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LEGAL OPTIONS FOR INTEGRATING A NEW INVESTMENT FACILITATION AGREEMENT INTO THE WTO STRUCTURE

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About the paper

This report is part of a series of background papers written in the context of a project by the International Trade Centre (ITC) and the German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE) on "Investment Facilitation for Development." The project supports the negotiations on a multilateral framework on investment facilitation for development by building negotiation capacity in developing (including least developed) countries, channelling ground-level and analytical expertise to negotiators and promoting public discussions of issues related to investment facilitation for development.

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For more information on Investment Facilitation for Development, see: https://www.intracen.org/itc/Investment-Facilitation-for-Development/

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Acronyms

FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IFDA	Investment Facilitation for Development Agreement
ITA	Information Technology Agreement
LDCs	Least developed countries
MFN	Most favoured nation
TFA	Trade Facilitation Agreement
WTO	World Trade Organisation

Abstract

This paper reflects on the possibilities for integrating an Investment Facilitation for Development Agreement (IFDA) into the World Trade Organisation (WTO) rulebook. The purpose of this paper is to briefly consider the legal aspects of this question, clarify options for such integration and consider the feasibility and desirability of each of them. Given the current stage in the process, such a discussion would need to be based on a set of working assumptions behind the negotiating initiative regarding the expected outcome. This paper reviews these working assumptions, while addressing the options available according to current WTO rules.

I. INTRODUCTION

In the design and implementation of investment policies, a useful distinction can be made between the substantive elements of a given policy on the one hand (e.g., market access rules for foreign investors, foreign equity limitations, sectoral regulations for investors, local content requirements, taxation) and, on the other hand, other procedural elements and measures that facilitate the implementation of, and ensure compliance with, such policies (e.g., transparency of regulation and streamlining and simplification of administrative procedures). An informative example of this distinction between substantive and procedural elements is found in the approach followed in developing the Trade Facilitation Agreement (TFA) of the World Trade Organization (WTO). The Agreement does not address market access issues such as tariffs or quantitative restrictions on merchandise trade but rather focuses on clarifying and improving the WTO General Agreement on Tariffs and Trade (GATT) rules relating to freedom of transit of goods (Article V), fees and formalities for imports and exports (Article VIII) and, transparency (Article X).

Attracting and retaining foreign direct investment (FDI) have always been matters of priority for developing countries and least developed countries (LDCs). It has also been long recognised that progress on this front requires a set of enabling factors, not the least of which is an attractive regulatory environment in the host country. Such an environment would generally depend on the policy mix that affects the business environment in which investors operate and the coherence among its various components. Some of those enabling factors may even go beyond the strict boundaries of investment policy per se. However, an important enabling aspect of such an environment will always be how transparent and predictable relevant policies and measures are and the nature of administrative procedures that implement them and how streamlined they are.

Against this backdrop, at the 11th WTO Ministerial Conference, at Buenos Aires, in December 2017, a group of 70 WTO Members adopted a Joint Statement Initiative to start structured discussions aimed at creating a framework for investment facilitation for development.[1] The elements identified for inclusion in such a framework included: improvement of transparency and predictability of investment measures, streamlining and speeding up administrative procedures and enhancing international cooperation, information sharing and relations with relevant stakeholders.

This initiative has been launched and driven to a large extent by the efforts of developing countries and LDCs aspiring to promote increasing inflows of FDI to satisfy their development needs. It therefore assigns importance to development concerns, including issues relating to special and deferential treatment as well as technical assistance and capacity building.

It was agreed and stated clearly among the cosponsors of this initiative, at the outset, that discussions shall not address other substantive investment policy matters relating to market access, investment protection or investor-state dispute settlement. Therefore, the elements identified for inclusion in the framework would not have implications for such sensitive policy areas.

Based on long preceding “Structured Discussions”, the actual negotiations on an Investment Facilitation for Development Agreement (IFDA)[2] started in September 2020. As the process unfolded, participation in this endeavour has expanded to over 100 WTO Members in mid-2021, representing around 64% of world gross domestic product, 78% of world exports and 69% of world inward FDI stock. The negotiations have made steady progress, from the identification of substantive elements to be covered in the IFDA to the development of a full-fledged negotiating text in mid-April 2021.

