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Relationship between the Investment Facilitation for Development and Other WTO Agreements

Potential Overlaps and Complementarities in the Non-Service Sector

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3.1 Introduction

At the Ministerial Conference in Buenos Aires in December 2017, seventy World Trade Organization (WTO) members called for "beginning structured discussions with the aim of developing a multilateral framework on investment facilitation."[1] More members have joined the initiative since then, and they have concluded the text-based negotiations in July 2023.

Formal negotiations on an IFD Agreement began in September 2020, with participation increasing to 112 members as of writing.[2] The elements to be discussed in the negotiations include the improvement of transparency and predictability of investment measures, streamlining and speeding up of administrative procedures and requirements, and enhancement of international cooperation.[3] The negotiations will not address market access, investment protection, and investor–state dispute

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[1] WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/MIN (17)/59, 13 December 2017, [hereinafter Joint Ministerial Statement 2017], para. 4, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-P.aspx?language=E&CatalogueIdList=240870 (last accessed 13 June 2023).

[2] WTO, 'Investment Facilitation for Development', online at: www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm (last accessed 13 June 2023).

[3] WTO News, 'Negotiations on an Investment Facilitation Agreement Show High Level of Engagement', 9 October 2020, online at: www.wto.org/english/news_e/news20_e/infac_09oct20_e.htm (last accessed 13 June 2023).

settlement.[4] The negotiations were inspired in part by the adoption of the Trade Facilitation Agreement (TFA), which entered into force in February 2017, and it is expected that they will be guided by the TFA's flexible approach.

Given the WTO's previous failed attempt to incorporate investment under its umbrella,[5] the IFD Agreement, if successfully adopted as either a multilateral or plurilateral agreement or a nonlegally binding instrument, will be a major evolution of the multilateral *trading* system. Understandably, some WTO members have expressed skepticism over the IFD Agreement[6] by stating, for example, that investment facilitation is a "non-trade issue" and that "shifting the priority from [Doha Development Agenda] issues to [such] non-trade issue is difficult to accept."[7] In order to convince skeptical members of the value of the IFD Agreement, it is critical to assess the relationship between the IFD and other WTO Agreements, more specifically whether the adoption of the IFD would bring a transformative change to the WTO or whether it would contribute to the continuing evolutionary development that the WTO has been experiencing.

[4] Joint Ministerial Statement 2017.

[5] WTO, 'Singapore Ministerial Declaration Adopted on 13 December 1996', WT/MIN(96)/DEC, 18 December 1996, para. 20, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=48267,32665&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023). At the Singapore Ministerial Conference in 1996, the WTO members agreed to establish the Working Group on the Relationship between Trade and Investment to conduct an analytical work on the relationship between trade and investment. WTO, 'Ministerial Declaration Adopted on 14 November 2001', WT/MIN(01)/DEC/1, 20 November 2001, para. 20, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37246&CurrentCatalogueIdIndex=0&FullTextSearch= (last accessed 13 June 2023). At the Doha Ministerial Conference in 2001, the members further agreed that negotiations on the relationship between trade and investment would take place after the ministerial conference scheduled in 2003 "on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations." The negotiations did not take place because of the failure of the members to reach the required consensus.

[6] WTO, 'Statements by Members and Observers at the Plenary Session of the Eleventh Session of the Ministerial Conference', online at: www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_plenary_e.htm (last accessed 13 June 2023).

[7] WTO, 'Statement by H.E. Mr Suresh Prabhakar Prabhu Union Minister for Commerce and Industry: India', WT/MIN(17)/ST/9, 13 December 2017, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/ST9.pdf&Open=True (last accessed 13 June 2023).

Several studies have already been conducted on the relationship between the IFD and other WTO Agreements, particularly the General Agreement on Trade in Services (GATS), which contains rules and procedures concerning investment in the service sector.[8] According to Arts. 1.1 and 1.2, the GATS applies to measures affecting "trade in services," which is defined as the supply of a service in four different modes. One of them is the supply of a service through cross-border investment "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." Given that investment in the service sector constitutes a significant part of overall global investment,[9] the importance of rules regarding trade in services through commercial presence cannot be underestimated. While the GATS has some rules in line with the objectives of the IFD Agreement, they are limited in scope and not sufficiently detailed. It is expected that the limited rules under the GATS would be complemented by the IFD.

What has not been discussed in detail so far is the relationship between the IFD and other WTO Agreements in the non-service sector. In fact, it is often overlooked that some of the WTO Agreements related to trade in goods and intellectual property rights have rules that may apply to investment. For example, the Agreement on Trade-Related Investment Measures (TRIMs) affirms the WTO members' obligations under the General Agreement on Tariffs and Trade (GATT) in respect of the Agreement on Trade-Related Investment Measures (TRIMs). Other agreements such as the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Subsidies and Countervailing Measures (SCM) may also apply to investment in the manufacturing sector, at least

[8] See, e.g., R. Adlung, P. Sauvé, and S. Stephenson, 'Investment Facilitation for Development – A WTO/GATS Perspective' (Geneva: International Trade Centre (ITC), 2020), online at: www.researchgate.net/publication/346192521_INVESTMENT_FACILITATION_FOR_DEVELOPMENT_-_A_WTOGATS_PERSPECTIVE (last accessed 13 June 2023); N. Bernasconi-Osterwalder, S. Leal Campos, and C. van der Ven, 'The Proposed Multilateral Framework on Investment Facilitation: An Analysis of Its Relationship to International Trade and Investment Agreements' (Geneva: International Institute for Sustainable Development and CUTS International, 2020) [hereinafter Proposed MFIF], online at: www.iisd.org/system/files/2020-09/multilateral-framework-investment-facilitation-en.pdf (last accessed 13 June 2023).

