative and institutional capabilities.

Article 28 Categories of Provisions

- Provisions that are implemented by entry into force (or 1 year after entry into force for LDCs) can be categorized as Category A.
- Provisions that require additional time for implementation can be categorized as Category B.
- Provisions that require time and capacity-building support for implementation can be categorized as Category C
- Category designations can be determined on an individual basis by self-assessing compliance levels and implementation needs.

Article 29 Notification and Implementation of Category A

- comply with specific Category A notification and implementation deadlines (See Table 2)

Article 30 Notification of Dates for Implementation of Categories B and C

- comply with specific Category B and C notification, implementation deadlines, and information-provision requirements on support programs (see Table 2)

Article 31 Early Warning Mechanism: Extension of implementation dates for provisions in Categories B and C

- Inform the committee if implementation deadlines will be missed; if extension requests are 1.5 years (or 3 years in the case of LDCs), the extensions will be automatically granted. Longer extensions or requests for second extensions will require the approval of the Committee.

Article 32 Expert Group to Support the Implementation of Category B and C

- If an extension request is not granted, and if implementation of a Category C provision is not feasible with existing capacity, the Committee will establish an expert group to examine the issue and to provide recommendations within three months following its composition.



- The expert group will be composed of five independent persons qualified in investment facilitation and capacity-building support, and it must be balanced between developing and developed country Parties.
- The expert group will consider a self-assessment capacity gap analysis of the country when making recommendations. For LDCs, the committee will facilitate the acquisition of sustainable implementation capacity for implementing expert group recommendations.
- No dispute claim may be raised during the expert group deliberation process, and in the case of LDCs, until the committee decides on the issue.

Article 33 Shifting Between Categories B and C

- If implementation expectations change, Parties can notify the committee of the shift in designations between Categories B and C. If the shift is from Category B to C, Parties should provide information on the additional capacity-building support needed.
- Parties can request approval from the committee if extension request is longer than the automatically permitted timeline.

Article 34 Grace Period for the Application of the Understanding of Rules and Procedures Governing the Settlement of Disputes

- “Grace period” for dispute settlement proceedings for
 - developing countries is 2 years after the agreement's entry into force for Category A provisions
 - LDCs is 6 years after the agreement's entry into force for Category A provisions
 - LDCs is 8 years after specific implementation deadlines for Category B and C provisions
- Parties recognize the special situation of LDCs and shall exercise due restraint on matters relating to dispute settlement proceedings.
- Parties will provide adequate opportunities to discuss matters relating to the Agreement's implementation during the grace periods.

Article 35 Provision of Assistance and Support for Capacity Building

- Donor Parties agree to provide technical assistance and support on mutually agreed terms, either bilaterally or through international organizations, to help recipient countries implement agreement's measures.
- Ensure targeted support to LDCs, especially to help them build sustainable capacity to implement the commitments. Comply with assistance principles and ensure the support does not compromise existing development priorities.
- Apply principles when providing support and assistance, including considering the overall development framework and existing efforts, regional and subregional integration efforts, reform activities relating to the private sector, and promotion of coordination activities among Parties and institutions. Encourage developing countries to provide capacity-building support where possible.



- At least one session of the committee per year will review implementation and capacity-building support progress.

Article 36 Information on Assistance and Support for Capacity Building to Be Submitted to the Committee

- Submit information on the provision of capacity-building support for implementing the agreement. On an annual basis, donor Parties must relay information on disbursement, status, procedures, beneficiaries, and implementing agency.
- Submit contact point information and relevant mechanisms, on both a donor and recipient country basis.
- Make the above information publicly available via the WTO Secretariat.
- Committee to invite relevant international and regional organizations to provide information on capacity-building progress. The WTO may collaborate with such organizations to evaluate the needs for investment facilitation and jointly provide assistance.



Section VI. Sustainable Investment

This section recognizes that additional effort may be needed to facilitate the flow of higher-quality investments, referred to as “sustainable investments.” The expectation is that implementation of this section’s articles will result in facilitating investments that deliver higher value for sustainable development objectives. Two types of articles are included: the first on responsible business conduct (RBC) and the second on measures against corruption.

First, Parties agree to encourage investors and enterprises operating in their jurisdictions to voluntarily incorporate internationally recognized principles, guidelines, and standards on **RBC** into their internal policies and business practices (Article 37). 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. Parties agree to share their experiences and best practices regarding such efforts through the Committee on Investment Facilitation. Finally, Parties are encouraged to recognize the important role of due diligence in ensuring RBC in international supply chains.