This negotiating process is by definition “plurilateral” in nature since it is taking place only among a subset of the WTO Membership. However, this does not define the nature of the outcome and how it might be implemented.

A plurilateral negotiating process may not necessarily produce a plurilateral outcome that benefits only its participants: often, plurilateral negotiations have produced outcomes that were applied multilaterally on a most-favoured-nation (MFN) basis.[3] Examples are the negotiations on financial services, basic

[1] WTO (2017). JOINT MINISTERIAL STATEMENT ON INVESTMENT FACILITATION FOR DEVELOPMENT. WTO document WT/MIN (17)/59.
[2] This title of the expected outcome of the negotiations, IFDA, is used only as a working assumption for the purpose of this discussion. Of course, the final decision in that respect will have to be taken by Members.
[3] See, Hamid Mamdouh (2021). PLURILATERAL NEGOTIATIONS AND OUTCOMES IN THE WTO, available here: https://fmg-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/

telecommunications, and the WTO Information Technology Agreement (ITA). In such cases, the plurilateral process of the negotiations did not affect the multilateral nature of the outcome. A point of terminology to clarify is: what would constitute a "multilateral outcome" and whether it would have to be binding on all Members to qualify as "multilateral"? The track record of the negotiating function of the WTO would not lead to such a restrictive definition. A definition that is more systemically consistent would be based on whether a given negotiated outcome is in itself "plurilateral" benefiting only its signatories or it is only the result of a plurilateral process but applied multilaterally to the benefit of all WTO Members on an MFN basis.

As the features of the outcome develop further and become clearer, one of the important issues that will have to be addressed in the IFDA negotiations, is how to integrate the outcome into the WTO treaty architecture. The purpose of this paper is to briefly consider this question, clarify options for such integration and consider the feasibility and desirability of each of them. Given the current stage in the process, such a discussion would need to be based on a set of working assumptions emerging from the negotiating process regarding the expected outcome. Section II of this paper will review these working assumptions, while section III will discuss the options available according to current WTO rules and section IV concludes with final observations.

II. WORKING ASSUMPTIONS FOR THE EXPECTED OUTCOME

A discussion of different legal options to integrate an IFDA into the treaty architecture of the WTO needs to be based on a set of working assumptions regarding the nature, form, and content of what participating Members wish to achieve. While, at this point, there is no definitive agreement on some of the elements of the agreement, the following might be a reasonable set of assumptions for the purpose of this discussion:

a. The scope of the IFDA should cover only FDI and no other forms of investment. It will cover FDI across all sectors of the economy and all industries. Where it applies, the IFDA would address only investment related regulation and would not extend to other regulatory aspects (e.g., services regulation such as licensing and other regulatory requirements).

b. The IFDA should be an integral part of the WTO treaty architecture.[4]

c. It should be legally binding on Members who accept it and subject to WTO rules and disciplines, including dispute settlement.

d. It should be applied on an MFN basis. While the IFDA will not be binding on all Members, those who will accept it will have the obligation to extend to all other WTO Members treatment no less favourable than that provided for by its provisions.

e. It should remain open for future acceptance by any Member wishing to do so.

Of course, these working assumptions may be further confirmed or changed by participating Members during the negotiations. They are identified here only as a basis for the analysis that follows, and the consideration of different legal options for integrating the IFDA into the WTO legal architecture.

III. OPTIONS FOR INTEGRATING THE IFDA INTO THE WTO

The integration of an IFDA into the legal architecture of the WTO could be achieved through more than one way, depending on choices to be made by participating Members. Perhaps a first question to consider would be whether, as a negotiated outcome, an IFDA would take the form of a set of commitments to be consolidated in participating Members' schedules under the WTO General

[4] This is the current working assumption that gives rise to most of the legal issues under examination in this discussion. If participants eventually decide to pursue other options outside the WTO, that would obviate the need for any extensive analysis of WTO rules.