[9] R. Echandi and P. Sauvé, 'Investment Facilitation and Mode 3 Trade in Services: Are Current Discussions Addressing the Key Issues?', World Bank Group, Policy Research Working Paper No. 9229 (Washington, DC: World Bank, 2020), at 3–9, online at: https://openknowledge.worldbank.org/handle/10986/33711 (last accessed 13 June 2023).

indirectly. Moreover, considering that many international investment agreements (IIAs) define investment as including intellectual property rights, many of the rules under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are directly relevant to investment.

This chapter seeks to reveal the relationship between the IFD and other WTO Agreements related to trade in goods and intellectual property rights. For this purpose, first, it examines how and to what extent rules under the TBT, SCM, TRIMs, and TRIPS Agreements as well as the GATT may apply to investment, particularly in relation to improvement of transparency and streamlining and speeding up of administrative procedures and requirements. Furthermore, it analyzes what the IFD Agreement would add to these rules under the existing WTO Agreements. It concludes by assessing the value that the IFD Agreement would bring to the WTO.

3.2 WTO Rules on Trade in Goods and Intellectual Property Rights

The IFD Agreement provides rules on the improvement of transparency and predictability of investment measures and the streamlining and speeding up of administrative procedures and requirements.

As discussed here, some of the rules concerning transparency under the TBT, SCM, TRIMs, and TRIPS Agreements as well as the GATT may apply to investment and therefore overlap with such rules under the IFD Agreement. In addition, the GATT and the TRIPS Agreement provide some rules concerning the streamlining and speeding up of administrative procedures and requirements, which may have implications for investment.

3.2.1 TBT Agreement

The WTO members have the right to adopt and maintain technical regulations and standards, including packaging, marking, and labeling requirements to achieve legitimate policy objectives, such as the protection of human, animal, or plant life or health, of the environment, or to prevent deceptive practices. However, technical regulations and standards could create trade barriers if products from other countries that do not meet these regulations and standards cannot be imported. The TBT Agreement ensures that technical regulations and standards do not create

unnecessary obstacles to international trade and that they are prepared, adopted, and applied in a transparent manner.[10]

The scope of the TBT Agreement is clarified by Art. 1.3, which provides that "All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement," except measures that are subject to the Agreement on Government Procurement (GPA)[11] and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[12] Moreover, Annex 1 of the TBT Agreement defines a technical regulation and a standard that are, respectively, addressed by the substantive and procedural rules of the TBT Agreement. For example, para. 1 of the Annex 1 defines a technical regulation as a "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory." A measure that falls within the definition is subject to the rules under Arts. 2 and 3 of the TBT Agreement concerning technical regulations.

Measures falling within the definition of a technical regulation or a standard can have a harmful impact on foreign investment in the manufacturing sector because both imported products and products produced domestically *by foreign investors* have to comply with applicable technical regulations and standards. Thus, technical regulations and standards have aspects of both trade measures and investment measures and may be simultaneously subject to the TBT Agreement and international instruments concerning investment, including the IFD Agreement.

The potential overlap of the scope of the TBT Agreement with the scope of the IFD Agreement is illustrated by disputes involving Australia's tobacco plain packaging.[13] Complaints were brought against the plain packaging in the WTO dispute settlement system pursuant to the TBT Agreement and the TRIPS Agreement, while, at the same time, complaints against the same measure were brought to investment arbitration under an IIA. Although violations were not found in any of these

[10] M. B. Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (Cambridge: Cambridge University Press, 2020). The TBT Agreement also applies to procedures for assessment of conformity with technical regulations and standards, which this chapter does not address.

[11] TBT Agreement, Art. 1.4.

[12] TBT Agreement, Art. 1.5.

[13] T. Voon, A. D. Mitchell, and J. Liberman (eds.), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Cheltenham: Edward Elgar Publishing, 2012).

disputes,[14] they show the possibility that the TBT and the IFD Agreement may apply simultaneously to certain technical regulations and standards.

Moreover, since the definitions of a technical regulation and a standard do not mention any relation to trade in goods, even a measure that does not have any impact on trade but may harm foreign investment could fall within the definition of a technical regulation or a standard and be subject to rules under the TBT Agreement. For example, suppose that an investor of a WTO member invests in a factory within the territory of another WTO member and that the investor sells products produced from the factory only *domestically*. A document from the latter WTO member laying down product characteristics or their related processes and production methods, with which the investor's products are required to comply with, would fall within the definition of a technical regulation and be subject to rules under Arts. 2 and 3 of the TBT Agreement. Thus, the scope of the TBT Agreement potentially extends to a broad range of non-trade measures related to investment in the manufacturing sector.