Article 38 sets out requirements to implement **measures against corruption**. Under this article, host states agree to develop measures that prevent and fight corruption and money-laundering activities that fall within the scope of the agreement. The article also recognizes that certain key principles should be applied when developing anti-corruption policies, such as accountability, transparency, and integrity. Finally, Parties 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.

Although the two articles above are requirements, a failure to implement them will not result in consequences relating to dispute claims. A provision in Article 44 on dispute settlement clarifies that Parties do not have recourse to dispute settlement proceedings for matters relating to the articles on RBC and measures against corruption.

The two articles have attracted praise on the basis that this is the first time that articles focusing on responsible conduct have been included in a potential WTO agreement (Sauvant, 2022). These articles also recognize the importance of implementing government measures that directly facilitate the flow of sustainable investments rather than simply assuming that beneficial outcomes will eventually be achieved indirectly through the facilitation of broader FDI flows. As a counterpoint, however, concerns have also been raised that these two articles are the only ones excluded from dispute settlement proceedings, making them function as minimal obligations on a member (Jansen Calamita, 2023). The exclusion also results in a hierarchy of sorts between the other obligations that facilitate the flow of broader investments and rules that aim to facilitate the flow of sustainable investments. It could also be argued that, given the urgency of attracting private investment that boosts sustainable development, the inclusion of just four articles (these two and the articles on supplier development) on these issues leaves something to be desired.

A final concern that has been raised is the logic of applying the obligations from a host state perspective rather than also applying such obligations to home states. The latter, as



capital-exporting countries, are primarily developed economies. The affluence of these countries means that they may be better positioned to implement activities that encourage RBC behaviour and undertake efforts to monitor good corporate behaviour. While a home country measure had been initially considered, Parties could not agree to include such a measure due to some Parties arguing that the agreement should primarily focus on host states' requirements (Jose et al., 2022). Some developing country Parties have also raised concerns about such provisions due to their increasing role as capital-exporting Parties.

Summary of Section IV (Sustainable Investments)

Article 37 Responsible Business Conduct

- encourage businesses to incorporate international guidelines, standards, and principles on RBC into business practices and policies
- encourage businesses to maintain meaningful engagement and dialogue with domestic communities
- recognize the importance of implementing due diligence for RBCs
- exchange information and best practices on efforts

Article 38 Measures Against Corruption

- ensure measures are taken to prevent and fight corruption and money laundering within the scope of the agreement
- recognize select principles (accountability, transparency, and integrity) when developing anti-corruption policies
- exchange information and best practices on efforts



Section VII. Institutional Arrangements and Final Provisions

This section is the final one in the agreement. It addresses institutional questions, such as the following: the functions of the Committee on Investment Facilitation that would be established to monitor the agreement; horizontal legal provisions containing general, security, financial, and monetary and exchange rate policies exceptions; and provisions clarifying how the WTO's dispute settlement mechanism can be used under the agreement.

A Dedicated Committee on Investment Facilitation

A significant segment of this section is Article 39, which establishes a WTO Committee on Investment Facilitation. The committee, meeting at least once a year, is expected to facilitate the sharing of information and experiences on investment facilitation and review Parties' 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.

An Issue to Pay Attention to From a Development Perspective

Nestled within the article on the WTO Committee on Investment Facilitation is a provision that developing and LDC Parties must pay attention to due to its implications for capacity-building matters. Once the committee has been set up, it must engage in a discussion to explore the possibility of setting up a dedicated fund (an Investment Facilitation Facility) that would manage the voluntary contributions of donor members, focusing on helping developing countries and LDC Parties in implementing the agreement's provisions.

During the negotiating process, some developing and LDC Parties advocated for a stronger commitment, asking that rather than exploring the idea Parties should instead agree to the creation of such a fund. They argued that the facility would ensure dedicated funds are available and tied to the agreement's implementation. They noted the inclusion of a strong commitment to a similar facility within the recently concluded fisheries subsidies agreement. They also pointed to the experience of the TFA, which had also set up a dedicated facility before the agreement came into force. Opponents of a more substantial commitment, however, raised concerns that funding coordination efforts are activities that belong outside the organization's mandate and should instead be carried out by other, more relevant, international organizations, such as the World Bank. The plurilateral nature of the initiative also added some complexity to the debate. Should a facility be set up, it will likely use Secretariat resources, which raises budget allocation questions. Given that the JSI has not (yet) received the backing of all WTO members, and some members remain vocal critics of the process, it was determined that the creation of such a facility could not be agreed to right away.



