



**WTO STRUCTURED DISCUSSIONS ON
INVESTMENT FACILITATION FOR DEVELOPMENT**

OPEN-ENDED INFORMAL VIRTUAL MEETING HELD ON 24 JUNE 2020

Summary of discussions by the Coordinator¹

An open-ended informal meeting of the Structured Discussions on Investment Facilitation for Development was held on 24 June 2020, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile).² This was the second informal meeting foreseen in the "Schedule of Open-Ended Informal Virtual Meetings, June-July 2020".³ As indicated in the annotated agenda circulated by the Coordinator to all WTO Members⁴, the main purpose of the meeting was to allow Members to introduce new text proposals submitted since the last meeting, as well as to continue the thematic discussion on the basis of the informal consolidated text circulated by the Coordinator to all WTO Members.⁵ As also indicated in the annotated agenda, the meeting was not meant to conduct any negotiations, nor to lead to any decision-taking or drafting suggestions by the Coordinator. In keeping with the Joint Initiative's open, transparent and inclusive nature, all WTO Members were invited to attend.

1 INTRODUCTION OF NEW TEXT PROPOSALS AND CONTRIBUTIONS BY MEMBERS

1.1. A new text proposal was submitted prior to the meeting.⁶ The Member concerned introduced the proposal in general terms. The purpose of the proposal was to ensure that the future framework on investment facilitation for development did not affect, or stood to be affected by, international Investment Agreements ("IIAs"), comprising Bilateral Investment Treaties (BITs) and Investment Chapters of Free Trade Agreements, concluded by Members thus far. In this Member's view, given the extremely broad nature of investment, as the term was interpreted by international courts and tribunals, clear language on insulation and separation would help avoid a situation where a prospective framework on investment facilitation and IIAs interacted with each other inadvertently. To that end and pending the review of further provisions as the discussions moved forward, the proposal suggested language for a mutual exclusion clause under the "Scope" element. In addition, for greater certainty, the scope of the future framework on investment facilitation for development should be clarified to make it clear that it shall not apply to investment protection, the treatment of investors or investments, or any dispute settlement proceeding within the meaning of IIAs concluded, or that might be concluded, by Members.

1.2. Several participating Members provided initial comments on the proposal. These Members shared the view that the scope of the framework should be further discussed and that the relationship with IIAs should be clearly delineated. Some of them announced their intention to table written proposals on this and other issues. One of them fully supported the language put forward in this proposal. Another Member shared the proponent's concern that the MFN clause in IIAs should not lead to the "importation" of obligations from other agreements into those IIAs, but considered that such eventuality had to be resolved primarily in those bilateral treaties. In that regard, this Member explained that it had included a "non-importation" clause in recent IIAs. The Member expressed doubts, however, with regard to the proposal to exclude the "treatment" of investors or

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/Rev.1, dated 15 June 2020.

⁴ Documents INF/IFD/W/21, dated 19 June 2020.

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

⁶ Document INF/IFD/RD/52, dated 23 June 2020.

investments from the scope of the framework altogether, as “treatment” was not necessarily an investment protection issue. In this Member's view, Section III of the informal consolidated text (Streamlining and Speeding up of Administrative Procedures and Requirements) contained principles of good governance that also related to the treatment of foreign investors. It was not clear therefore how the proposal to carve out “treatment” from the scope would affect the provisions in section III of the framework. He suggested that, instead of excluding “treatment”, a better option might be to clarify that the framework would not confer rights that investors could claim under investor-state dispute settlement mechanisms in other treaties.

1.3. In replying to the comments, the proponent clarified that the proposal to remove “treatment” from the scope was not intended to diminish or undermine the value added of administrative good governance provisions contained in the investment facilitation framework, but to avoid that those 'provisions' could be used in IIAs disputes. The Member added that it was willing to consider alternative language that could be both supportive of administrative good governance and mindful of the possible misuse by investors. She further considered that while it would be ideal to have non-importation clauses in all IIAs, the fact that many older-generation IIAs had non-derogation clauses allowing investors to apply more favourable rules in case of conflict with IIAs made it important that an insulating provision be included in the investment facilitation framework.

