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WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

OPEN-ENDED INFORMAL VIRTUAL MEETING HELD ON 5 JUNE 2020

Summary of discussions by the Coordinator¹

An open-ended informal virtual meeting of the Structured Discussions on Investment Facilitation for Development was held on 5 June 2020, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile).² As indicated in the "Proposed Schedule of Open-Ended Informal Virtual Meetings, June-July 2020" and the annotated agenda³ circulated by the Coordinator to all WTO Members ahead of the meeting, its main purpose was to allow delegations share information, present their text proposals and contributions,⁴ and resume thematic discussions on the basis of the informal consolidated text circulated by the Coordinator to all WTO Members.⁵

In keeping with the Joint Initiative's open, transparent and inclusive nature, all Members have been invited to attend and participate in this first open-ended virtual meeting – with two further meetings scheduled for 24 June and 10 July.⁶

1 INTRODUCTION BY THE COORDINATOR AND REVIEW OF LATEST DEVELOPMENTS

1.1. The Coordinator reiterated the objectives and modalities of these three informal meetings, restating that they would not serve the purpose of conducting negotiations and, consequently, would not lead to decision-taking or drafting suggestions by the Coordinator.

1.2. Turning to the latest developments since the preceding meeting,⁷ Morocco and Mauritius informed participating Members of their decision to formally join the initiative. The representative of Morocco stressed his country's conviction of investment's key role in achieving sustainable development objectives. The representative of Mauritius stated his authorities' decision to join the initiative as communicated in document INF/IFD/W/20 – emphasising that a properly designed framework on investment facilitation at the WTO could send a strong signal to investors and assist them in their cross-border investment decisions.

1.3. Participating Members and the Coordinator welcomed and expressed their appreciation to the two new members, highlighting that the initiative now counted with the support of over 100 Members. A delegation stressed the importance of special and differential treatment – including

¹ This summary, prepared and circulated under the Coordinator's responsibility, is being shared with a view to providing delegations with a record of the discussions and assisting them in reporting back to their capitals. It provides a non-exhaustive, illustrative review of the issues addressed by Members at the meeting.

² The meeting was conducted over the Interprefy virtual platform.

³ Documents INF/IFD/W/18 and INF/IFD/W/19 respectively.

⁴ Text contributions have been submitted by Argentina (INF/IFD/RD/42), and text proposals have been submitted by China (INF/IFD/RD/48), the European Union (INF/IFD/RD/46), Japan (INF/IFD/RD/47) and Turkey (INF/IFD/RD/49). Qatar also circulated a communication (INF/IFD/RD/51) providing initial comments on the streamlined text circulated by the Coordinator in January 2020 (INF/IFD/RD/45).

⁵ Document INF/IFD/RD/50 dated 22 April 2020.

⁶ See "Revised Schedule of Open-Ended Informal Virtual Meetings June-July 2020" (INF/IFD/W/18/Rev.1).

⁷ Organizational meeting held on 27 February 2020. The subsequent substantive meetings scheduled to take place on 12-13 March, 21-23 April, 13-15 May and 28-29 May 2020 had to be cancelled due to the COVID-19 pandemic.

transition periods for implementation, technical assistance and capacity building – to enable developing and LDC Members to implement a future investment facilitation framework.

2 GENERAL INTRODUCTION OF TEXT PROPOSALS AND CONTRIBUTIONS BY MEMBERS

2.1. The four participating Members who submitted text proposals since February 2020⁸ took the floor to introduce them in general terms, followed by general questions and comments from delegations.

2.2. The first delegation who took the floor explained that its proposal⁹ aimed at contributing to a meaningful investment facilitation framework, while ensuring the highest possible consistency with the existing WTO legal framework, and notably the GATS. Extending the GATS' transparency and good governance standards applying in services sectors to investment in all sectors was a way to ensure legal consistency, as well as a first step to improve the conditions for all foreign investment, beyond services. It was important to avoid conflicting requirements between this initiative and the one on services domestic regulation. The proposal also built on concepts and principles of the WTO TFA, which was a clear point of reference. In addition, it took inspiration from their bilateral agreements, and from provisions shared by participating Members over the course of the discussions. The proposal fully respected the scope of the initiative and clarified that its provisions would not undermine the commitments that Members had undertaken in other agreements. The delegate pointed out that the proposal included some placeholders: certain key elements (such as special and differential treatment, MFN, exclusions from scope of application) could be elaborated only once the framework's rules and obligations would be further developed. Thus, it reserved its right to submit proposals on specific issues at a later stage.