It is true, however, that the TBT Agreement is one of the WTO Annex IA Multilateral Agreements on Trade in Goods and is carefully drafted in line with its objective of ensuring that technical regulations and standards do not "create unnecessary obstacles to *international trade*" (emphasis added).[15] In fact, most of the rules under the TBT Agreement apply to measures that have some effect on trade. For example, Art. 2.1 of the TBT Agreement requires WTO members to ensure, in respect of technical regulations, imported products be accorded treatment no less favorable than that accorded to products of national origin and products originating in any other country. According

[14] The panel and the Appellate Body concluded that the tobacco plain packaging did not violate the TBT Agreement. Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Reports of the Panels* [hereinafter *Australia – Tobacco Plain Packaging*], WT/DS WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018), para. 8.1; Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Reports of the Appellate Body*, WT/DS435/AB/R, WT/DS441/AB/R (9 June 2020), para. 7.6. The investment arbitral tribunal denied jurisdiction over the complaints for reasons that are not relevant to this chapter. Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), Sec. VII.

[15] TBT Agreement, Preamble, para. 5.

to the Appellate Body, this provision prohibits detrimental impact on competitive opportunities for *imports* unless it stems exclusively from legitimate regulatory distinctions.[16] Similarly, Art. 2.2 of the TBT Agreement provides that technical regulations shall not be more *trade-restrictive* than necessary to fulfill a legitimate objective, taking account of the risks nonfulfillment would create. In *Australia – Tobacco Plain Packaging*, the panel and the Appellate Body found that in order to demonstrate the trade restrictiveness of the measures at issue within the meaning of Art. 2.2, it must be established that the measures have a "limiting effect on *international trade*" (emphasis added).[17]

The existence of an effect on trade is also key in the transparency requirements under many provisions of the TBT Agreement. For example, obligations under Art. 2.9 of the TBT Agreement to publish and notify certain technical regulations apply "*if* the technical regulation may have a significant effect on *trade* of other Members" (emphasis added).

However, some of the publication requirements apply to technical regulations, regardless of their impact on trade. According to Art. 2.11, WTO members shall ensure that *all* technical regulations that have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other members to become acquainted with them. Article 2.12 further provides that, except in certain urgent circumstances, "a reasonable interval" shall be allowed "between the publication of technical regulations and their entry into force in order to allow time for producers in exporting members, and particularly in developing country members, to adapt their products or methods of production to the requirements of the importing Member." The term "reasonable interval" has been clarified by the Ministerial Decision of 14 November 2001, which decided that the term "shall be understood to mean normally a period of not less than six months, except when this would be ineffective in fulfilling the legitimate objectives pursued."[18]

[16] Appellate Body Report, 'United States – Measures Affecting the Production and Sale of Clove Cigarettes' [hereinafter *US – Clove Cigarettes*], WT/DS406/AB/R (4 April 2012), para. 174.

[17] Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1166; Appellate Body Report, *Australia – Tobacco Plain Packaging*, para. 6.384.

[18] WTO Ministerial Conference, 'Implementation-Related Issues and Concerns: Decision of 14 November 2001', WT/MIN(01)/17, 20 November 2001, para. 5.2, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=35625,33346,18756,37254,17243&CurrentCatalogueIdIndex=2&FullTextHash= (last accessed 13 June 2023).

Having noted that this decision constitutes a subsequent agreement between the parties within the meaning of Art. 31(3)(a) of the Vienna Convention,[19] the Appellate Body found that Art. 2.12 imposes an "obligation" to provide a "'reasonable interval' of not less than six months between the publication and entry into force of a technical regulation" unless such interval "would be ineffective to fulfil the legitimate objectives pursued" by the technical regulation.[20]

In short, while substantive rules of the TBT Agreement address trade-restrictive effects of technical regulations and standards, certain publication requirements apply to measures related to investment, regardless of their impact on trade. More specifically, the TBT Agreement, as interpreted by the Appellate Body, requires that technical regulations, including those related to foreign investment, be published no less than six months before their entry into force, except in certain circumstances.

3.2.2 SCM Agreement

Subsidies are an essential policy tool for WTO members to pursue legitimate economic and noneconomic policy objectives. However, they can modify the competitive relationship between domestic producers, on the one hand, and exporters and foreign producers, on the other hand, to the detriment of the latter, thereby adversely affecting international trade. The SCM Agreement does not deny the right of the WTO members to grant subsidies but provides rules to avoid trade-distorting effects of subsidies.

The scope of the SCM Agreement is determined by the definition of a subsidy. In this regard, Art. 1.1 of the SCM Agreement provides that for the purpose of the Agreement, "a subsidy shall be deemed to exist if" "a financial contribution by a government or any public body within the territory of a Member" or "any form of income or price support in the sense of Article XVI of GATT 1994" confers a benefit. The subparagraphs of Art. 1.1(a)(1) clarify the meaning of the "financial contribution." Article 1.2 further provides that a subsidy so defined shall be subject to the provisions of Part II, III, or V of the SCM Agreement "only if such a subsidy is specific." Article 2 provides principles to determine if a subsidy is "specific to an enterprise or industry or group

[19] Appellate Body Report, *US – Clove Cigarettes*, para. 268.
[20] Ibid., para. 275.

of enterprises or industries ... within the jurisdiction of the granting authority" in the sense of Art. 1.2.

The definition of a subsidy is one of the most controversial issues in the WTO rules, and discussing it in detail goes beyond the scope of this chapter.[21] It suffices to note that a subsidy may be found to exist in the sense of the SCM Agreement, regardless of its impact on trade. Thus, the SCM Agreement may apply to a subsidy that is granted by a WTO member to a foreign investor engaging in manufacturing within the territory of that member. Similar to the TBT Agreement, rules under the SCM Agreement may also overlap with rules under the IFD Agreement.

