

# Implementing the Investment Facilitation for Development Agreement

Practical Legal Considerations of  
Provisional Application

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## About the paper

This report is part of a series of technical papers written in the context of a project by the International Trade Centre (ITC) and the German Institute of Development and Sustainability (IDOS) 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 and 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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## I. INTRODUCTION

The attraction and retention of foreign direct investment (FDI) has always been one of the highest priorities for developing countries and least developed countries (LDCs). More recently, however, increasing global economic hardships resulting from the cumulative effects of the Covid-19 pandemic, elevated levels of public debt, the war in Ukraine and the ensuing economic stress have made it more necessary than ever for developing countries to seek all possible means to reduce the widening development finance gap. Therefore, the challenge of attracting and retaining sustainable FDI has become a strategic national priority for many countries.

Advancing towards that objective requires the creation of an enabling investment environment that, in addition to the right mix of substantive policies, provides for legal clarity, predictability and transparency of regulation, as well as a streamlined and efficient facilitating administrative and procedural framework.

For this purpose, a group of WTO Members started in September 2020, under a Joint Statement Initiative (JSI), the negotiation on the Investment Facilitation for Development Agreement (IFDA).<sup>1</sup> The purpose of the Agreement is to facilitate FDI flows through the promotion of transparency of regulations and the streamlining and speeding up of administrative procedures. It has been made clear all along that the Agreement will not cover substantive policy matters relating to market access, investment protection or investor-state dispute settlement.

Currently, participation in this negotiation has expanded to more than 110 WTO Members the majority of whom are developing countries and LDCs. So far, the process has made steady progress, including reaching a well-developed text of the IFDA. Participating Members aim at concluding the negotiations in the near future.

Participants in this negotiation aim at establishing an IFDA which will be legally binding, constitute an integral part of the WTO treaty system and subject to its dispute settlement mechanism. They also aim at applying the Agreement multilaterally on a most-favoured nation (MFN) basis, thereby creating new rights for non-signatory WTO Members.

Discussions have been taking place among participants in the negotiations, as well as among experts in the field, regarding how best to integrate the IFDA into the treaty architecture of the WTO.<sup>2</sup> In considering different legal options, the route that seems to best serve the objectives of participants would be the introduction of a new standalone agreement within the WTO system, as has been the case for the Trade Facilitation Agreement (TFA). The TFA was inserted into Annex 1 A of the WTO Agreement through an amendment protocol.<sup>3</sup> In the case of the IFDA, there will also be the question regarding which of the Annexes to the WTO Agreement should the IFDA be inserted. Whatever the answer to this latter question might be, the fact will remain that an amendment procedure in accordance with the provisions of Article X (Amendments) of the WTO Agreement would be necessary to achieve the desired outcome.

Concluding an amendment procedure to integrate the IFDA into the WTO treaty framework will no doubt be a lengthy process that will entail an undesirable time gap between the conclusion of the negotiation and the entry into force of the IFDA. A particular complication in this case will be the need to attain the consent of WTO Members not participating in the IFDA negotiations. In addition, any amendment would enter into force only upon acceptance by at least two third of the WTO Membership. This is likely to substantially defer the benefits that participating Members aspire to achieve from the Agreement.

As a response to the urgent needs of participants to reap such benefits, a consideration may therefore be given to a provisional application of the IFDA pending its definitive entry into force as part of the WTO treaty system.

The purpose of this paper is to briefly consider some of the legal and practical considerations relating to a provisional application of the IFDA. Section II of the paper will address the legal basis for the provisional application of treaties as provided for in the customary rules of public international law,

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<sup>1</sup>This title of the expected Agreement, IFDA, is used in this paper 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.

<sup>2</sup> See Mamdouh H. (2021). Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure. International Trade Centre, Geneva, Switzerland.

<sup>3</sup> See WTO (2014). PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (WT/L/940).

Section III will look at the legal effects of such an application, Section IV will briefly review the experience of the multilateral trading system with provisional application, Section V (and the Annex) will consider a possible way forward for the IFDA and finally, Section VI will provide concluding observations.

## II. DEFINITION AND LEGAL BASIS

The application of a treaty on a provisional basis is an optional mechanism for states. They may resort to it in situations where a definitive entry into force of a treaty would require lengthy procedures in the presence of an urgent need to give effect to the provisions of the agreement and reap its benefits. Provisional application has the object and purpose of bridging such a time gap. It is considered as a customary arrangement in treaty law as codified in the Vienna Convention on the Law of Treaties (VCLT).