Horizontal Exceptions

The second type of article included in the section focuses on exceptions. Article 40 on Disclosure of Confidential Information clarifies that nothing in the agreement can be construed as requiring Parties to provide confidential information that could impede law enforcement, public interest matters, or prejudice against legitimate commercial interest. Article 41 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 Parties undertake under this agreement.

A financial exception article (Article 42) 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. Another exception, focusing more specifically on monetary and exchange rate policies, clarifies that the agreement must not prevent Parties from being allowed to adopt or maintain measures relating to such policies (Article 43).

Dispute Settlement and Final Provisions

This final section also includes an article on dispute settlement (Article 44), which clarifies that Parties to the IFDA can use the WTO's dispute settlement mechanism for any dispute that may arise. However, the Parties are not allowed to use the mechanism to bring a claim against another Party for failing to comply with the articles in the sustainable investment section. The article also encourages Parties to use alternative dispute resolution solutions provided under the Dispute Settlement Understanding, 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 45). The article provides clarity on how the agreement will enter into force, how Parties may either join or withdraw from the agreement, and other remaining institutional details.

The agreement will enter into force once 75 Parties have deposited their instrument of acceptance to the WTO Director-General (DG). For the remaining Parties, the rules will apply 30 days following their own deposit of the instrument of acceptance. While Parties are expected to implement the agreement upon its entry into force, developing and LDC Parties, 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.

It is clarified that a Party is not allowed to submit reservations regarding any of the provisions of the agreement. However, amendments to the agreement can be made should the changes be agreed to by consensus of the Parties. A Party may withdraw from the agreement at any time and can do so by submitting a written notification to the WTO DG.

Other important clarifications include recognizing that nothing in the agreement can be construed as detracting from the rights and obligations that Parties have under the Marrakesh Agreement establishing the WTO, as well as noting that the WTO Secretariat will service the



agreement. During the final stages of negotiations, an important footnote was added to this last article. The footnote clarifies that more favourable treatment can be granted to Indigenous persons within the host state's territory, as long as such a measure is not used as a disguised restriction on investments from other members.

Summary of Section VII (Institutional Arrangements and Final Provisions)

Article 39 WTO Committee on Investment Facilitation

- Establish a Committee on Investment Facilitation upon integration of the agreement within the WTO framework.
- The committee is expected to meet at least once a year.
- The committee's functions include:
 - developing procedures for sharing information and experiences on investment facilitation, as well as the identification of best practices;
 - preparing an annual report on investment facilitation measures implemented by members;
 - maintaining close contact with other international organizations around investment facilitation to ensure support services are efficient and effective. Inviting representatives from such organizations representatives to share experiences and relevant information;
 - reviewing the operation and implementation of the agreement 4 years after its entry into force and periodically thereafter. Ensuring periodic reporting to the WTO General Council;
 - considering engaging in ad-hoc discussions on specific issues and challenges in a bid to find mutually agreed solutions;
 - exploring the possibility of setting up an investment facilitation facility to assist developing and LDC Parties in implementing the agreement's provisions;
 - encouraging the sharing of experiences on measures of general application to facilitate outward FDI.

Article 40 Disclosure of Confidential Information

- Obligations do not apply to confidential information, the disclosure of which would impede law enforcement, public interests, or legitimate commercial interests.

Article 41 General and Security Exceptions

- Exceptions of GATS Article XIV and Article XIV *bis* para 1a,1b, and 1c and GATT Articles XX and XXI apply to this agreement as well.

Article 42 Financial Exceptions

- exception for measures for prudential reasons, as long as such measures are not developed as a means for avoiding compliance with obligations



Article 43 Monetary and Exchange Rate Policies

- exception for measures of general application concerning monetary policy, exchange rate policy, or related measures.

Article 44 Dispute Settlement

- Disputes arising from this agreement can only be raised through the WTO's dispute settlement mechanism.
- Mechanisms to leverage good offices, conciliation, and mediation are provided in Articles 5 and 25 of the Dispute Settlement Understanding.
- Recourse to dispute settlement is not permitted for matters related to Section VI on sustainable investment.