That said, the substantive rules provided under Parts II, III, and V of the SCM Agreement principally provide rules concerning subsidies with trade-distorting effects. For example, Part II of the SCM Agreement prohibits export subsidies and import substitution subsidies because they are regarded as aiming at distorting *trade*. Parts III and V provide rules to deal with subsidies that cause "adverse effects to the interests of other Members."[22] The term "adverse effects" has been interpreted to mean *trade-distorting impacts* of a subsidy on the importing country market or the third country market.[23]

Despite the limited scope of the substantive rules, the transparency obligations provided in Part VII of the SCM Agreement may apply to subsidies in general, regardless of their impact on trade.

For example, Arts. 25.1 and 25.2 of the SCM Agreement require WTO members to annually notify specific subsidies, as defined in Arts. 1.1 and 1.2 of the Agreement, granted or maintained within their territories. Moreover, Art. 25.8 allows any WTO member to "make a written request for information on the nature and extent of any subsidy granted or maintained by another Member," and according to Art. 25.9, "Members so requested shall provide such information as quickly as

[21] For more about the definition of a subsidy, see, e.g., R. Howse, 'Making the WTO (Not So) Great Again: The Case against Responding to the Trump Trade Agenda through Reform of WTO Rules on Subsidies and State Enterprises' (2020) 23 *Journal of International Economic Law* 371–389; G. Horlick and P. A. Clarke, 'Rethinking Subsidy Disciplines for the Future: Policy Options for Reform' (2007) 20 *Journal of International Economic Law* 673–703.

[22] SCM Agreement, Art. 5.

[23] According to Art. 5 of the SCM Agreement, adverse effects refer to: "injury to the domestic industry of another Member"; "nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994"; or "serious prejudice to the interests of another Member."

possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member." Article 25.10 further provides that any member which considers that a subsidy has not been properly notified "may itself bring the alleged subsidy in question to the notice of the Committee." These periodic notification requirements and counter-notification procedures do not limit their scope to subsidies with trade-distorting effects. It can be assumed that subsidies granted to foreign investors in the manufacturing sector are subject to these requirements and procedures.

Some caveats need to be noted. First, one of the proposals in the IFD negotiation proposes to exclude "subsidies or grants provided by a Member, including government supported loans, guarantees, and insurance."[24] While this proposal would not prevent the application of the transparency requirements under the SCM Agreement to investment-related subsidies, it would exclude subsidies from the scope of additional transparency requirements, if any, under the IFD Agreement.

Second, while trade disputes involving subsidies often arise out of trade-distorting impacts on trade caused by subsidies, investment disputes involving subsidies often arise when subsidies that foreign investors are expected to receive are reduced or not granted at all. In the context of investment, transparency may be needed not only as to subsidies granted or maintained but also to changes made to these subsidies.

Third, WTO members have been long concerned that the notification requirements under Art. 25 of the SCM Agreement are not rigorously implemented by WTO members.[25] For example, in January 2020, Japan, the United States, and the European Union issued a joint statement, expressing a concern that "the state-of-play of subsidies notifications is dismal" and stating that "a new strong incentive to notify subsidies properly should be added to Art. 25 [of the SCM Agreement], rendering prohibited any non-notified subsidies that were counter-notified by another Member, unless the subsidizing Member provides the required information in writing within set timeframes."[26] Though the robust

[24] Proposed MFIF, at 11.

[25] S. Baliño, 'As WTO Talks Continue on Subsidy Reform Initiatives, Concerns Persist over Poor Notification Records', IISD Policy Brief (9 November 2020), online at: https://sdg.iisd.org/commentary/policy-briefs/as-wto-talks-continue-on-subsidy-reform-initiatives-concerns-persist-over-poor-notification-records/ (last accessed 13 June 2023).

[26] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020, para.4, online at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (last accessed 13 June 2023).

notification requirements under the SCM Agreement can potentially contribute to the improved transparency of investment-related subsidies, their success depends on the implementation of these requirements.[27]

3.2.3 *GATT and TRIMs Agreement*

The TRIMs Agreement does not create new rights or obligations concerning investment, but it confirms that certain obligations of WTO members under the GATT apply to investment measures in the "recognition that certain investment measures can cause trade-restrictive and distorting effects."

What is relevant for the purpose of this chapter is Art. 6.1 of the TRIMs Agreement, which reaffirms the WTO members' commitments to obligations on transparency and notification in Art. X of the GATT with respect to TRIMs. Thus, the transparency requirements under Art. X apply to investment measures, as discussed later.

This chapter takes up two obligations under Art. X. First, para. 1 of Art. X requires publication of

> laws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

While the publication requirements under Art. X:1 of the GATT primarily seek to ensure transparency of domestic laws, regulations, judicial decisions, and administrative rulings for the interest of *imported products*, they may also contribute to the transparency of measures related to foreign investment. In fact, the text of the provision suggests that it applies to measures "affecting [the] sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use" of products produced by both domestic *and foreign investors*. The breadth of the scope of the provision has been implied by past WTO dispute settlement findings. For example, in *Dominican Republic – Import and Sale of Cigarettes*, the panel found that average-price surveys

[27] Cf. S. Li and X. Tu, 'Reforming WTO Subsidy Rules: Past Experiences and Prospects' (2020) 54 *Journal of World Trade* 853–887.

of cigarettes conducted by the Dominican Republic to establish the tax base for cigarettes constitute "administrative rulings of general application" within the meaning of Art. X:1 and are subject to the publication requirements thereof.[28] Evidently, the measures at issue in this case affect not only imported cigarettes but also domestic cigarettes produced by foreign investors within the territory of the respondent.