2.3. The second delegation who took the floor explained that its text proposal¹⁰ aimed at complementing the streamlined text, by focusing on three elements: scope; security and financial exceptions; and the temporary entry of investment persons. The proposal tried to answer some key questions relating to scope – such as the types of investments that the framework shall apply to; which sectors it would cover; whether it would cover the full lifecycle of investment activities; and whether it shall apply both to central and local government levels. The proposal also specified certain excluded areas (government procurement, public concessions and subsidies) and, under its 'scope' section, addressed the exclusion of obligations with respect to market access, investment protection and ISDS. The delegate expounded that the proposal also contained horizontal security and financial exceptions based on similar language borrowed from their investment treaties. Lastly, the proposal contained provisions on the temporary entry of investment persons, which sought to respond to repeated calls his delegation had received from the domestic and foreign business community. Acknowledging the sensitivity of this topic, the proposal only applied to temporary entry and only involved transparency and some procedural requirements.

2.4. The third delegation who took the floor stressed the value it saw in delivering a meaningful investment facilitation framework and its readiness to negotiate ambitious rules to facilitate investment and enhance transparency, to which all participating Members would bear equal commitment. The delegation stressed that its text proposal¹¹ did not prejudge its position with respect to the final negotiated outcome including its final format. Touching upon two substantial features of their proposal, the delegate first highlighted the new rules on transfers and subrogation based on language used in standard bilateral investment treaties. These rules could help alleviate investors' financial and administrative concerns, while not addressing market access or investment protection issues, which were agreed not to be dealt within the framework. Secondly, the delegate highlighted his country's initial views on special and differential treatment (S&DT) and capacity building contained in Section V of the proposal. His delegation held the view that S&DT must be granted only to those developing and LDC Members in real need of it, and to the extent necessary. As for technical assistance and capacity building, further discussion was required to devise an efficient framework to help those Members who needed it and to the extent required for implementing the negotiated rules.

⁸ See documents INF/IFD/RD/46, INF/IFD/RD/47, INF/IFD/RD/48 and INF/IFD/RD/49.

⁹ Document INF/IFD/RD/46.

¹⁰ Document INF/IFD/RD/48.

¹¹ Document INF/IFD/RD/47.

2.5. Finally, the fourth delegation explained that its text proposal¹² focused on priority issues to them, namely: objective; scope and definitions; and the facilitation of the movement of businesspersons for investment purposes. In her delegation's view, the provisions on objective, scope and definitions were key to define the framework's rights and obligations. Her delegation believed that an 'objectives' article would serve as an anchor to ensure that any future obligations would serve the basic objectives of the framework. The proposed provisions on 'scope' highlighted, inter alia, that the framework did not confer any market access or establishment rights. The proposal also provided detailed definitions of 'investment', 'investor' and further key elements. Finally, the section on movement of business persons for investment purposes, focusing on entry and temporary stay based on GATS terminology, sought addressing one of the leading administrative hurdles experienced by their investors abroad. Since the 'scope' provision excluded any market access commitment, this section aimed solely at developing transparency as well as procedural and good governance principles for the administration of entry and temporary stay application processes.¹³

2.6. The presentations were followed by a first round of general questions and comments. Further to a question raised, all four proponents clarified that their proposals covered investment activities both in services and non-services sectors – pending the possible determination of specific sectors that would need to be excluded. Reiterating its full commitment to the process, a participating Member advocated a thorough discussion of the framework's scope of application. Another participating Member announced its intention to table a new proposal before the summer break.

3 INTRODUCTION OF THE INFORMAL CONSOLIDATED TEXT BY THE COORDINATOR

3.1. The Coordinator explained that the informal consolidated text had been prepared based on the January 2020 streamlined text – itself a distillation of the extensive example-based and subsequent text-based discussions conducted in 2018-19. The consolidated text included the text contributions and proposals submitted by Members up to end March 2020.¹⁴ While the document aimed at assisting Members in further developing the elements and specific provisions of the framework – its structure, content and wording did not, in any way, prejudice the position or views of any delegation on the issues under negotiation. The Coordinator provided a brief overview of the informal consolidated text, including the criteria followed to prepare it, as explained in the document's cover note.

3.2. Participating Members strongly supported the informal consolidated text as the basis for the discussions and future negotiations. A participating Member expressed the need to look at the interaction between obligations in the future investment facilitation framework under the WTO, and existing ones under bilateral investment treaties and free trade agreements.

4 THEMATIC DISCUSSION

4.1 Section II: Transparency of investment measures

4.1.1 Sub-section II.3: Publication and availability of measures and information [including by electronic means]¹⁵

4.1. The Coordinator reviewed the corresponding core publication obligations contained in the informal consolidated text – before inviting the two Members, whose text proposals contained drafting suggestions pertaining to this sub-section, to present their submissions.

4.2. The first delegation who took the floor introduced its text proposal¹⁶ by stressing the importance – frequently highlighted by investors, international organizations and academics – that relevant information be made available online, whenever possible. Para. 1 of their proposal reproduced the general publication requirements already existing under the GATS with regard to all "measures of general application" covered by the agreement. The language "or otherwise make publicly available in writing" and related footnote (inspired from the services domestic regulation

¹² Document INF/IFD/RD/49.