Agreement on Trade in Services (GATS) and the WTO General Agreement on Tariffs and Trade (GATT) or, whether it would take the form of a new standalone agreement within the WTO treaty architecture. These two pathways are different in terms of the legal procedures to be followed as well as the implications for the scope of application of the final outcome.

Scheduling of commitments under the GATS and the GATT

According to this scenario, participating Members would proceed to consolidate the obligations of the IFDA into their respective schedules of commitments under the GATS and their schedules of concessions under the GATT. The newly consolidated commitments and concessions would then be given legal effect by means of "certification" of the new schedules. This is a procedure for which specific rules have long been agreed by WTO Members. Upon conclusion of the certification procedure, new commitments become an integral part of a member's original schedule which, in turn, is an integral part of the main Agreement (GATS or GATT). If no objection is raised by any WTO Member, the certification of a schedule containing new commitments would be concluded at the end of a period of 45 days for GATS schedules and 90 days for GATT schedules. In case of objection, consultations between the certifying Member(s) and the objecting Member(s) would take place with a view to reaching a satisfactory resolution. A certification would be concluded upon withdrawal of an objection or the expiry of respective deadlines (45 and 90 days), whichever comes later. This pathway has the advantage of requiring less demanding legal procedures compared to the other pathway of integration of a new standalone agreement into the WTO system. The latter would require an amendment procedure pursuant to Article X of the WTO Agreement which would have to be based on consensus by all Members.

While completing a certification procedure requires the absence of objections by other Members, this should not be equated with "consensus" within the meaning of Article IX (Decision-Making) of the WTO Agreement which also is based on the absence of objections.[5] While the latter provides the rules for joint action that binds the entire Membership through consensus-based decisions, a schedule certification procedure has the sole object and purpose of the technical verification of the content of the modifying Member's schedule regarding any possible adverse effects on existing rights of other Members under the Agreement. Hence, the expectation, in accordance with the procedures adopted by the Services Council,[6] is that, in a certification procedure, an objecting Member would identify the specific elements giving rise to its objection and consult with the certifying Member with a view to resolving the matter. If the matter is not resolved, the procedures provide for other negotiating routes with the possibility of arbitration as a final resort. The mere fact that the footnote to Article IX of the WTO Agreement refers to the absence of objection should not mean equivalence between the certification of a schedule and the adoption of a consensus decision by all Members.

Apart from the conclusion of the certification process as such and securing the non-objection of any Member to the content of a new set of commitments, there are normally other procedural questions that participants in the negotiations would need to consider, such as conditions for, and dates of entry into force of new commitments. For example, would the new commitments enter into force once certification is concluded or at a subsequent date and whether such date would be coordinated among participating Members so that all commitments would enter into force at the same time. Such questions need not involve non-participating Members since they relate mainly to the negotiating dynamics between participants. In this regard, two scenarios have been followed in the past and they might provide some guidance going forward. In the first, as in the case of the ITA, participants have resorted to individual certification of schedules of concessions, each specifying the date of entry into force of the new obligations once certification is completed. Such an arrangement would, of course, be based on an understanding among participants in the negotiations regarding the timing for submission of schedules for certification and subsequent entry into force of new commitments. However, the act of initiating certification would be taken individually by each participating Member.

In the second scenario, as in the case of the post Uruguay Round negotiations on telecommunications and financial services, participants in the negotiations would use a protocol as a vehicle to synchronize

[5] Footnote 1 to Article IX of the WTO Agreement states: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."

[6] See WTO (2000). PROCEDURES FOR THE CERTIFICATION OF RECTIFICATIONS OR IMPROVEMENTS TO SCHEDULES OF SPECIFIC COMMITMENTS, Adopted by the Council for Trade in Services on 14 April 2000 (S/L/84).

the various procedural steps all the way to the entry into force of the new commitment. Typically, a protocol, to which new commitments would be annexed, would contain elements such as:

- Timeframe during which the Protocol would be open for acceptance.
- Date of entry into force of the protocol and annexed commitments.
- Conditions required for the entry into force of the protocol (e.g., acceptance by all Members concerned/a certain number of Members or any other formula).
- The legal effect of entry into force of the Protocol on participating Members' schedules specifying the relationship between old and new commitments (replacing, supplementing, or modifying pre-existing commitments).
- Contingent scenarios upon the expiry of the timeframe for acceptance in case not all Members concerned or required number of Members have accepted (e.g., those who have accepted would decide upon entry into force or otherwise).
- Institutional provisions such as depositary, registration, date, and venue.