Article 45 Final Provisions

- Agreement shall enter into force 30 days after the 75th Party's deposit of their instrument of acceptance. Subsequent Parties ratifying will have rules apply 30 days following their own instrument of acceptance deposit. Developing and LDC Parties that use Section V will implement the agreement according to the flexibilities inherent in the section.
- Nothing in this agreement will diminish the rights and obligations of the Party under the Marrakesh Agreement establishing the WTO.
- Amendments to the agreement can be taken by consensus of the Parties.
- A Party is allowed to withdraw from the agreement by written notification to the WTO DG, and the withdrawal will come into effect 60 days following the notification.
- The agreement will be serviced by the WTO Secretariat.
- Other: Registration, deposit, and annex integration clarifications.



What's Next in the IFDA Negotiating Process

After concluding the substantive negotiations in July 2023, the co-coordinators of the JSI process highlighted three key objectives that they intended to prioritize in the run-up to the Ministerial Conference 13 (MC13) in Abu Dhabi in February 2024 (WTO, 2023c).

The first track was on “legal scrubbing,” and it was recently completed in November 2023. The process resulted in the finalized English text, which represents the final result of the IFDA. During the legal scrubbing, the participants reviewed the July legal text and made corrections to ensure technical coherence and accuracy. They also took the opportunity to negotiate some additional final provisions, notably providing clarity on how non-Parties would be able to join the agreement, should they choose to do so, at a later stage.

The second track of work is to encourage developing and LDC members¹¹ to undertake their needs assessment analysis. As mentioned, the needs assessments help members assess the extent to which their domestic framework is already aligned with the provisions set out through the IFDA framework. The information can then be used to determine how best to schedule their provisions as part of the S&DT scheduling process. The WTO Secretariat has provided a standardized self-assessment guide to help countries with such assessments. While some IFDA participants, such as the Lao People's Democratic Republic, members of the Organization of Eastern Caribbean States (OECS), and Ecuador, have started to undertake pilot studies, some 30 other countries have voiced an interest in also doing the studies in 2024. Convincing the remaining subset of developing and LDC members to carry out their needs assessment analysis is highlighted as an important priority under this track. Donor members and relevant international organizations are also assessing the extent of the support that they can provide to assist with the conducting of needs assessments.

A Deep Dive Into the Legal Architecture Challenge

The final track, and one which is regarded as the most difficult, is to agree with the broader WTO membership that the IFDA can be incorporated into the WTO framework. For the agreement to be permitted within the WTO framework, there are only a few ways this can be done.

The participants in the JSI process have chosen to prioritize one approach over the various options. They agreed to proceed within the WTO framework, thereby foregoing the option of finalizing negotiations outside the WTO. They agreed that they would like to maintain the agreement as a stand-alone agreement, thereby foregoing the option of breaking the IFDA into bits and pieces and integrating the separated provisions within existing WTO treaties, such as the GATS and GATT. And finally, during a meeting in October 2023, the members of the IFDA decided that they would no longer prioritize the option of convincing the broader

¹¹ No distinction has been made between Parties and non-Parties when encouraging needs assessment studies; therefore, the term “members” is used when referring to needs assessment activities.



membership to incorporate the treaty as a multilateral agreement under Annex 1 of the WTO Agreement (WTO, 2023d). For this option to have been successful, it would have required convincing all 164 WTO members to sign onto the agreement so that all members would have the rights of the agreement but would also be bound by its obligations. There was a recognition that convincing some non-signatory countries to agree to rules that they had no role in shaping may prove too challenging at this stage.

The IFDA participants, therefore, decided to prioritize the option of convincing the broader membership to incorporate the IFDA into the WTO rulebook under Annex 4 on Plurilateral Trade Agreements as established in Article X.9 of the WTO Agreement. Under this option, the IFDA will be incorporated as a plurilateral agreement, in which the rules of the agreement will be applied only to those who have signed it, meaning that the non-Parties will not be bound by the obligations of the IFDA. While non-Parties will be able to enjoy the benefits of the agreement through the improvements that Parties make to their investment processes, but they will not be able to enforce their access to those benefits through the WTO's dispute settlement system.

Even though non-Parties will not participate in the agreement, their consensus, i.e., their permission, is still needed to add the IFDA as a plurilateral agreement within the WTO framework.

