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WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

OPEN-ENDED INFORMAL VIRTUAL MEETING HELD ON 10 JULY 2020

Summary of discussions by the Coordinator¹

An open-ended informal meeting of the Structured Discussions on Investment Facilitation for Development was held on 10 July 2020, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile).² This was the third 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 Members,⁴ 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 SUBMITTED BY MEMBERS SINCE THE LAST MEETING

1.1. A new text proposal was submitted prior to the meeting.⁶ The Member concerned introduced its comprehensive proposal, reiterating its aim of achieving a meaningful, comprehensive and ambitious Agreement on Investment Facilitation for Development. The delegation explained that, in preparing its text proposal, it took into consideration other proposals submitted by Members, as well as suggestions and concerns expressed by Members in the course of the discussions. The proposal aimed at creating a transparent, efficient and predictable regulatory framework for promoting further development to be endorsed by as many WTO Members as possible. The proposal was without prejudice to the Member's position with respect to the final negotiated outcome, and its right to submit additional text proposals in the course of the negotiations.

1.2. The Member provided a general overview of its proposal. The provision on scope built on other proposals and aimed at responding to demands made by some Members to strengthen the exclusion of market access. The provisions on "Single Portal", which was one of the main elements of the proposal, built on this Member's previous proposal and feedback received from other Members. The proposal on "National Investment Facilitator" merged the functions of the national focal points and the enquiry points, while providing additional flexibility in terms of domestic institutional arrangements for implementation. He explained that the newly proposed element of "Domestic Supplier Databases", which was not yet covered in the consolidated text, aimed at promoting the participation of local suppliers in global value chains. The proposed provisions on "Technical Assistance and Capacity Building" aimed at reinforcing the development dimension of the framework, which in the delegation's view should go beyond the Trade Facilitation Agreement (TFA) given the different types of procedures concerned. Finally, the delegation stressed the importance of 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 Document INF/IFD/W/18/Rev.1, dated 15 June 2020.

⁴ Document INF/IFD/W/22 dated 7 July 2020.

⁵ Document INF/IFD/RD/50/Rev.1, dated 2 July 2020.

⁶ Document INF/IFD/RD/53, dated 7 July 2020.

provisions on "Responsible Business Conduct" at the global level and indicated that their proposal encouraged investors to contribute to sustainable development.

1.3. A number of participating Members provided initial comments on the proposal, while emphasizing that they were still consulting internally on its different elements. Some Members who intervened indicated that they shared the proponent's aim of achieving a meaningful agreement. They also indicated that they appreciated the proponent's efforts in building upon other Members' proposals, and in taking into consideration comments expressed by delegations during the discussions. One delegation commended such an approach particularly in relation to the provisions on single window and national focal point types of mechanisms. Three delegations indicated that they found the ideas behind the proposals on "National Investment Facilitator" and "Domestic Supplier Databases" interesting.

1.4. One Member stated that, while it saw merit in providing concrete ideas on some of the issues discussed, it was important to find a balance between the level of detail and the nature of the provisions. In its view, it was important to provide enough guidance on implementation, while avoiding being overly prescriptive on institutional arrangements in recognition of the different legal systems and practices of Members. The delegation expressed the hope that the negotiations would resume soon.

1.5. Another delegation considered that the proposal reflected the aspirations of many developing Members. In the Member's view, it was important to highlight the framework's development objectives, as expressed in the preamble and objectives of the proposal. This delegation requested Members to consider the challenges faced by many developing countries in implementing obligations. He welcomed the proposal on scope and transparency of measures, which they considered added clarity to the text. The delegation considered that the provisions on technical assistance and capacity building contained in the proposal were more precise and actionable than the ones contained in the informal consolidated text.

2 THEMATIC DISCUSSION

2.1. The thematic discussions resumed where they had been adjourned at the last meeting.

2.1 Section III: Streamlining and speeding-up administrative procedures and requirements

2.1.1 Element 12: Fees and charges

2.2. One participating Member briefly presented its text proposal on authorization fees. The delegation indicated that the second paragraph was inspired from the TFA, in the understanding that such provision could also contribute to facilitate investments.

2.3. Several Members considered it unrealistic to require making fees "commensurate with the cost incurred to process the application" as indicated in the consolidated text since that depended on different factors, such as the nature of the activities involved (e.g. whether they related to concessions or the extraction of natural resources) or changing circumstances (e.g. effects of climate change on the use of natural resources). In that sense, one delegation supported the Member's text proposal, which provided as benchmark that fees "shall not in themselves restrict the investment". The same delegation indicated that, in some cases, fees were also used for pension fund of agencies. In reply, the proponent explained that the footnote already addressed some of the issues expressed by the Member.⁷

2.4. A Member sought clarification on the term "authorization" and the meaning of "authorization fees". In reply, the proponent indicated that it might be useful to clarify what "authorization" meant for purposes of the entire framework.