Such a protocol is normally used only if needed to coordinate procedural and legal steps among participating Members as well as guarantee the "conditionality" of commitments made by each, being contingent upon other participants fulfilling their commitments at the same time. Such an arrangement is likely to be more the case as the circle of participation in the negotiations get larger and more diverse. A protocol of this type would only be binding on participants hence its adoption by all Members would not be legally necessary, as politically desirable as it might be.

In the cases of telecommunications and financial services, the Fourth and Fifth Protocols were adopted by the Council for Trade in Services by consensus decisions. While this collective adoption by the entire Membership is politically desirable, it should not be considered as a legal requirement without which a protocol could not be used. The content of a protocol is typically concerned with legal and procedural issues relating to the acceptance and entry into force of the negotiated outcome. In situations where such an outcome commits only a group of Members, it would be up to them to agree on such stipulations. The rights of other non-participating Members would be preserved through the certification process and their right to object at that stage.

Despite the relatively less demanding nature of a certification procedure compared to other legal options, this option entails a considerable challenge if applied to the IFDA with respect to the legal scope of application of the new commitments and how they would apply to domestic policy and regulatory frameworks in participating Members. Members' schedules under the GATT and the GATS are integral parts of those Agreements. The scope of application of all legal obligations, including those in schedules, will always be limited to the respective scopes of the GATT and the GATS.

The scope of the GATT is limited to the treatment of goods crossing borders and the non-discriminatory treatment of such goods in national markets once they cross the border. It does not extend to the treatment of producers nor investors in the territory from where goods are being imported. Any concession contained in a Member's schedule under the GATT would not be legally applicable beyond that scope, absent an amendment to the GATT itself to that effect. Accordingly, the GATT, including the content of Members' schedules thereunder, would hardly capture any significant part of what is currently being negotiated in the IFDA which is primarily about FDI and foreign investors seeking to have access to the domestic economy.

In the case of the GATS, the scope of the Agreement is focused on "measures by Members affecting trade in services".[7] Legal obligations in the Articles and Annexes of the GATS and commitments in Members' schedules cover the treatment of services and service suppliers of other WTO Members. Unlike the GATT, the scope of the GATS covers products (services) and producers (service suppliers). Therefore, it covers situations where an FDI (actual or prospective establishment) qualifies as a "service supplier of another Member". That is, if the entity in question is owned (50% or more) or controlled by a person of another Member.[8] This would cover a significant segment of FDI; however, it would not extend to cover the full range of situations currently considered in the ongoing negotiation of the IFDA. It would not cover situations where the foreign investor is operating (or seeking to operate) in a non-services sector of the economy or, even within the services sector but does not qualify as a service supplier of another Member. However, there is no legal reason why any of the elements currently contained in the draft IFDA could not be scheduled as Additional Commitments under GATS Article

[7] See Article I:1 of the GATS (Scope and Definition).
[8] See Article XXVIII: (g), (m) and (n) of the GATS (Definitions).

XVIII and be applied in accordance with the scope of the Agreement (i.e., only to services related FDI). Such commitments would also trigger all other provisions of the GATS which apply where specific commitments are scheduled. Those include good governance obligations on transparency (Art. IV), domestic regulation (Art. VI), payments and transfers (Art. XI) and other disciplines in GATS Annexes.

If such a pathway is adopted, in addition to the question of legal scope of application, the question of sectoral coverage of the IFDA would also arise. Normally, specific commitments (Market Access (Art. XVI), National Treatment (Art. XVII) and Additional Commitments (Art. XVIII) apply in the sectors that a member lists in its schedule. Such commitments do not apply to all sectors covered by the GATS. However, participants in the negotiations may decide whether the IFDA would apply only in services sectors listed in a Member's schedule or apply horizontally to all services sectors covered by the GATS. That is, all services sectors except services supplied in the exercise of governmental authority (government services) and air transport services. An appropriate entry in the horizontal section of a Member's schedule to that effect would extend the sectoral coverage of the IFDA and would be consistent with the rules of the GATS.