According to the International Law Commission, provisional application is defined as:

“.. a mechanism available to states and international organisations to give immediate effect to all or some of the provisions of the treaty prior to the completion of all internal and international requirements for its entry into force.

Provisional application serves a practical purpose, and thus is a useful tool, for example, when the subject matter entails a certain degree of urgency or when the negotiating states or international organisations want to build trust in advance of entry into force, among other objectives. More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty.”<sup>4</sup>

The VCLT provides the legal basis for the provisional application of treaties in Article 25 which states:

“1. A treaty or a part of a treaty is applied provisionally *pending its entry into force* if:

(a) *the treaty itself so provides*; or

(b) *the negotiating States have in some other manner so agreed.*

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.” (Emphasis added)

As stated in this Article, provisional application is an optional mechanism which parties to a treaty may resort to. It could cover the whole treaty or parts thereof. It could also be subject to conditions that may be agreed by parties to the treaty (e.g., conformity with other treaties or with domestic laws) that are tailored to the needs of the parties at a given time.

In terms of legal form, it is possible that the terms of provisional application may be provided for in the treaty itself or in a separate legal instrument.<sup>5</sup>

In the case of the IFDA, participating Members are yet to take a final decision on whether to provisionally apply the Agreement and if so, what would be the terms and conditions of such application and what legal form would it take.

## III. LEGAL EFFECTS

The agreement to apply a treaty on a provisional basis is a legal act that results in consequences which can be summarized as follows:

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<sup>4</sup> See Guide to Provisional Application of Treaties, adopted by the International Law Commission at its seventy-second session, 2021

[http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft\\_articles/1\\_12\\_2021.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_12_2021.pdf&lang=EF).

<sup>5</sup> For more detail on legal form, see International Law Commission Guide.

a) Binding effects of provisional application

The provisional application of a treaty has a legally binding effect on the parties, in accordance with the terms agreed to among them. Provisional application may not cover all obligations in a treaty. It may also alter or adjust the extent to which certain obligations may apply during the provisional application such as in the case of the Protocol of Provisional Application of the GATT, as discussed below. However, subject to the terms and conditions of the provisional application agreement, legal obligations applied provisionally would have the same binding effect as if the treaty itself were in force.

b) Enforceability of treaty obligations during provisional application

The enforceability of provisionally applied treaty obligations would normally depend on whether the treaty itself provide for enforcement mechanisms and whether such treaty provisions are part of the provisional application arrangement, as in the case of the GATT.<sup>6</sup> In some instances, enforcement mechanisms depend on institutional structures and procedures which might not be in place during the provisional application of the treaty.

c) Termination of provisional application of a treaty

Due to its interim nature, provisional application normally terminates once the treaty in question enters into force. However, if a party to the treaty decides individually to terminate its provisional application of the treaty, Article 25 of the Vienna Convention provides in paragraph 2 that:

“2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated *if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.*” (Emphasis added)

According to this rule, there are two main scenarios. The first is when the parties agree in advance on the terms of termination of the provisional application of the treaty by one of the parties. The second scenario, which applies only as a default in the absence of a prior agreement among the parties, is when one of the parties decides that it no longer wishes to be party to the treaty itself and notifies such intention to the other parties.

## IV. EXPERIENCE IN THE MULTILATERAL TRADING SYSTEM

The main experience with provisional application in the Multilateral Trading System has been with the General Agreement on Tariffs and Trade (GATT) and its Protocol of Provisional Application (PPA). The PPA was concluded in October 1947, pending the entry into force of the Havana Charter. While the Charter never materialized, the PPA continued as the legal basis for applying the GATT until the establishment of the WTO in 1995.

The PPA contained the essential elements that gave it legal effect among the Contracting Parties who accepted it. That included the procedures for its acceptance, the terms according to which the GATT applied on a provisional basis, the date, and conditions for the entry into force of the protocol, the terms of withdrawal from the protocol and, finally, its deposit.<sup>7</sup>

With the establishment of the WTO, GATT 1947 was replaced by GATT 1994 which became an integral part of the WTO system. On 8 December 1994, at their Sixth Special Session, the CONTRACTING PARTIES of the GATT adopted a Decision on “Transitional Co-existence of the GATT 1947 and the WTO Agreement”, which provides inter alia:

“The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the CONTRACTING PARTIES may decide to postpone the date of termination by no more than one year.”<sup>8</sup>

In principle, the provisional application of the GATT through the PPA was done, back at the time, in a manner consistent with the current rules of the Vienna Convention described above.