2.5. Two delegations sought clarification on the second paragraph of the Member's proposal, and whether such provision should be read together with the relevant transparency provisions on

⁷ The footnote states that "authorization fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision."

publication and availability of measures (like in the informal consolidated text), which provided flexibility language. The proponent explained that there was no reason for omitting the reference to the provisions in the section on transparency of the informal consolidated text, since the most important was to establish the principle.

2.1.2 Element 13: Periodic Review of administrative procedures and requirements

2.6. One participating Member presented its text proposal, which used best endeavours language in recognition of the fact that the periodic review of relevant measures of general application could be resource-intensive for many Members. The first paragraph of the proposal was based on the original text of the consolidated text, while adding a reference to the specific needs of MSMEs. The second paragraph was based on Article 6 paragraph 1.4 of the TFA, albeit in a softer language.

2.7. Participating Members who intervened largely saw value in this provision, while underlining at the same time the importance of including soft language ("encouraged to"), as in the Member's text proposal. In reply to a question on the consequences of non-compliance given the best endeavours nature of the provision, the proponent explained that the aim was to encourage good governance and that such periodic reviews be carried out in an open and informed manner.

2.8. A couple of Members shared their domestic experiences with the review of specific measures on a regular basis and the consideration of feedback from users, as appropriate. Replying to a question on the periodicity of the reviews, the proponent explained that such reviews could take place at regular intervals, as deemed appropriate by each Member. Also, in response to Members' questions, the proponent clarified that it was up to each Member to identify what specific measures should be modified or streamlined.

2.9. Most participating Members also saw value in paragraph 3 of the proposal, which encouraged the consideration of stakeholder feedback and the use of relevant international performance indicators, such as the World Bank's ease of doing business score, to guide Members in carrying out their domestic reforms. They also saw value in ensuring coherence with the work of other international organizations. One Member, however, considered that the framework should be circumscribed to WTO concepts.

2.10. Participating Members supported sharing experiences on these matters in the Investment Facilitation Committee, as provided in paragraph 3 (last sentence) of the Member's proposal. One delegation considered that such sentence would be better placed in paragraph 28 of the framework, which dealt with the Investment Facilitation Committee.

2.1.3 Element 14: Use of ICT / E-government including electronic applications

2.11. One participating Member introduced its text proposal on this element, which recognized the increasing use of ICT for streamlining and speeding up administrative procedures and requirements. He explained that the proposal aimed at taking due account of Members' resource constraints, as well as different authentication requirements.

2.12. A delegation enquired whether the proposal, which referred to "an authorization for an investment" (as opposed to "an authorization to invest" as stated in paragraph 14.1 of the informal consolidated text) would apply to any application that an investor might submit regarding an investment. The Member replied that their proposal was broader since it was intended to apply throughout the investment lifecycle, including the operation of an investment.

2.13. A delegation indicated that in some countries, electronic applications were not allowed in some cases and suggested the proponent to add "as applicable" to paragraph 1.a. In response to a question, the proponent clarified that the phrase "authenticated in accordance with the Member's domestic law" in paragraph 1.b alluded to the law of the "host country".

2.14. A couple of delegations sought clarification on the forms of electronic payments covered in paragraph 2 of the proposal. Noting that the proposal was based on Article 7.2 of the TFA, the proponent replied that, following the understanding of the World Customs Organization, the term "electronic payment" would cover all forms of transfers of information on payments made

electronically instead of physical exchange of paper (including credit cards or online banking), as in the TFA.

2.15. One delegation noted an overlap between paragraph 14.1.b and paragraph 10.2c) (on acceptance of copies) of the informal consolidated text.

2.1.4 Element 15: One-stop Shop /Single Window Types of Mechanisms

2.16. One participating Member introduced its new text proposal on "Single Portal". The delegation explained that, compared to its previous proposal, the new one provided more flexibility for Members by including best endeavours language. The main functions of the mechanism included receiving documents on investment applications; providing information of competent authorities involved in the authorization and operation of investments; and consolidating relevant information in one single portal. With a view to facilitating investments, specially of MSMEs, Members were required to publish their measures, to the extent possible, in one of the official languages.

2.17. A Member sought clarification on the scope of the investment procedures and the information covered by the single portal. He enquired whether the idea was to integrate "all procedures" under one single portal.

2.18. A Member stated that the framework shall aim at including obligations that all Members would be able to implement. This delegation considered that another Member's proposal, which was based on the Reference Paper on services domestic regulation, provided a possible "landing zone", which would need to be adapted to an investment facilitation context. Another delegation indicated that investors might not feel comfortable about their information being shared by governmental agencies and cautioned against a too prescriptive approach that would make it difficult to accommodate different legal systems, multiple- jurisdictions, types of procedures and levels of development. In reply, the proponent of the Single Portal stressed again the best endeavours language of the proposal and highlighted that several of its elements were already contained in other sections of the consolidated text.