¹³ As a result, any decision of whether to grant an entry and temporary stay permit to a "business person of another Member" remained exclusively under the government's sovereign authority.

¹⁴ Namely the text contribution INF/IFD/RD/42, as well as the text proposals INF/IFD/RD/48, INF/IFD/RD/46, INF/IFD/RD/47 and INF/IFD/RD/49.

¹⁵ As contained in the informal consolidated text INF/IFD/RD/50, pp. 10-13.

¹⁶ Document INF/IFD/RD/46 dated 27 February 2020.

text) was added to provide additional flexibility in publication methods. Para. 2 proposed language on mandatory online publication of specific information relevant to FDI,¹⁷ which was inspired from the WTO TFA and aimed at helping investors answering basic questions.¹⁸ The delegate stressed that publishing such information did not amount to covering market access. The language under para. 3, which focused on the practical steps needed to invest, was again inspired by the TFA and included an indicative list of elements built on feedback received from investment promotion agencies, work by international organizations, and international surveys. Para. 4 under the element 3.2 "information to be published when an authorization is required to invest in a country"¹⁹ built on language agreed in the services domestic regulation text, which could be used as a starting point. Para. 5 of their proposal (no-imposition of fees for access to information)²⁰ addressed an important concern notably of MSMEs – building on language contained in the MSMEs chapter of the delegation's bilateral agreements. Regarding element 3.3 "publication in advance and opportunity to comment on proposed measures", the proposal built on language included in the services domestic regulation text, which provided flexibility language to take into account the diversity of WTO Members' legal systems (letter a.); letter b. thereunder provided an additional, more flexible alternative.²¹

4.3. The second delegation presenting its proposal highlighted the importance of publishing relevant information both for businesses/investors and for Members. Under element 3.1 (Publication and availability of measures), his delegation preferred stipulating the concrete measures to be published²² (excluding judicial decisions) – instead of the term "measures of general application".

4.4. In their comments, many participating Members stressed that the provisions on transparency constituted a core pillar of the framework. A delegation advocated further discussion about the addressees/recipients of the information to be published in order to better understand the different terms used in the informal consolidated text.²³ With respect to element 3.1 "Publication and availability of measures" of the informal consolidated text (and related proposals), participating Members discussed the merits of including a list of measures versus the generic reference to "measures of general application" (following GATS Art. III:1).²⁴ In response to a question raised on the scope of the term "procedures" used in subsection II.3 of the informal consolidated text – a delegation clarified that its proposal addressed only the procedures in the interactions between an investor and the host-country administration. Finally, a participant Member stressed the importance of the information to be published when a Member required authorization for an investment in its territory to be made available also in one of the official languages of the WTO.²⁵ Several participant Members supported and stressed the importance of the proposed flexibility language under the element 3.3. "Publication in advance and opportunity to comment on proposed measures" – in line also with the language agreed in the services domestic regulation initiative.

5 OTHER BUSINESS AND NEXT MEETING

5.1. The Coordinator informed Members about the change of date of the third informal meeting, which would be held on 10 July 2020. He announced that he would circulate a short non-attributable informal summary of the meeting to all WTO Members. He highlighted that, at the following open-ended informal virtual meeting,²⁶ the thematic discussions would resume starting from Section II, Element 4 "Notification to the WTO" of the informal consolidated text.²⁷ He encouraged Members

¹⁷ The delegation clarified that para. 2 of its proposal aimed to replace para. 3.4 of the informal consolidated text.

¹⁸ Such as: Are investors allowed to invest in this sector and, if so, under which conditions? Whom do they need to contact when seeking authorization for their investment?

¹⁹ Included on top of p. 12 of the informal consolidated text.

²⁰ Included in the middle of p. 12 of the informal consolidated text.

²¹ By allowing, as an alternative to publishing in advance the laws and regulations themselves, to publish in advance documents providing sufficient details about such possible laws or regulations.

²² Namely "laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this framework".

²³ E.g., "interested persons and the other Members", "investors or persons seeking to invest", "investors", "governments, investors, and other interested parties", etc.

²⁴ In this context, a participating Member referred to the 2012 Note by the WTO Secretariat on the use of the term "measures of general application" in WTO agreements. See documents S/WPDR/W/47 and S/WPDR/W/47/Corr.1.

²⁵ Element 3.2, sub-paragraph 3.9 of the informal consolidated text, p. 12.

²⁶ That would take place in the afternoon of 24 June 2020.

²⁷ Informal consolidated text, p. 13.

wishing to submit text proposals or contributions to do so in advance of the next meeting. He also incited Members to exchange their questions and comments on the proposals and other submissions in writing. Such written questions, comments and answers could be circulated by the Coordinator to all Members.
