



WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

OPEN-ENDED INFORMAL VIRTUAL MEETING HELD ON 24 JULY 2020

Summary of discussions by the Coordinator¹

An open-ended informal meeting of the Structured Discussions on Investment Facilitation for Development, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile), was held on 24 July 2020.² As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting,³ its main purpose was to allow Members to continue the thematic discussion based on the latest version of the informal consolidated text.⁴ As also specified 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 the meeting.

1 BRIEF INTRODUCTION OF ANY NEW TEXT PROPOSALS SUBMITTED BY MEMBERS SINCE THE LAST MEETING

1.1. In the absence of any new text proposal submitted since the last meeting (held on 10 July), Members moved to the next agenda item.

2 THEMATIC DISCUSSION

2.1. Before resuming the thematic discussions where they had been adjourned, the Coordinator replied to questions raised by different delegations that had remained unanswered at the end of the last meeting.

2.2. Three questions pertained to element 12 of the informal consolidated text on "Fees and Charges".⁵ When asked about the meaning of "authorization fees and charges" in para. 12.1, the Coordinator answered that, in the absence of an agreed definition, the expression had to be considered in the context of the whole sentence of that paragraph – referring to the fees and charges "charged by [the Member's] relevant competent authorities for processing an application, including those charged for the amendment or renewal of such authorization". The requirement imposed on those fees and charges that they must be "commensurate with the costs incurred to process the application" seemed to indicate that the fees and charges were charged by the competent authorities to cover the (administrative) costs incurred to process the application. Another question regarded the footnote to para. 12.1 stating that "Authorization fees do not include fees for the use of natural resources, payments for auction, royalties, tendering or other means of awarding concessions, or mandated contributions to universal service provision". The Coordinator explained that the footnote aimed at clarifying that 'authorization fees' were different from 'extraction fees' (i.e., royalties or similar taxes) charged for the use (extraction, commercialization, etc.) of natural resources. Authorization fees aimed at covering the administrative costs of processing a license (related to paperwork, etc.), while extraction fees were charged for the right to explore and/or extract. Another question pertained to whether the fees and charges referred to in paragraph 12.2 of the informal

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/23 dated 20 July 2020.

⁴ Document INF/IFD/RD/50/Rev.2 dated 15 July 2020.

⁵ Document INF/IFD/RD/50/Rev.2, p. 20.

consolidated text⁶ were the same as the 'authorization fees and charges' mentioned in paragraph 12.1. The Coordinator suggested that this be further discussed and clarified in future drafting sessions.

2.3. Another question sought clarification of the relationship between paragraphs 10.2 and 14.1 of the informal consolidated text, both regarding the acceptance of authenticated copies in lieu of original documents. The Coordinator explained that sub-paragraph 10.2 set out the general obligation regarding the acceptance of copies in authorization procedures (with some flexibility language added in square brackets), while sub-paragraph 14.1(b) referred to an obligation to accept copies of documents submitted through electronic means as part of the online submission of applications. Finally, the Coordinator explained that the expression "integrity of the authorization process"⁷ seemed to indicate an authorization process guaranteeing the ability of competent authorities to verify the authenticity of relevant documents.

2.2 Section III *bis*: Temporary entry for investment persons/ facilitation of movement of business persons for investment purposes

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

2.5. The first Member briefly introduced its text proposal on the temporary entry for investment persons based on its recently concluded RTAs (adapted to a multilateral context). The obligations were kept relatively general to accommodate the diversity of Members' regulatory frameworks in this area and the wide range of sectors covered by the IF framework. The proposal also included a further elaborated definition of 'investment persons' based on existing FTA language.⁸

2.6. The second Member reiterated some cardinal points of its presentation made at the last meeting. Its proposal on facilitating the movement of business persons for investment purposes had to be read together with its proposed scope article (carving out market access). Furthermore, it incorporated the safeguards from the GATS Annex on Movement of Natural Persons – ensuring that no commitment was taken on border and/or labour market opening. Thus, Members retained full sovereignty over whether to allow entry of foreign investments, investors or their employees into their countries. The proposal was based on work by key international organizations, which found the regulatory environment regarding the movement of investment-related personnel to be an important determinant of FDI flows. The proponent highlighted that the proposed disciplines addressed problems faced both by domestic investors abroad and foreign investors in its territory.

2.7. Some delegations welcomed the two proposals and, offering preliminary comments (pending further analysis in their capitals), considered the facilitation of movement of business persons for investment purposes to be an important aspect of investment facilitation. They mentioned notably the publication of information on requirements for the temporary entry of investors, and the fostering of transparency, predictability and governance principles for the treatment of permit applications as relevant in this regard. At the same time, these delegations stressed the need for governments to protect their legitimate policy objectives and to retain full authority over whether to grant access to their territory and to whom. Regarding the second proposal,⁹ the need to keep paragraph 19 (acceptance and processing of applications in electronic format) as a best-endeavour provision was stressed. Many of the intervening delegations underlined the challenges in defining an 'investment person' and in operationalizing any such provisions. These challenges required further discussions.