2 THEMATIC DISCUSSION

2.1. The thematic discussions resumed where they had broken off at the last meeting.

2.1 Section II: Transparency of investment measures

2.1.1 Element 4: Notification to WTO

2.2. One participating Member considered that the notification obligations should apply not only to changes to existing laws but also to the introduction of new laws – something that was not contemplated in the current version of the informal consolidated text. In addition, this Member advocated that the existing investment frameworks also be notified to the WTO. The Member also suggested that the term “major change” be clarified, and that the conjunction “or” in the first line of paragraph 4.1 be replaced by “and” in line with GATS Article III:3. Some delegations supported these last two suggestions. Other participating Members suggested that the expression “promptly” be also clarified. One participating Member considered that notification obligations should not be burdensome and suggested that only official places of publication be notified.

2.1.2 Element 5: Enquiry points

2.3. Most participating Members saw value in this provision. One participating Member advocated the use of the enquiry points already foreseen in the GATS. In general, participating Members saw value in a mechanism that would allow investors to make enquiries and have them answered. They noted however a potential overlap between the functions of enquiry points, contact / focal points (section IV) and, to a lesser extent, the Committee on investment facilitation (section VII). They considered that further clarity should be provided on the different types of relationships (i.e. Member-investor, Member-Member, and Member-WTO) and the mechanisms to deal with them. A participating Member saw value in having a mechanism that would help investors obtain information from governments and, noting the overlap between enquiry points and contact / focal points, suggested merging both. Another participating Member considered that enquiry, contact and focal points had different responsibilities that could be fulfilled by different authorities or by the same authority, depending on the internal organization of the Member concerned.

2.4. In addition, while one participating Member noted the absence of a reference to “enquiry point” in paragraph 5.1, another one considered that the reference to “appropriate mechanisms” in that paragraph provided Members with flexibility to organize the functions foreseen in this element. Another participating Member suggested that the expression “reasonable” enquiry be further clarified.

2.1.3 Element 6: Specific exceptions applicable to transparency requirements

2.5. One participating Member introduced its text proposal on this element, which consisted of reproducing the text of GATS Article III *bis* "Disclosure of Confidential Information".⁷ It was suggested that, in the corresponding text in the informal consolidated text, the term "could prejudice" should be replaced by "would prejudice" to align it with GATS Article III *bis*.

2.2 Section III: Streamlining and speeding up administrative procedures and requirements

2.2.1 Element 7: Consistent, reasonable, objective and impartial administration of measures

2.6. One participating Member introduced its text proposal on paragraph 7.1., which sought to adopt an approach similar to GATS Article VI:1.⁸ In replying to other Members' questions, the proponent confirmed its agreement with paragraph 7.2 of the informal consolidated text (which was not addressed in its proposal) and considered that the framework on investment facilitation would be a complement to the GATS, allowing Members to go beyond the GATS as far as investment was concerned.

2.7. A participating Member suggested to align the title of this element with the text in paragraph 7.1 by deleting the word "consistent" from the title. Another participating Member posed a question on the relationship between the GATS and the prospective investment facilitation framework in this regard: whereas GATS Article VI:1 applied only in sectors where Members had undertaken specific commitments, the framework seemed to seek to apply this obligation horizontally. Finally, some participating Members considered that paragraph 7 was linked to the scope of the framework and would thus need to be revisited once the scope had been further clarified.

2.2.2 Element 8: Reduction and simplification of administrative procedures and documentation requirements

2.8. Two participating Members introduced their text proposals on this element.⁹ The first proponent explained that its proposal aimed at making this provision clearer, by simply imposing the obligation to limit the complexity of procedures while still requiring investors to fulfil those requirements.

2.9. The second proponent explained that the language proposed as an alternative to paragraph 8.4 of the consolidated text had been drawn from Article 10, paragraph 1.1, of the TFA. Commenting on this proposal, a Member expressed some scepticism about the introduction of "other factors" (e.g. changed circumstances, relevant new information, business practices, availability of techniques and technology, international best practices, and inputs from interested parties) that competent authorities might take into account in the application of procedures and requirements since they might increase uncertainty for investors.

2.10. Another Member considered that there were significant overlaps among elements 7, 8 and 9. He suggested merging paragraphs 7.1 and 8.2; as well as paragraphs 8.1 and the first sentence of paragraph 9.2, which addressed the same matter. In addition, this Member considered that the language should not conflict with existing obligations and negotiations in the WTO, notably the GATS and the services domestic regulation discussions. He further indicated that his country could support using the services domestic regulation-related language as a starting point for discussions on this and related elements.

2.11. Another Member said that there were instances where more detailed scrutiny by competent authorities might be necessary, for example in the case of large-scale investments. In that regard, he suggested using flexibility language such as "to the extent practicable". In the same vein, another Member said that some of the standards mentioned in this element, such as "simplicity", might not be applicable in certain sensitive sectors (such as the health or financial sector).