Of course, participating Members would need to consider the extent to which adopting the pathway of scheduling commitments under the GATT and the GATS would fulfil their aspirations for investment facilitation, considering other factors that go beyond legal questions.

New standalone Agreement to be inserted into the current WTO legal architecture

The WTO Agreement provides clear rules for the integration of new standalone agreements into its treaty architecture. This approach, however, calls for a distinction to be made, in terms of negotiated outcomes, between what might be referred to as Agreements (with capital A) and agreements (with small a). That is, between an outcome that takes the form of a new standalone Agreement as opposed to an agreement on an outcome that takes the form of a package of new commitments to be consolidated into schedules of participating Members. In the case of the latter, as explained in the previous section, such schedules become integral parts of a pre-existing Agreement and do not constitute a new standalone agreement as such. For example, the Trade Facilitation Agreement (TFA) took the form of a new standalone Agreement (with capital A) that was inserted into the WTO treaty architecture through an amendment procedure, in accordance with Article X of the WTO Agreement.[9] However, the ITA is an agreement (with small a) that took the form of new binding tariff concessions added to schedules under the GATT, a pre-existing Agreement.

If participating Members take the pathway of concluding the IFDA as a new standalone Agreement, a starting point would be the initiation of an amendment procedure in accordance with the provisions of Article X of the WTO Agreement. This, of course, would require a consensus decision by all Members of the WTO. The rules and procedures for taking that path are clear; however, the challenge would be political in terms of securing the consent of all Members.

A further question to consider would be: in which of the Annexes to the WTO Agreement should the new IFDA be inserted? The two Annexes that contain substantive trade Agreements are Annex 1 and Annex 4. Annexes 2 and 3 contain the institutional provisions of the Dispute Settlement Understanding and the Trade Policy Review Mechanism, respectively, and therefore are not relevant to this discussion.

Annexes 1 and 4, however are different in terms of the types of Agreements they comprise. The descriptions of what these Annexes cover is to be found in the provisions of paragraphs 2 and 3 of Article II of the WTO Agreement (Structure of the WTO) which state that:

> "2. The agreements and associated legal instruments included in **Annexes 1, 2 and 3** (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, **binding on all Members**.
>
> 3. The agreements and associated legal instruments included in **Annex 4** (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them and are binding on those Members. The Plurilateral Trade Agreements **do not create either obligations or rights for Members that have not accepted them."** (Emphasis added)

[9] See WTO (2014). PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (WT/L/940).

Accordingly, under the current structure, if the IFDA is to be binding on, and creates rights for, all Members, it should be inserted in Annex 1, following the example of the TFA. A further question, of course, would be whether it should be inserted in sub-Annex A (Trade in Goods), sub-Annex B (Trade in Services) or, sub-Annex C (Trade Related Aspects of Intellectual Property Rights)? Alternatively, if none of the three sub-Annexes is considered suitable, it would also be legally possible in an amendment procedure to create a new sub-Annex D. In any case, under Annex 1 the IFDA would be binding on all Members.

On the other hand, if the IFDA is not binding on all Members and creates rights only for its signatories, it should then be inserted in Annex 4 (currently comprising of two Agreements on Government Procurement and Trade in Civil Aircraft). In this case, signatories could still extend the benefits of the IFDA to non-signatories if they wish to do so. However, in this case it would be on a voluntary basis and would not create any legal rights for non-signatories.

Given that one of the current working assumptions in section II above is that the IFDA will be applied on an MFN basis and create rights for all Members while being binding only on a subset of the membership and, unless Members decide to amend the characterization of Annex 1 or 4 in Article II of the Marrakesh Agreement, the IFDA would not be fitting under neither of the two Annexes.