2.8. On the other hand, some delegations expressed reservations on the proposals. They voiced doubts on the workability of including any such provisions in an IF framework as well as concerns on their nexus with mode 4 market access issues. Other Members saw room only for very precise and targeted/circumscribed provisions in this area.

2.9. A participating Member expressed the view that the obligations contained in these proposals went beyond the realm of investment facilitation. In its jurisdiction, measures affecting the

⁶ Adequate time-period between the publication of measures and their entry into force.

⁷ In sub-paragraphs 10.1(c) and 14.1(b) of the informal consolidated text.

⁸ The proponent noted in this regard that, in past discussions on its previous proposal, the question had been raised on the difference between an 'investor' and an 'investment person'.

⁹ Proposal entitled "Facilitation of Movement of Business Persons for Investment Persons", pp. 25-26 of document INF/IFD/RD/50/Rev.2.

temporary entry and stay – including procedural ones – were within the competence of migration and sub-national authorities. They were addressed bilaterally with other States, typically in mutual recognition agreements. The Member was not currently in a position to engage on these issues since an additional internal mandate would be required to do so.

2.10. Regarding the first proposal,¹⁰ that same Member enquired whether an 'investment person' (i.e., a natural person) was meant to include both service suppliers/investors as well as employees of services suppliers/investors. Regarding the second proposal,¹¹ it asked about the relationship between 'business persons' and the mode-4 categories contained in Members' GATS schedules. The proponent in question clarified that 'business persons' designated persons related to the investment/business, irrespectively of any particular GATS mode-4 categories. The Member also asked the proponents of the two proposals how they envisaged addressing Members' existing MFN exemptions under the GATS relating to the movement of natural persons. The proponent of the second proposal replied that the footnote relating to paragraph 3 of its proposal – which used the same wording as footnote 1 in the GATS Annex on Movement of Natural Persons – had been inserted to that purpose. The proponent stated its readiness to work on additional or amended language with interested Members.

2.11. The Coordinator observed that more discussions were needed on these topics, and encouraged Members to engage on them bilaterally, in small groups as well as multilaterally.

2.3 Section III *ter*: Transfers and subrogation

2.12. The proponent presented its proposal stressing that provisions on transfers and subrogation were typically included in its BITs and did not relate to market access or investment protection. Rather, they promoted transparency and procedural stability, thus improving the investment climate and facilitating investments. The provision on transfers aimed at facilitating transfers relating to profits as well as other investment-related capital flows (e.g. a foreign-owned subsidiary purchasing equipment/materials, for which it needed funds to be sent by its parent company). Transfers of capital occurred not only in relation to companies, but also their employees. The provision on subrogation (risk insurance) contributed to fostering a more secure business environment and thus, furthering investment. Both provisions were without prejudice to Members' right to decide on FDI applications. The proponent also indicated its interest in exception clauses (general, security related as well as other exceptions) and its intention to table a related proposal.

2.13. Many Members expressed reservations regarding the inclusion of provisions on transfers and subrogation into the framework. In order for their capital to better assess the proposal, they requested more information from the proponent regarding the relationship of these provisions with the scope and objectives of an IF framework.

2.14. One Member held the view that transfers of funds were a key element of the operation of investment and pleaded in favour of finding room in the framework for such a provision. The question was raised as to the relationship between the proposed provision on transfers and GATS Article XI; and also, whether the proponent could consider the introduction of an exception provision, such as GATS Article XII. The latter question was answered in the affirmative by the proponent.

2.15. Several Members regarded subrogation as akin to investment protection afforded to investors, notably in relation to ISDS claims – and thus outside the scope of an IF framework. The proponent replied that its proposal focused solely on the procedural aspects of subrogation and reiterated its willingness to discuss further with interested Members.

2.4 Preamble

2.16. Two Members submitted text proposals on preambular language, and three submitted a proposal on 'objectives' of the framework.

2.17. Several Members advocated that the preamble be developed at a later stage, once the framework provisions would be more advanced. The suggestion was made to replace 'framework' by 'agreement'. A Member presented its proposal on the preamble, stating its preference for the use

¹⁰ INF/IFD/RD/50/Rev.2, Section III bis, p. 24.

¹¹ INF/IFD/RD/50/Rev.2, Section III bis, pp. 25-26.

of the term 'investment' instead of 'FDI'. Another Member opposed the references made in the preamble to corporate social responsibility and specific international instruments, as well as the UN 2030 Agenda for Sustainable Development since the IF framework would exist beyond 2030.

2.5 Section I: Scope and general principles

2.18. Six Members proposed language under Section I.

2.19. Many Members who took the floor supported a wide coverage of FDI, including both services and non-services' sectors as well as the whole investment lifecycle. They argued that investors would not understand artificial dividing lines between investment stages. A Member suggested a wide and comprehensive 'overall scope' under Section I – to be complemented by more specific scope provisions under relevant sections. As an example, that Member stated that the scope of Section II ("Transparency of Investment Measures") could be more comprehensive as compared to the one of Section III ("Streamlining and speeding up Administrative Procedures and Requirements"). The latter could, for example, be limited to specific authorization procedures. What mattered most, it argued, were the framework's substantive obligations, which needed to be clearly defined.