<sup>6</sup> See Articles XXII and XXIII of the GATT.

<sup>7</sup> See PROTOCOL OF PROVISIONAL APPLICATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1947).

<sup>8</sup> See ANALYTICAL INDEX OF THE GATT (Provisional Application of the General Agreement).

## V. A POSSIBLE WAY FORWARD FOR THE IFDA

As previously pointed out, among the objectives agreed at the outset by participants in the negotiations is that the IFDA should be part of the WTO treaty system and subject to its dispute settlement procedures. The IFDA would presumably take the form of a new standalone agreement to be added to the WTO treaty structure through an amendment procedure under Article X of the WTO Agreement.<sup>9</sup> As in the case of the TFA, an amendment to the WTO Agreement would require the consent of all WTO Members expressed in a consensus decision by the Ministerial Conference (or the General Council acting on its behalf, in accordance with Article IV:2 of the WTO Agreement). The considerable time gap between the adoption of the final text of the IFDA and its the entry into force as part of the WTO system might lead participants to consider the provisional application of the Agreement.

In mapping out a possible process going forward in this regard, a view needs to be taken of the different steps along the way and the distinct, but related, sequence of legal events to be expected, including:

- a) Adoption of the text of the Agreement. The concrete step that marks the end of the negotiation on the provisions of the IFDA is the adoption of its final text. Article 9 of the VCLT provides the respective legal basis in this regard.<sup>10</sup>
- b) The initiation of an amendment procedure. Members participating in the negotiation will need to decide, at the end of the negotiation, on the means of giving legal effect to the IFDA and make it part of the WTO system. Such a decision would normally lead to a proposal to be submitted to the General Council to amend the WTO Agreement. This would mark the start of the process provided for in Article X of the WTO Agreement and related procedures which is likely to entail a long process in the General Council to secure an agreement by all Members on the proposed amendment. The amendment protocol inserting the TFA into Annex 1A of the WTO Agreement is a relevant example of an outcome of such an amendment procedure.
- c) A decision on the application of the IFDA on a provisional basis, and related procedures. Participating Members would need to agree to resort to provisional application of the IFDA until its definitive entry into force as part of the WTO. Such a decision would also need to be formalised to take legal effect.

Accordingly, participating Members would need to agree on the terms and conditions of the provisional application of the IFDA as well as the form it would take. This would call for a focused discussion among participants about how such terms and conditions should be set from the start until the final definitive entry into force of the Agreement as part of the WTO system.<sup>11</sup>

A discussion about such terms and conditions would need to address whether all or some of the substantive obligations in the Agreement would be applied provisionally. The discussion would also need to address how to provisionally apply the institutional provisions provided for in the Agreement to oversee its implementation and settle disputes arising from its application. On matters such as the establishment of the Committee on Investment Facilitation or the settlement of disputes, account needs to be taken of the fact that, during provisional application, the Agreement would still be outside the scope of the WTO's legal and institutional structure. This would make it difficult for the WTO to formally service the institutional part of the Agreement. Therefore, participants would need to provide for independent institutional arrangements until the Agreement enters into force as part of the WTO. If agreement can be

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<sup>9</sup> See Mamdouh H. (2021). Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure. International Trade Centre, Geneva, Switzerland.

<sup>10</sup> See Article 9 (Adoption of the text) of the VCLT.

<sup>11</sup> As in the case of the PPA of the GATT, this would include the procedures for its acceptance of the obligation to apply the Agreement provisionally, the terms according to which such application would be observed, the date, and conditions for the entry into force of provisional application, the terms of withdrawal from the provisional arrangement and its implications and, finally, its deposit.



reached with all WTO Members, such interim arrangements may not necessarily be logistically separate from the WTO as an Organization.

While the provisional application of the IFDA would be legally binding in nature according to the VCLT, it should be noted that it would still not be part of the WTO treaty structure and therefore not enforceable through WTO dispute settlement procedures.