⁷ Document INF/IFD/RD/46, dated 27 February 2020.

⁸ Document INF/IFD/RD/46, dated 27 February 2020.

⁹ Documents INF/IFD/RD/46 and 47, dated 27 February and 25 March 2020, respectively.

2.12. Finally, another Member considered that the last part of paragraph 8.4 of the consolidated text ("each Member shall ensure that such procedures and documentation requirements are applied in a manner that aims at reducing the time and cost of compliance") imposed a rule that might be difficult to implement at all times.

2.2.3 Element 9: Clear criteria for administrative procedures

2.13. Two participating Members introduced their text proposals on this element.¹⁰ The first proponent explained that the main purpose of its proposal was to clarify that this element must not be understood as creating additional market access rights and obligations for Members. This clarification had been introduced in a footnote to the text proposed, which was otherwise similar to the language used in the joint statement initiative on services domestic regulation. The second proponent explained that it was against including the expression "may establish criteria" appearing in paragraph 9.1 of the informal consolidated text. Rather, the Member preferred to require Members to ensure that any criteria established by its competent authorities be clear, transparent, objective and published beforehand.

2.14. Commenting on the first proposal, a Member wondered whether terms used in the services domestic regulation text, such as "criteria", would fit within an investment facilitation framework. In addition, paragraph 9.3 of the informal consolidated text made a circular use of the term "criteria" when stating that "each Member shall ensure that any such criteria that it adopts or maintains are based on objective and transparent criteria...". Addressing, this comment, the first proponent explained that basic provisions like this one could also be applied to investment. The footnote to the proposal already provided some indications as to the nature of those "criteria". It was useful for investors to be aware of those criteria in advance.

2.15. Commenting on this element, a Member considered that the relationship between the "criteria" referred to in these paragraphs and the commitments on market access and national treatment in the GATS should be further explored. Replying to this specific comment, another Member saw value in having this element, and observed that these provisions focused on procedural issues and did not address either market access or national treatment.

2.2.4 Element 10: Authorization procedures

2.16. One participating Member introduced its text proposal on this element.¹¹ The Member explained that the proposal drew from the relevant text of the services domestic regulation text, in the understanding that such types of provisions could be applied across-the-board, to investment in all sectors (services and non-services). He proposed to use this language as a starting point for negotiations. A number of participating Members supported this proposal. A Member expressed its preference to use the wider term "authorisation *for an investment*" compared to the language "authorization *to invest in its territory*" used in the consolidated text. Replying to another Member's question, the proponent explained that the proposal did not imply that each Member should have only a single authority to deal with authorizations. Rather, the proposal provided how authorizations were to be dealt by any competent authority in the Member concerned.

2.17. Commenting on this element, a Member said that paragraph 10.2 of the consolidated text overlapped with paragraph 14.1. Since the latter addressed the use of ICT, he suggested deleting paragraph 10.2 and retaining paragraph 14 instead, a suggestion supported by another delegation. The same Member considered that the term "authorization" needed to be defined. In particular, he wondered if the expression was meant to cover the establishment phase only or also the post-establishment phase. He supported a broad definition of "authorization". Some Members supported the suggestion to define the term "authorization".

2.2.5 Element 11: Treatment of incomplete and rejection of applications

2.18. One participating Member introduced its text proposal on this element.¹² The Member explained that the proposal drew from the relevant services domestic regulation text, again in the understanding that such types of provisions could be applied across-the-board, to investment in all

¹⁰ Documents INF/IFD/RD/46 and 47, dated 27 February and 25 March 2020, respectively.

¹¹ Document INF/IFD/RD/46, dated 27 February 2020.

¹² Document INF/IFD/RD/46, dated 27 February 2020.

sectors. Commenting on this proposal, another Member suggested using the expression "relevant competent authorities" instead of simply "competent authorities", as the former implied a limited number of competent authorities that investors might need to approach. In response, the proponent clarified that the competent authorities envisaged by this proposal were those specifically dealing with investments. Another Member supported aligning these provisions with the services domestic regulation text to avoid unnecessary divergences.

3 OTHER BUSINESS AND NEXT MEETING

3.1. The Coordinator announced that he would circulate a revised version of the informal non-consolidated text including the new proposal submitted prior to the meeting. He also announced that he would circulate a non-attributable informal summary of the meeting to all WTO Members. At the following open-ended informal virtual meeting, to be held on 10 July, the thematic discussions would resume starting from Section III, Element 12 "Fees and charges" of the informal consolidated text. He encouraged Members 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.