2.20. Other Members argued that the current proposals on 'scope' were excessively broad and favoured, instead, a more precise and circumscribed definition of the scope – notably to minimize potential overlaps with BITs. A Member thought that the most efficient way to proceed was to model the scope of the IF framework on the definition of commercial presence (mode 3) in the GATS. Further discussion on how to best draft the exclusions of market access, investment protection and ISDS was also deemed necessary.

2.21. Overall, most Members who took the floor favoured covering only foreign *direct* investment (FDI) – to the exclusion of other types of investment and notably of indirect (portfolio) investment. Conversely, a Member argued that limiting the scope to FDI, which implied that it had to exceed a certain ownership threshold, would diminish the framework's value. That Member favoured, instead, a coverage of both direct and indirect investment – as provided for in its proposed definition of the term 'investment' under Section I.

2.22. Views differed on whether, or not, to list the different stages of the investment life cycle. Some Members advocating a more narrowly defined scope, were against listing the different stages of the investment life cycle. In their view, that would minimize the overlap with investment protection provisions in IIAs.

2.23. A Member stated that the extension of Members' obligations to measures adopted or maintained by sub-central governments would potentially be problematic and that, therefore, some obligations would need to be circumscribed to central governments. Finally, a Member requested clarification of the coverage of measures adopted or maintained by "non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities", as proposed by several Members in paragraph 1.4(b) of the informal consolidated text.¹²

2.24. **Definitions:** While some Members favoured the inclusion of definitions of 'investment' and 'investor' in the framework, many others were either unsure at this stage or opposed to include such definitions.

2.25. **Specific exclusions of specific sectors or activities:** Some Members indicated that they might need some sector-specific (or other specific) exclusions. The question of exclusions was deemed to depend on the nature of the substantive commitments in the framework and would thus, need to be decided upon later.

2.26. **MFN treatment:** many participating Members shared the objective of ensuring a non-discriminatory application of the framework – stressing that MFN treatment constituted a cornerstone of the WTO. One Member saw no need to include an MFN clause in the framework.¹³ Many Members agreed that, before devising concrete language for the MFN clause (and possible MFN exemptions), a clearer understanding of the framework's substantive provisions and scope of

¹² See INF/IFD/RD/50/REV.2, p. 7. The provision in question is based on GATS Article I:3(a)(ii).

¹³ It argued that element 7 of the informal consolidated text ("Reasonable, objective and impartial administration of measures") could serve that purpose.

application, including any benefits to be extended to other Members, was needed.¹⁴ At the same time, the need to avoid unintentionally 'importing' provisions from other IIAs through the framework's MFN clause was acknowledged. In this regard, a Member argued in favour of including also a reference to future IIAs in paragraph 32.3 of the consolidated text. Another Member mentioned possible drafting solutions ('non-importation' clause) in order to avoid this.

3 PROPOSED SCHEDULE OF MEETINGS FOR THE PERIOD SEPTEMBER–DECEMBER 2020

3.1. Participating Members endorsed the "Proposed Schedule of Meetings for the Period September–December 2020"¹⁵ and supported the switch to negotiating mode starting in September 2020. The Coordinator announced his intention to circulate a methodology of work together with the annotated agenda for the September meeting, following bilateral consultations that he would conduct with interested delegations in due course.

3.2. Some participating Members reiterated the commitment made by their Ministers in November 2019 to achieve a concrete outcome by MC12. They hoped that a comprehensive and ambitious outcome could be achieved at MC12 next year. To that end, they stressed, Members needed to make the best use of the four rounds of negotiations starting in September. They also hoped that a draft text reflecting convergence among Members could be achieved by the end of 2020 – as an early harvest and stepping stone for a concrete outcome for MC12. They encouraged Members wishing to do so to submit proposals as soon as possible. A Member stressed its objective to reach a balanced, sound and robust IF framework. Another delegation drew attention to the challenges in relation to the COVID-19 pandemic still faced by a number of Members, which needed to be taken into consideration.

4 NEXT MEETING

4.1. The next meeting (in-person, with virtual add-on over the Interprefy platform) will be held on 24-25 September 2020. The Coordinator stated that, in the morning of 24 September, time would be provided for Members who so wished to finalize the informal thematic discussions on the remaining sections of the informal consolidated text that could not be addressed before the summer break due to lack of time.¹⁶

4.2. The Coordinator encouraged all Members wishing to do so to send their text proposals or contributions as early as possible before the next meeting in September. All text proposals would be incorporated in further revisions of the informal consolidated text.

¹⁴ I.e., the exact benefits that should be extended to other Members needed to be better understood.

¹⁵ Document INF/IFD/W/24 circulated to all Members before the meeting; re-circulated as document INF/IFD/W/24/Rev.1 after its endorsement by participating Members at the meeting.

¹⁶ Sections IV, V, VI and VII of the informal consolidated text.