Council of the European Union

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	11 January 2024
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2024) 4 final
Subject:	Proposal for a COUNCIL DECISION establishing the position to be taken on behalf of the European Union in the World Trade Organization's 13th Ministerial Conference on adding the Agreement on Investment Facilitation for Development into the Agreement establishing the World Trade Organization

Delegations will find attached document COM(2024) 4 final.

Encl.: COM(2024) 4 final

EUROPEAN
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Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union in the World Trade Organization's 13th Ministerial Conference on adding the Agreement on Investment Facilitation for Development into the Agreement establishing the World Trade Organization

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Council decision establishing the position to be taken on the Union's behalf in the 13th Ministerial Conference of the World Trade Organization ('WTO') in connection with the envisaged adoption of a decision on adding the Agreement on Investment Facilitation for Development ('IFDA') to Annex 4 to the Agreement establishing the World Trade Organization ('the WTO Agreement').

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement Establishing the World Trade Organization

The WTO Agreement aims to achieve the objectives mentioned in the preamble to the Agreement. The agreement entered into force on 1 January 1995.

The European Union ('EU') is a party to the Agreement.[1] All 27 EU Member States are also parties to the Agreement. The WTO may take decisions in accordance with the procedures set out in the WTO Agreement.

2.2. The Ministerial Conference of the World Trade Organization

The Ministerial Conference is the highest decision-making body of the WTO and meets at least once every two years. As a matter of law and practice, decisions are taken by consensus.

The next meeting of the Ministerial Conference will take place in Abu Dhabi, United Arab Emirates on 26-29 February 2024. Article IV:2 of the WTO Agreement states that the functions of the Ministerial Conference shall be conducted by the General Council in the intervals between meetings of the Ministerial Conference.

2.3. The envisaged act during the Ministerial Conference and reason for and objective of the proposal

During the WTO's 13th Ministerial Conference ('MC13'), a decision may be adopted to add the IFDA to Annex 4 to the WTO Agreement ("the envisaged act"). If the envisaged act is not adopted at MC13, this may take place at a later meeting of the General Council.

Negotiations towards the IFDA were formally launched in September 2020. The Commission conducted the negotiations on behalf of the EU.[2] The IFDA will cover the following topics: improving the transparency and predictability of investment measures, simplifying and speeding up investment-related administrative procedures, strengthening the dialogue between governments and investors, and promoting the uptake by companies of responsible business conduct practices, as well as preventing and fighting corruption, ensuring special and differential treatment, technical assistance and capacity building for developing and least-developed countries.

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1 Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regard matters within its competence, of the agreements reached in the Uruguay Round of multilateral negotiations (1986-1994) OJ L 336 23.12.1994, p. 1.

2 Council Decision 10973/19 of 27 September 2019 supplementing the negotiating directives for the Doha Development Agenda as regards the negotiations for a multilateral framework on investment facilitation (not published).

Negotiations were concluded on 6 July 2023.[3] Because not all WTO Members participated in the negotiations, the intention of the negotiators is to submit a request to the Ministerial Conference to add the IFDA as a plurilateral agreement to Annex 4 to the WTO Agreement. After the request, Article X:9 of the WTO Agreement specifies that the Ministerial Conference of the WTO may decide "exclusively by consensus" to add an agreement to Annex 4 of the WTO Agreement.

For greater clarity, this Decision is only about allowing the EU to join the consensus regarding the legal incorporation of the IFDA to Annex 4 to the WTO Agreement. This proposal does not relate to the formal acceptance of the IFDA by the Union. For that purpose, the Commission will issue a proposal for a Council decision concluding the IFDA pursuant to Article 218(6) TFEU after the IFDA has been added to Annex 4 to the WTO Agreement and declared open for acceptance.

2.4. Consistency with existing policy provisions in the policy area

In its Communication on a *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*,[4] the Commission announced as follows: "WTO rules need to be brought into line with the economic and trade realities of the 21st century. In substance, the priority should be to modernise the rules of the WTO on e-commerce, investment facilitation, services domestic regulation and on the role of the state in the economy, including on subsidies."

The envisaged act is fully consistent with that Communication because it is a necessary procedural step under WTO rules to incorporate an agreement on investment facilitation into the WTO rules.

2.5. Consistency with other Union policies

The envisaged act is consistent with other Union policies, and notably with the Union's development cooperation policy.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The objective of this proposal is to enable the EU to join a possible consensus at MC13 or at a later General Council on the adoption of the envisaged act.

While it is not yet clear if, and to what extent, WTO Members will be able to reach consensus on the envisaged act, the EU position at MC13 has to be established in advance by the Council pursuant to Article 218(9) TFEU.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

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[3] Statement of the co-coordinators of the WTO structured discussions on Investment Facilitation for Development, INF/IFD/W/51.

[4] Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions on a Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, 18 February 2021, COM(2021) 66 final.

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[5].

4.1.2. Application to the present case

The WTO Ministerial Conference is a body set up by an agreement, namely the WTO Agreement, which according to Article IV:1 of the WTO Agreement has the authority to take decisions on all matters covered under any of the multilateral trade agreements, including decisions having legal effects.

The envisaged acts mentioned above constitute acts having legal effects, as they may affect the rights and obligations of the Union by virtue of international law.

The envisaged acts do not supplement or amend the institutional framework of the WTO Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

The substantive legal basis of the proposed decision, therefore, is Article 207 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207 TFEU in conjunction with Article 218(9) TFEU.

[5] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Marrakesh Agreement Establishing the World Trade Organization ('the WTO Agreement') was concluded by the Union by Council Decision 94/800/EC of 22 December 1994[6] and entered into force on 1 January 1995.

(2) Pursuant to Article X:9 of the WTO Agreement, the Ministerial Conference of the World Trade Organization ('WTO') may adopt a decision by consensus to add an agreement to Annex 4 of the WTO Agreement.

(3) The WTO Ministerial Conference, during its 13th meeting on 26-29 February 2024, may adopt a decision on adding the Agreement on Investment Facilitation for Development to Annex 4 to the WTO Agreement.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the WTO Ministerial Conference, as the decisions are binding on the Union.

(5) Negotiations towards an Agreement on Investment Facilitation for Development were formally launched in September 2020. The Commission conducted the negotiations on behalf of the EU. The negotiations were concluded on 6 July 2023. Because not all WTO Members participated in the negotiations, the intention of the WTO Members participating in the negotiations is to submit a request to add the Agreement on Investment Facilitation Agreement as a plurilateral agreement to Annex 4 of the WTO Agreement. The Union should participate in that request as a preparatory step to a possible decision of the Ministerial Conference,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 13th WTO Ministerial Conference shall be:

To join the consensus reached among WTO Members with a view to adding the Agreement on Investment Facilitation for Development to Annex 4 to the WTO Agreement.

[6] OJ L 336, 23.12.1994, p. 1.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President