It has to be noted, however, that the publication requirements under Art. X:1 of the GATT are general in nature and do not precisely stipulate specific steps to be taken. For example, Art. X:1 requires "prompt[]" publication "in such a manner as to enable governments and traders to become acquainted with them," but does not specify when and in what manner the publication should be made. The jurisprudence in the WTO dispute settlement sheds little light on this issue.[29] Moreover, the provision does not require notification of relevant measures to the WTO. These vague requirements may be complemented by more robust transparency requirements under other WTO Agreements, such as the TBT Agreement and the SCM Agreement, if measures subject to Art. X:1 of the GATT also fall within the scope of application of these agreements. However, if not, the transparency of investment measures ensured by Art. X:1 of the GATT remains limited.

Another important obligation under Art. X of the GATT is set forth in para. 3(a), which provides that each WTO member "shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in" Art. X:1. Similar to Art. X:1 of the GATT, Art. X:3(a) is expected to apply both trade measures and investment measures and to contribute to streamlining administrative procedures and requirements relating to investment. The applicability of Art. X:3(a) to investment is implied by past WTO panel findings. For example, the panel in *EU – Energy Package* found that certain measures related to natural gas infrastructure fall within the scope of the provision.[30]

Despite the breadth of Art. X:3(a) of the GATT, its obligation is general in nature and does not explicitly specify what the "uniform, impartial and reasonable" administration means. Past panel findings on

[28] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, 26 November 2004, paras. 7.405–7.408.

[29] Cf. Panel Report, *European Communities and Its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010, paras. 7.1074, 7.1082–7.1087.

[30] Panel Report, *European Union and Its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R (10 August 2018), paras. 7.873–7.892.

the provision have clarified its meaning to some extent, but many ambiguities remain unclear. Moreover, panels and the Appellate Body have been very cautious in finding violations of this provision. For example, the Appellate Body stated that allegations that "the conduct of a WTO Member is biased or unreasonable are serious under any circumstances" and that "Such allegations should not be brought lightly, or in a subsidiary fashion."[31] It further insisted that "A claim under Art. X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Art. X:3(a) of the GATT 1994."[32] In fact, the Appellate Body rarely finds a violation of Art. X:3(a).[33]

In short, while the scope of Art. X is broader than that of other WTO Agreements, such as the TBT Agreement and the SCM Agreement, and applicable to measures related to investment, its obligations concerning transparency and the streamlining of administrative procedures and requirements are significantly limited.

3.2.4 *TRIPS Agreement*

Despite a reference to "trade-related aspects" in its title, the TRIPS Agreement incorporates relevant rules under intellectual property conventions and provides comprehensive rules on various aspects of intellectual property rights. The substantive rules as well as the transparency requirements under the TRIPS Agreement apply to intellectual property rights often, regardless of their impacts on trade.[34]

In terms of transparency, Art. 63.1 of the TRIPS Agreement provides that

> Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to

[31] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (29 November 2004), para. 217.

[32] Ibid.

[33] In an exceptional case, the Appellate Body upheld the panel's finding that the respondent's administration of law was not "uniform." Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R (13 November 2006), paras. 244–260.

[34] Cf. T. Cottier and M. Temmerman, 'Transparency and Intellectual Property Protection in International Law', in A. Bianchi and A. C. Peters (eds.), *Transparency in International Law* (Cambridge: Cambridge University Press, 2013), at 197.

> the subject matter of this Agreement (the availability, scope, acquisition, enforcement, and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.

In addition, Art. 63.2 requires members to notify the laws and regulations referred to Art. 63.1 "to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement." Article 63.3 provides "Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1." It also allows "A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement" to "request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements."

The TRIPS Agreement does not contain a provision equivalent to Art. X:3(a) of the GATT. However, Art. 41.2 provides that "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable" and "shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." Moreover, Art. 62.4 requires that "Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in" Art. 41.2.

Given the comprehensive nature of the TRIPS Agreement and the robust requirements concerning transparency as well as streamlining relevant procedures, what would be added by the IFD Agreement in terms of intellectual property rights is likely to be minimal. It should also be noted that significant work is being done by the World Intellectual Property Organization to enhance the transparency of laws and regulations regarding intellectual property rights.[35] It is prudent to exclude intellectual property rights from the scope of the IFD Agreement.

[35] Cf. WTO, 'Text of Proposed "Agreement between the World Intellectual Property Organization and the World Trade Organization": Approved by the Council for TRIPS on 11 December 1995', IP/C/6, 13 December 1995.

3.3 Scope and Rules of the IFD Agreement

The concept of investment facilitation and the constituent elements of the IFD Agreement are thoroughly analyzed in other chapters of this book. This section analyzes the IFD Agreement only to the extent necessary for the purpose of this chapter, which is to discuss the relationship between the IFD and other WTO Agreements on trade in goods and intellectual property rights.

An informal consolidated text, developed from the structured discussions on IFD, was circulated in April 2020[36] and then drafted as the so-called Easter Text,[37] which was last updated in February 2022 as of the writing of this chapter, but no version of it has been officially made publicly available.[38] An analysis of this chapter is based on information from the April 2020 version of the text [*hereinafter* informal Consolidated Text] sporadically made available in a recently published research paper[39] as well as limited information on publicly available WTO documents. While the informal Consolidated Text is by no means final and it is subject to substantial changes during the course of the negotiations, it provides useful hints about what the members may agree on.