New standalone Agreement to be inserted into a new Annex 5 to the WTO Agreement

Indeed, having a new standalone agreement binding on some Members but creating rights for all would be unprecedented in the WTO. Therefore, it might require a novel solution. In this regard, the creation of a new Annex 5 might be worth contemplating as a fitting legal option in light of the following considerations:

- The option of scheduling IFDA obligations under the GATS and the GATT would not be an optimal solution for the reasons explained in section II above.
- All other approaches for the integration of the IFDA into the WTO legal architecture would require an amendment in accordance with Article X of the WTO Agreement.
- An amendment procedure would require the consent of all WTO Members expressed in a decision by the Ministerial Conference (or the General Council acting on its behalf, in accordance with Article IV:2 of the WTO Agreement) to be agreed by consensus.
- An amendment inserting a new agreement into the WTO structure, as in the case of the TFA, would be an amendment of the WTO Agreement itself, not an amendment of any of the existing Agreements under any of its Annexes.
- Consequently, from a legal perspective, an amendment adding a new Annex 5 to the structure of the WTO Agreement would be no different in its legal nature from the act of inserting the IFDA into one of the existing Annexes (1 or 4). In both cases, it would be the same legal act of amending the WTO Agreement itself.
- Proceeding with the insertion of the IFDA into Annex 1 would require either making it binding on all Members (which is not foreseen) or amending paragraph 2 of Article II of the WTO Agreement to allow for agreements that would not be binding on all Members. Similarly, inserting the IFDA into Annex 4 would also require the amendment of paragraph 3 of the same Article to allow for agreements that would create rights for non-signatories. Members may see merit in preserving the nature and integrity of Annexes 1 and 4 and proceed with a solution tailored to the IFDA.
- From a broader systemic perspective Members might also see the desirability of entertaining new standalone agreements binding on a subset of the Membership but creating rights for all. In the wider context of WTO reform discussions and efforts to revive the negotiating function of the Organization, many believe that more variable geometry is needed to entertain wider possibilities that cater for the increasing diversity among a growing membership as well as the ever-evolving global trade landscape.

All decisions needed for any of the options, other than scheduling of new commitments under the GATT and the GATS, would require a decision by all Members to be agreed by consensus. This would probably lead to linkages and trade-offs to be drawn with other issues of interest to non-participating Members which might require the “packaging” of some other outcomes in other areas of negotiation. If this political hurdle is crossed, the technical details of any legal option would be facilitated.

Linking the IFDA with other negotiated outcomes, including those related to WTO reform, raises the challenge of timeline discrepancies between different processes. The negotiations on the IFDA may

very well be concluded much sooner than other areas that are candidates for "trade-offs" or even before sufficient progress on WTO reform. This could represent a significant obstacle to reaching agreement on integrating the IFDA into the WTO structure. In this case, a sequencing of legal events may be considered as a means of bridging the time gap. The customary rules of public international law, as codified in the Vienna Convention on the Law of Treaties, distinguish between the conclusion of the negotiating process by the "Adoption of the text" of a treaty (Art. 9), its "Provisional application" (Art. 25) and, its "Entry into force" (Art. 24). Those three events, in many situations are decided upon all at once on a given occasion or at a conference. However, they are legally distinct and could take place at different points in time with the same legal validity.

A possible scenario that may be considered for the IFDA would be to aim at concluding the negotiations by adopting the text of the agreement (among participants) and agree on its implementation on a provisional basis, pending its entry into force through a WTO amendment procedure. A commitment to provisionally apply the agreement would be more of a political nature rather than legally enforceable and it would be agreed among participants in the negotiations, pending its definitive entry into force. Such an agreement could provide for full implementation of the provisions of the IFDA or simply to refrain from adopting any measures that would be inconsistent with its provisions. That, of course, would depend on what participants in the negotiations would eventually agree on. There are several examples of such arrangements throughout the history of the multilateral trading system, ranging from the Protocol of Provisional Application of the GATT[10] to more recent examples such as the Decision on Disciplines Relating to the Accountancy Sector.[11] The exact content of a possible decision of a similar nature for an IFDA would depend on how participants in the negotiations would wish to proceed and what they would be ready to commit to at that point.