2.19. One Member sought clarification on how the provisions on technical assistance and capacity building would operate when putting in place this type of mechanisms. Another delegation requested the proponents to share their experiences in implementing the mechanisms concerned.

2.20. In reply to a question, the proponent concerned clarified that there was a clerical error in its proposal, which appeared below paragraph 15.1 of the informal consolidated text, as it should read "investment", instead of "service".

2.1.5 Element 16: Independence of Competent Authorities

2.21. One participating Member introduced its text proposal on this element, which aimed at ensuring that decisions by the competent authority were taken in a manner independent from any enterprise carrying out the activity for which authorization was required. Noting that the proposal was based on the Reference Paper on services domestic regulation, one delegation enquired whether the footnote should be adapted to reflect subsequent changes introduced in the context of those negotiations.

2.1.6 Element 17: Appeal and Review

2.22. One participating Member introduced its text proposal, explaining that the first two paragraphs were based on Article VI:2, paragraphs (a) and (b), of the GATS. The aim was to extend the obligations that already applied to services sectors to the non-services sectors. The other two paragraphs of their proposal laid down basic principles of due process in appeal and review procedures.

2.23. A couple of delegations stated that they saw merit in the proposal. Several Members sought clarification on whether the proposal required creating new judicial, arbitral or administrative tribunals for investment facilitation, or if those already existing at the domestic level would suffice to meet the obligation in the first paragraph. One Member cited Article 41.5 of the TRIPS Agreement as an example of provision that made clear that there was no obligation to put in place a special

mechanism for implementation. In reply, the proponent stressed that the proposal did not require setting up a specific institution or tribunal.

2.24. In one Member's view, by stating in paragraph 3 that a decision shall be based, where required by law, on the record compiled by the administrative authority, the proposal could deny consideration of a party's arguments. Therefore, the delegation requested the proponent to review that phrase. Another Member sought clarification on the reasons for requiring the decision to be subject by the authority entrusted with administrative enforcement on paragraph 4, as well as on the types of administrative enforcement envisaged. In reply, the proponent indicated that the proposal did not impose any enforcement mechanism, as that depended on each Member's legal system.

2.25. As to paragraph 17.1 of the consolidated text, one Member cautioned against the use of terms such as "quasi-judicial", which differed from Article VI:2 (a) of GATS.

2.26. Finally, one delegation indicated that the proposal would benefit from clarifying certain key terms to avoid any confusions, particularly given sensitivities surrounding ISDS. The proponent assured Members that the proposal was not related to ISDS.

2.2 Section III *bis* – Temporary Entry for Investment Persons / Facilitation of Movement of Business Persons for Investment Purposes

2.27. Two participating Members submitted text proposals under this section.

2.28. One participating Member made a comprehensive presentation of its text proposal on the "Facilitation of Movement of Business Persons for Investment Purposes". She indicated that the proposal had to be read together with this Member's proposal on scope of the framework, which provided amongst others that "nothing in [this] framework shall be construed to confer any rights for market access and establishment". According to the proposal, governments retained full sovereignty over whether to allow entry, or not, of foreign investments, investors or their employees into their countries. Therefore, it was up to each government to approve or reject a visa, work permit, residency permit or any other permit that granted entry and temporary stay for a natural person. The disciplines contained in the proposal aimed at providing greater transparency and predictability for investors.

2.29. The proposal covered the "entry" and "temporary stay" of business persons. In the proponent's view, the term "temporary entry" related to visas as they allowed a natural person into a country for a temporary stay, even if only for a very limited time. In the proponent's view, while visas were important, work permits were more important for investors as they needed executives or specialists to oversee the smooth operation of their investments. The proposal included language based on paragraphs 2 and 4 of the GATS Annex on Movement of Natural Persons. It also included a provision based on Article VI:1 of the GATS, which required all measures of general application to be administered in a reasonable, objective and impartial manner. As to the proposal's transparency component, the proponent indicated that the aim was to make information accessible to all investors, regardless of their size. The other provisions in the proposal followed the order of a typical application procedure. The delegation presented examples to illustrate how the different provisions would apply in a real case scenario.

2.30. Due to lack of time, Members' questions on the proposal had to be deferred to the next meeting. Likewise, the other Member's presentation of its proposal under this section had to be postponed to the following meeting.

3 OTHER BUSINESS AND NEXT MEETING

3.1. The Coordinator announced that an additional informal virtual meeting would be held before the summer break, in the afternoon of 24 July 2020. At the meeting on 24 July the thematic discussions would resume starting from Section III *Bis* of the informal consolidated text.

3.2. The Coordinator also announced that a revised version of the informal non-consolidated text including the new proposal submitted prior to the meeting, as well as a non-attributable informal summary of the meeting, would be circulated to all WTO Members. The Coordinator 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.