The informal Consolidated Text consists of a preamble and nine sections.[40] This chapter discusses the scope and general principles in Section I, the transparency of investment measures in Section II, and streamlining and speeding up administrative procedures in Section III.

[36] WTO, 'WTO Structured Discussions on Investment Facilitation for Development – Informal Consolidated Text', INF/IFD/RD/50, 22 April 2020.

[37] WTO, 'WTO Structured Discussions on Investment Facilitation for Development – Consolidated Document by the Coordinator – Easter TEXT', INF/IFD/RD/74 (12 April 2021).

[38] WTO, 'WTO Structured Discussions on Investment Facilitation for Development – Consolidated Document by the Coordinator – Easter Text – Revision', INF/IFD/RD/74/Rev.6, 9 February 2022. This version has recently been leaked, see online at: https://web.wtocenter.org.tw/DownFile.aspx?pid=367074&fileNo=0 (last accessed 13 June 2023).

[39] Proposed MFIF.

[40] WTO, 'WTO Structured Discussions on Investment Facilitation for Development Negotiating Meeting of 9–10 November 2020, Annotated Agenda by the Coordinator', INF/IFD/W/27, 3 November 2020, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W27.pdf&Open=True (last accessed 13 June 2023); WTO, 'WTO Structured Discussions on Investment Facilitation for Development Negotiating Meeting of 8–9 October 2020, Annotated Agenda by the Coordinator', INF/IFD/W/26, 2 October 2020, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W26.pdf&Open=True (last accessed 13 June 2023).

3.3.1 Section I

Section I has two provisions: Art. 1 on the scope and Art. 2 on the most-favored-nation treatment. This chapter focuses on the former. Examining the scope of the IFD Agreement is essential to properly assess how it complements and overlaps with the existing rules under the WTO Agreements.

Article 1.1 of the informal Consolidated Text provides that the IFD Agreement applies to "measures adopted or maintained by Members for facilitating foreign direct investments [ ] across the whole investment life-cycle [including the admission, establishment, acquisition and expansion of investments] in services and non-services sectors."[41] Article 1.4 further provides that the IFD Agreement applies to measures adopted or maintained by not only "central, regional or local governments and authorities" but also "nongovernmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."[42]

This chapter identifies two interpretative questions that may arise regarding the scope of the IFD Agreement defined by these provisions. First, the definition of investment is one of the most controversial issues in investment arbitration, and the same controversy might arise in the context of the IFD Agreement. While the informal Consolidated Text clarifies that the IFD Agreement applies to foreign direct investment rather than investment in general and does not apply to portfolio investment,[43] it does not define the term "investment." Although there have been proposals to define the term in the IFD negotiations,[44] any attempt at doing so is likely to be unsuccessful, given the broad and diverse nature of investment.

In any event, the definition of investment may not be as crucial as in IIAs and investment arbitration because it does not affect the jurisdiction of WTO dispute settlement. While the jurisdiction of investment arbitration is often limited to disputes arising directly out of an investment and the existence of investment is critical to establish the jurisdiction of investment arbitration,[45] the jurisdiction of WTO dispute settlement extends to any disputes in which a complaining member "*considers* that

[41] Proposed MFIF, at 11.
[42] Ibid., at 12.
[43] Ibid.
[44] Ibid., at 21–22.
[45] For example, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Art. 25.1.

any benefits accruing to it directly or indirectly under the covered agreements are being impaired" (emphasis added).[46] As long as a complaining member claims in good faith that a responding member violates WTO Agreements and its benefits protected under the agreements are impaired, it is entitled to a ruling by a panel and the Appellate Body.[47] In fact, panels and the Appellate Body have never denied jurisdiction over the disputes brought before them.

It should also be noted that neither trade in goods nor trade in services is defined in the WTO Agreements. Panels and the Appellate Body have taken a flexible approach in deciding what constitutes trade in goods and what constitutes trade in services. For example, in *Canada – Periodicals*, the Appellate Body agreed with the panel's statement that "obligations under GATT 1994 and GATS can co-exist and that one does not override the other."[48] Moreover, in *EC – Bananas*, the Appellate Body acknowledged that there are "measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good" and that these measures could fall within the scope of both the GATT and the GATS, although "specific aspects of that measure examined under each agreement could be different."[49] Similarly, in *Australia – Tobacco Plain Packaging*, the panel stated that "the mere fact that a measure, or a certain aspect of a measure, is covered by a specific provision of the TRIPS Agreement is not, in itself, an obstacle to its potentially also falling within the scope of relevant provisions of the TBT Agreement."[50] These findings suggest a blurry distinction between trade in goods, trade in services, and intellectual property rights, as well as potential overlaps among them. They also imply that investment covered by the IFD Agreement may simultaneously be covered by some of the rules under the existing WTO Agreements, which are discussed in the preceding section.

[46] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 3.3.

[47] Cf. Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (6 March 2006), para. 52.

[48] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (30 June 1997), at 19.

[49] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* [hereinafter *EC – Bananas III*], WT/DS27/AB/R (9 September 1997), para. 221.

[50] Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.85.

The second interpretative question concerns the meaning of the measures "facilitating" foreign direct investments. Despite the broad and flexible approach to the definition of investment, the scope of the IFD Agreement may be limited because it applies to the measures "facilitating" foreign direct investment.