In such a scenario, while the integrity of the IFDA is preserved through the adoption of the text and a decision on provisional application, negotiations in the WTO regarding the broader agenda of reform and other negotiating items would continue in search for the right balance of trade-offs that would generate the political will for the necessary amendment decision to integrate the IFDA into the WTO structure.

IV. FINAL OBSERVATIONS

A discussion about integrating a new agreement in the legal architecture of the WTO is a political discussion in the first order. It will normally have to involve considerations wider than the subject matter of the agreement in question. In the case of the IFDA, it will inevitably have to be part of a bigger picture and a wider process where political balances and compromises are at play. Such a process will probably be guided, not only by Members' transactional interests across specific negotiating files and trading off one against the other, but also by their views on systemic questions regarding the future direction of the WTO and the expected role of the negotiating function in a deeply troubled trading system with widely diverse membership.

Among the systemic issues to be addressed in reforming the WTO negotiating function are: (a) the role of plurilateral negotiating processes and their outcomes; (b) the application of special and differential treatment; and (c) how to integrate new subjects that are so far not covered by current WTO Agreements. These three systemic issues will be relevant in the case of the IFDA.

The IFDA negotiations are an initiative that was launched and driven by aspirations of developing countries and LDCs. It initially started with the group of "Friends of Investment Facilitation for Development" in the WTO in 2017. It aimed at starting exploratory discussions on how to enable participating Members to attract inward FDI through benchmarking best practices and mobilizing technical assistance and capacity building to support domestic regulatory reforms. A successful conclusion of the IFDA would be a major achievement that would respond to the aspirations of developing countries and LDCs and strengthen the WTO's role in promoting their development and

[10] See GATT (1947). PROTOCOL OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, Geneva, 30 October 1947.
[11] See WTO (1998). DECISION ON DISCIPLINES RELATING TO THE ACCOUNTANCY SECTOR, adopted by the Council for Trade in Services, 14 December 1998 (S/L/63).

integration in the global economy.[12] Such an achievement would also be significantly enhanced by ensuring that the IFDA contains effective provisions providing flexibilities for developing countries and LDCs as well as ensuring meaningful implementation assistance. In this regard, the experience with the TFA approach should provide instructive guidance.