Getting this permission, however, will be challenging and is likely to engender a highly politicized debate in the run-up to the MC13. Below, we summarize some of the arguments that have been raised between participants and non-participants as a part of the ongoing debate.

Ensuring the WTO System Remains Relevant

Proponents have argued that more variable geometry needs to be injected into the WTO system to better respond to the demands of a membership body with increasingly diverse needs pertaining to a rapidly evolving global trade landscape. The JSIs are viewed as a prototype to show what a more flexible WTO system would look like, which would be more effective in negotiating a newer and more diverse set of issues among subsets of members (Mamdouh, 2021). The successful incorporation of the IFDA is, therefore, equated to a willingness to inject variable geometry into the system. It is seen as a means for ensuring that the WTO remains relevant for the modern era.

Opponents of this argument, however, raise concerns that injecting more variable geometry into the system may mean undermining a fundamental founding principle of the WTO—that it is a forum for developing a multilateral trade agenda based on the consensus principle.¹² Some non-participants worry that agreeing to incorporate the IFDA as a plurilateral agreement would be seen as a tacit agreement to move away from the multilateral agenda as a priority and to agree to a WTO system with more variable geometry, where the development

¹² Some non-Parties argue that the JSI processes were launched without the permission of the entire WTO membership. The lack of consensus means that the JSI negotiations should have had no legal mandate to proceed within the WTO. They also argue that the plurilateral initiatives have been a distraction, preventing the full membership from concentrating on finalizing the multilateral negotiations on the Doha Development Agenda (DDA), which notably has a multilateral mandate.



of new rules does not require consensus from all members. They argue the importance of maintaining agenda setting by consensus because it also ensures that the poorest and weakest countries still have a voice and that their interests are not overridden to cater to the needs of the most influential and wealthy countries.

The Implementation Burden and the Risk of Disputes

Opponents have urged the IFDA's JSI participants to reconsider their participation in the JSI process by highlighting the significant implementation burden of having to comply with the rules of the agreement. The IFDA would require reforming whole-of-government governance processes across different levels of government that are implicated in the regulation or management of FDI activities. Some experts (Bernasconi-Osterwalder et al., 2020; Mohamadieh, 2019; Singh, 2018) have highlighted that such reform efforts can be challenging for resource-strapped countries and larger countries with complex legal and bureaucratic systems, especially those in which decision-making powers are decentralized at the federal, regional, and local levels.

Questions have also been raised about whether facilitation efforts should be subject to legally binding treaty obligations that can, under the WTO system, be enforced through a dispute settlement system with economic consequences if policies found to be inconsistent with the obligations are not reformed. They argue that investment facilitation efforts should instead continue to be guided by international frameworks that can be implemented on a voluntary basis, such as UNCTAD and the Development Global Action Menu for Investment Facilitation.

Another dispute-related risk is the issue highlighted in an earlier section on the potential use of the IFDA to justify ISDS claims through the IIA regime. While the firewall provision is viewed as important for reducing the dispute risk, eliminating that risk can only be done by reforming the old-generation investment treaties within the IIA regime.

As a counterpoint to the different concerns, proponents argue that binding commitments are necessary to showcase a member's commitment to follow through with investment facilitation reforms. They also note that the threat of disputes (even within the ISDS context) is overstated, and the risk for most developing country members is likely to be minimal. Beyond the flexibilities and benefits granted through the S&DT section, there is also some policy space flexibility provided through the language in many binding requirements. Examples of flexibility include recognizing that reform efforts would only have to be implemented "to the extent practicable" or "in a manner consistent with its legal system."

Accessing More Technical Assistance and Capacity-Building Support

Many developing and LDC members participating in the IFDA have stated that one of the main reasons they joined is to access the S&DT benefits, notably the potential for capacity-building and technical assistance support to implement investment facilitation-related reforms. Beyond increased funding through bilateral and international organization channels, these



members also hope for the eventual creation of a dedicated investment facilitation facility that will coordinate funds to help developing and LDC members implement the measures of the agreement.

Opponents, however, argue that the setup of such a facility is far from guaranteed. They also emphasize that countries are already receiving significant technical assistance and capacity-building support on investment facilitation matters through existing bilateral and international organization funding channels. Agreeing to the IFDA, however, changes the power dynamics associated with undertaking such reforms. Whereas previously, countries could receive financing support while undertaking voluntary domestic governance reforms, with the establishment of the IFDA, that financing will now be linked to binding reforms.



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