That many of the WTO rules are to apply to measures "affecting" trade should be considered. For example, Art. I:1 of the GATS provides that the GATS "applies to measures by Members *affecting* trade in services" (emphasis added). Similarly, Art. III:4 of the GATT requires that imported products be accorded treatment no less favorable than that accorded to like domestic products "in respect of all laws, regulations and requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use" (emphasis added). As noted by the Appellate Body, the term "affecting" has been interpreted to mean "having an effect," which indicates a broad scope of application.[51] For example, the panel in *US – FSC (Article 21.5 – EC)* found that the term "affecting" in Art. III:4 of the GATT covers "not only laws and regulations which *directly govern* the conditions of sale or purchase but also any laws or regulations which *might adversely modify* the conditions of competition between domestic and imported products" (emphasis added).[52]

That said, the broad interpretation of the term "affecting" does not mean that the term "affecting" does not serve any purpose to define the scope of application. Rather, the Appellate Body pointed out that the term "affecting" under Art. III:4 of the GATT "operates as a *link* between identified types of government action ('laws, regulations and requirements') and specific transactions, activities, and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')" (emphasis added) and that not simply *any* "laws, regulations and requirements" but only those that "affect" the specific transactions, activities, and uses are covered by the provision.[53] This finding suggests that the term "facilitating" in the informal Consolidated Text would also operate as a link between measures and

[51] Appellate Body Report, *EC – Bananas III*, para. 220.

[52] Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities* [hereinafter *US – FSC (Article 21.5 – EC)*], WT/DS108/RW (20 August 2001), para. 8.147.

[53] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, WT/DS108/AB/RW (14 January 2002), para. 208.

investment and that only measures that "facilitate" investment can fall within the scope of the IFD Agreement.

The question then arises as to what the term "facilitating" means. The ordinary meaning of "facilitating" is to make something easy or easier or to promote something,[54] which implies a narrower scope of application than the term "affecting." In other words, a measure having *some* effect on investment is not sufficient for the measure to fall within the scope of the IFD Agreement; it has to have an effect that makes investment easier. Under this interpretation, the scope of the IFD Agreement may not be as broad as it may look.

The scope of the IFD Agreement may be further limited by Art. 1.3 of the informal Consolidated Text, which provides that the IFD Agreement "shall not cover" investment protection rules and investor–state dispute settlement.[55] The provision is meant to insulate the IFD Agreement from IIAs and investment arbitration, but some of the measures that facilitate investment may also have an effect of protecting it. It would be extremely difficult to draw the line between investment protection rules and investment facilitation rules, which leaves significant uncertainty about the scope of the IFD Agreement. In addition, Art. 1.2 of the informal Consolidated Text excludes government procurement, public concessions (under certain conditions), market access, and the right to establish from the scope of the IFD Agreement.[56] Members may also be allowed to exclude specific sectors or activities from the scope.[57]

In sum, the IFD and the WTO Agreements on trade in goods and intellectual property rights potentially overlap and apply in parallel to the same measure because the measure can be related simultaneously to investment, trade in goods, and intellectual property rights. However, the scope of the IFD Agreement may be significantly limited because the informal Consolidated Text provides that the IFD Agreement applies only to measures "facilitating" foreign direct investment.

3.3.2 *Section II*

Section II has four provisions concerning transparency: Art. 3 on publication, Art. 4 on notification, Art. 5 on enquiry points, and Art. 6 on

[54] Oxford English Dictionary, Oxford University Press.
[55] Proposed MFIF, at 11.
[56] Ibid.
[57] Ibid.

specific exceptions to transparency requirements. This chapter discusses rules under Arts. 3 and 4.

As to the publication requirements, one version of the proposed Art. 3.1 requires publication of "laws, regulations, procedures, judicial decision and administrative rulings of general application that pertain to or affect the operation of" the IFD Agreement.[58] The informal Consolidated Text also requires members to leave a "reasonable period of time" between the publication and entry into force of a measure, providing an explanation of the rationale/objective of the law, requiring the publication in an official publication/online source, and requiring no imposition of a fee.[59] In addition, the publication of information required for an investment authorization such as "contact information, requirements and procedures, forms and documents, fees and charges, taxes, procedures for appeal or review of decisions concerning application, procedures for monitoring or enforcing compliance with the terms of conditions or licenses, opportunities for public involvement, time frame for processing an application" is required.[60]

As to the notification requirement, Art. 4 of the informal Consolidated Text requires notification of major changes to existing "regulations of general application" to the Committee on Investment Facilitation.[61] Members are also required to specify where the measure has been published.[62]

These provisions concerning transparency are at a very early stage of negotiations, but they would be expected to provide more robust transparency requirements than those under the GATT. Nevertheless, the scope of the transparency requirements under the IFD Agreement may be limited for two reasons.

First, the scope of the publication and notification requirements would correspond to that of the IFD Agreement itself, which is discussed in the preceding subsection. If the scope of application of the IFD Agreement were significantly limited as indicated earlier, the scope of the publication and notification requirements would also be limited accordingly. Second, it is also notable that the publication and notification requirements under the informal Consolidated Text are expected to apply to measures of

[58] Ibid., at 14.
[59] Ibid., at 36.
[60] Ibid., at 37.
[61] Ibid., at 36.
[62] Ibid., at 36–37.

"general application." The term "measures of general application" is also used in provisions concerning transparency under the GATT and the GATS. For example, Art. X:1 of the GATT provides that "Laws, regulations, judicial decisions and administrative rulings of g*eneral application*" related to trade in goods "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them" (emphasis added). Similarly, Art. III:1 of the GATS provides that "Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of *general application* which pertain to or affect the operation of" the GATS (emphasis added).