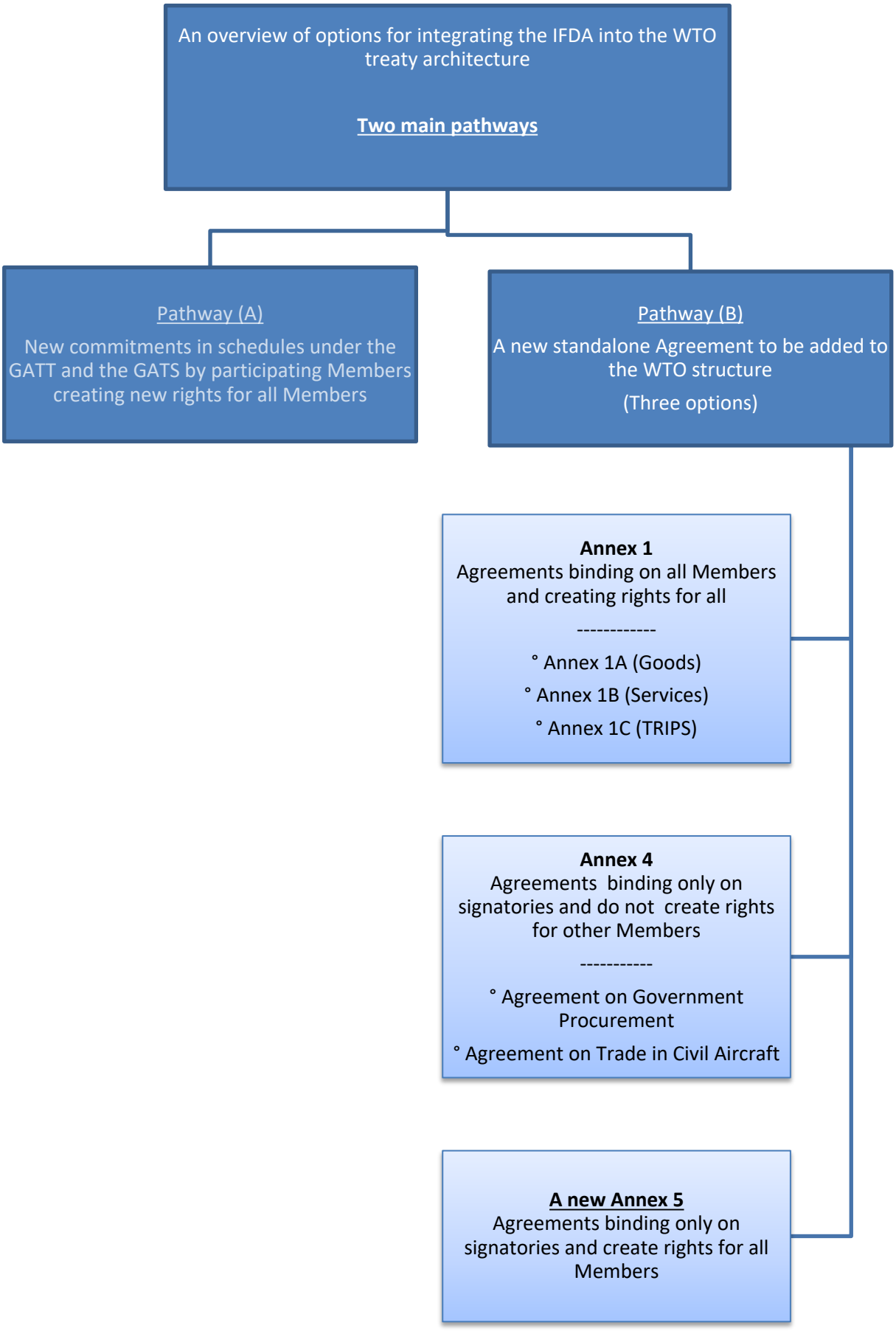
Concerns regarding investment policy space have been present in these discussions from the outset. Participants therefore focused on issues relating to transparency of regulations and simplification and speeding up of administrative procedures. They statedly did not address core sensitive issues that relate to the direction and content of investment policies.

The expected scope of the IFDA, according to current working assumptions, will cover FDI flows in all sectors of the economy. It will not be confined to FDI in the services sector as currently covered by the GATS. Current WTO rules do not cover non-services related FDI. This raises concerns about the viability of following a scheduling approach to integrate the ID into the WTO structure. The scope and coverage of scheduled commitments would necessarily be confined to the scope and coverage of the GATT and the GATS. This leads to the conclusion that preserving the integrity of the IFDA and its intended scope and coverage would best be achieved through the introduction of a new standalone Agreement.

Introducing a new standalone Agreement into the WTO structure would require an amendment within the meaning of Article X of the WTO Agreement. In this case, it would be an amendment to the WTO Agreement itself, not to any of the existing Agreements, as has been the case for the Trade Facilitation Agreement.

Whether an amendment takes the form of inserting a new Agreement into one of the existing Annexes (Annex 1 or Annex 4) or introduces a new Annex 5 into the treaty structure, it remains the same legal act of amendment by the Membership.

[12] See Rolf Adlung, Pierre Sauvé and Sherry Stephenson, "Investment Facilitation for Development –A WTO/GATS Perspective", Chapter 1, p. 1-14, in Axel Berger and Karl P. Sauvant, eds., Investment Facilitation for Development: A Toolkit for Policymakers (Geneva: ITC, 2021), available here: https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Investment%20Facilitation%20for%20Development_rev.Low-res.pdf


An overview of options for integrating the IFDA into the WTO treaty architecture
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A new standalone Agreement to be added to the WTO structure
(Three options)
Annex 1
Agreements binding on all Members and creating rights for all
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° Annex 1A (Goods)
° Annex 1B (Services)
° Annex 1C (TRIPS)
Annex 4
Agreements binding only on signatories and do not create rights for other Members
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° Agreement on Government Procurement
° Agreement on Trade in Civil Aircraft
A new Annex 5
Agreements binding only on signatories and create rights for all Members

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