Regarding legal form of provisional application, Article 25 of the VCLT provides for two options. Either the treaty itself provides for such possibility and specifies its terms and conditions or, a separate legal instrument would fulfil this purpose. The choice, of course, is up to participants in the negotiations. As it currently stands, the text of the IFDA does not provide for its provisional application. Therefore, it would need to be either added to the text or provided for in a separate legal instrument. Previous experience might suggest that using a separate legal instrument (e.g., a protocol) might be a more practical form to adopt rather than making it part of the negotiation of the text of the agreement itself. The drawing of such a protocol could be based on a customary list of elements that can be drawn together by participants at the conclusion of the negotiation. Such elements would define the terms and conditions of application as well as its relationship with the eventual definitive entry into force of the Agreement and the transition from provisional to definitive application. The Annex to this paper provides an indicative list of such elements.

- d) The definitive entry into force of the IFDA as part of the WTO treaty system. This would be the final legal outcome that participants in the negotiation are aiming for. It would be achieved pursuant to Article X of the WTO Agreement and in accordance with the terms and conditions stipulated in the amendment protocol to be agreed by consensus with the consent of all WTO Members, including non-participants in the negotiation.

## VI. CONCLUDING OBSERVATIONS

The negotiation of an IFDA has all along been driven by the aspirations of developing countries and LDCs. It responds to their need to develop an investment environment that helps them attract sustainable FDI for their development needs. The implementation of the Agreement and the expected supportive technical assistance and capacity building would bring about major benefits they urgently need.

Participants in the negotiation are aiming for a WTO legally binding agreement creating obligations only on Members who sign it but would create rights for all WTO Members, including non-signatories, through the MFN principle.

Integrating the IFDA into the WTO treaty architecture raises a range of legal and procedural issues which, even under normal circumstances, would require considerable time to resolve. Considering that the WTO is currently facing overwhelming institutional challenges, the process of integrating a new agreement into the system is likely to take even longer time than usual since it will raise institutional questions that relate to the broader subject of WTO reform.

Current tensions among WTO Members regarding plurilateral negotiations pursuant to JSIs will no doubt be an additional complication to an IFDA related amendment process in the General Council. An unavoidable link with the broader discussion on how to restore the functionality of the negotiating arm of the WTO is likely to cause longer delays.

A provisional application of the Agreement, given its legally binding nature, would provide an effective response to the urgent needs of developing countries and LDCs to reap the expected benefits, including implementation related technical assistance and capacity building. A commitment by participants to implement is likely to facilitate a corresponding commitment to mobilize necessary resources for such assistance.



Considering that provisional application will be in force in parallel with the amendment process in the General council, participants would need to ensure that it only fulfils its role as a transitional arrangement and not subtract from the political will and momentum to conclude the amendment process in the General Council.

## ANNEX

### Protocol of Provisional Application of the Investment Facilitation Agreement for Development

#### INDICATIVE LIST OF ELEMENTS

The provisional application of the IFDA, in accordance with Article 25 of the VCLT could be based on a legal instrument in the form of a protocol. Such a protocol would need to specify the terms and conditions that participating members would agree on and according to which the Agreement would be applied provisionally. The following elements would be indicative of what members might consider in such a protocol:

- A list of participating members adopting the protocol.
- A clear statement by participants of the undertaking to apply the IFDA on a provisional basis, specifying whether this undertaking covers the entire Agreement or parts thereof, or whether there are any conditions, limitations or qualifications attached to this undertaking.
- A statement to the effect that this provisional application shall be terminated upon the conclusion of the amendment of the WTO Agreement and the integration of the IFDA into the Organization's treaty system.
- The timeframe during which the protocol would be open for acceptance by participants. This would normally specify an end date for acceptance.
- Conditions stipulated for the entry into force of the protocol and the start of the provisional application (e.g., upon acceptance of the protocol by all members listed, and/or on a day certain, etc.)
- If the entry into force is contingent upon acceptance by all participating members, a contingency scenario might be needed in case the timeframe for acceptance expires prior to securing acceptance by all (e.g., those who have accepted would meet within a certain period to decide on entry into force).
- Provisions regarding interim institutional arrangements prior to the integration of the IFDA into the WTO treaty and institutional framework (e.g., an interim committee on investment facilitation, an alternative dispute resolution arrangement, administrative arrangements relating to technical assistance and capacity building, etc.). This element could also relate to the second element above regarding the application of institutional provisions in the IFDA.
- Terms of withdrawal from the provisional application, including any implications for the commitment, in principle, to the IFDA.
- Deposit of the protocol with the Director General of the WTO who would also furnish certified copies of the protocol and notifications of acceptance.
- The protocol would be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.
- Place [Geneva] and date [.....]