The meaning of "measures of general application" has been clarified by panels and the Appellate Body to refer to laws and regulations that apply in a general manner and not specific application of such laws and regulations.[63] For example, in *EC – Poultry*, the Appellate Body sided with the panel's finding that an application of the licensing system to a specific company or shipment "cannot be considered to be a measure 'of general application' within the meaning of Article X" (footnote omitted).[64] In *US – Anti-Dumping Methodologies (China)*, the Appellate Body stated that "a rule or norm has 'general application' to the extent that it affects an unidentified number of economic operators."[65] Assuming that the same interpretation applies to the IFD Agreement, the publication and notification requirements under the IFD Agreement apply only in relation to laws and regulations as such and not specific applications thereof.

This is in contrast to the publication requirements under the TFA, Art. 1.1 of which provides that not only certain laws, regulations, and administrative rulings of general application but also "applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation" as well as "fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit" shall be published. It appears that this provision requires the publication of information concerning specific application of certain

[63] Cf. Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998), para. 65.

[64] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/WT/DS69/AB/R (13 July 1998), para. 113.

[65] Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China* (*US — Anti-Dumping Methodologies (China)*), WT/DS471/AB/R (11 May 2017), para. 5.130.

laws and regulations. Moreover, WTO Agreements on trade remedies also provide extensive transparency obligations. For example, the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) requires notifications not only of "any changes in its laws and regulations relevant to [the] Agreement and in the administration of such laws and regulations"[66] but also of individual investigations, determinations, and actions taken pursuant to the Agreement.[67]

The preceding section notes that the publication requirements under Art. X:1 of the GATT apply to broad measures related to trade and investment. While the transparency requirements under the IFD Agreement would be more robust than those under Art. X of the GATT, the scope of these requirements may substantially overlap.

3.3.3 Section III

Section III has eleven provisions concerning the streamlining of administrative procedures and requirements. While it is premature to discuss what rules would be provided under these provisions, it is certain that they are the core of the IFD Agreement.

Section III would begin with Art. 7, para. 1 of which requires that "each Member shall ensure that all measures of general application [covered by this framework] are administered in a reasonable, objective and impartial manner."[68] In addition, Art. 7.2 of the informal Consolidated Text reportedly provides for "specific obligations related to proceedings that directly affect investors of another Member."[69]

Article 7.1 basically mirrors Art. X:3(a) of the GATT as well as Art. VI:1 of the GATS, which provides that "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." The previous section identifies the ambiguous nature of the obligation under Art. X:3(a) and notes that past panel findings have clarified its meaning to some extent. The expectation is that Section III of the IFD Agreement would provide detailed rules based on jurisprudence concerning Art. X:3(a) of the

[66] Anti-Dumping Agreement, Art. 18.5.
[67] Anti-Dumping Agreement, Arts. 12 and 16.4.
[68] Proposed MFIF, at 28.
[69] Ibid., at 37.

GATT. In this regard, it is noteworthy that the TFA has detailed rules that expand the obligations under Art. X:3(a) of the GATT. In fact, the preamble to the TFA states that "Desiring to clarify and improve relevant aspects of Arts. V, VIII, and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit."

As already suggested, the scope of Art. X of the GATT and Section III of IFD Agreement may substantially overlap. Nevertheless, the latter could significantly complement the ambiguous obligations in the former if it provides sufficiently detailed rules building, in part, on the past jurisprudence.

3.4 Conclusion

This chapter analyzed WTO Agreements on trade in goods and intellectual property rights and showed that some of the rules under these agreements may apply to measures related to investment. At the same time, it suggested that while the IFD Agreement could provide more robust obligations concerning transparency and the streamlining of administrative procedures and requirements, their scope may substantially overlap with those of the existing WTO Agreements.

The overlapping of the scopes may ease the skepticism of some WTO members concerned that the IFD Agreement would bring a transformative change to the multilateral trading organization.[70] This chapter revealed that, despite the long-time reluctance of WTO members to introduce investment rules into the WTO, rules under the existing WTO Agreements already apply to measures related to investment, at least to some extent. This does not deny that the IFD Agreement would complement the existing WTO Agreements and contribute to enhanced transparency and streamlined administrative procedures and requirements.

As international transactions have been expanding from traditional trade in goods to wider and more varied areas such as services and intellectual properties, the multilateral rules under the GATT and the WTO have also been evolving to cover such areas. The IFD Agreement

[70] S. Baliño and N. Bernasconi-Osterwalder, 'Investment Facilitation at the WTO: An Attempt to Bring a Controversial Issue into an Organization in Crisis', Investment Treaty News, 27 June 2019, online at: www.iisd.org/itn/en/2019/06/27/investment-facilitation-at-the-wto-an-attempt-to-bring-a-controversial-issue-into-an-organization-in-crisis-sofia-balino-nathalie-osterwalder/ (last accessed 13 June 2023).

can be regarded as another step of the evolutionary development of the WTO rather than its transformative change. That said, the WTO's traditional approach of seeking to promote the flow of trade and investment by restraining WTO members from taking restrictive measures would not be acceptable for many WTO members who have expressed concern about the uneven distribution of the benefits of trade and investment. In this regard, the centrality of development and sustainability in the IFD negotiations would bring innovation to the WTO.