



7 October 2020

(20-6920)

Page: 1/7

Original: English

WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 24 AND 25 SEPTEMBER 2020

Summary of discussions by the Coordinator¹

An open-ended meeting of the Structured Discussions on Investment Facilitation for Development, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile), was held on 24 and 25 September 2020. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting,² the purpose of this meeting was two-fold: 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;³ and to start the negotiations on a multilateral framework on investment facilitation for development.

In keeping with the Joint Initiative's open, transparent and inclusive nature, all WTO Members were invited to attend the meeting.

1 GENERAL REMARKS

1.1. A delegation drew attention to the challenges still faced by participating Members in Africa due to the COVID-19 pandemic. He reminded Members that at the meeting on 24 July 2020, his delegation raised concerns regarding the COVID situation that was still evolving in Africa, and which was likely to undermine the effective participation of capital-based officials in the negotiations and their ability to provide guidance. Some of the COVID-related difficulties included restrictions on international air travels; difficulties in obtaining guidance from Capital on substantive negotiating issues requiring stakeholders' validation; as well as, more generally, the digital divide and IT infrastructure related difficulties, which might undermine their capacity to participate through virtual means. The last sentence of paragraph 3.2 of the report of the meeting held on 24 July made reference to his delegation's concern regarding the COVID situation, but did not capture the specific difficulties he had just mentioned. As stated at the July meeting, he called on Members to take note of these concerns. His delegation reserved the right to revert to any issue in the text with its views at any time before the conclusion of the negotiations.

1.2. Indonesia informed delegations that it had formally joined the initiative. The Coordinator welcomed Indonesia, highlighting that the initiative now counted with the support of 105 Members.

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

2.1. Two new text proposals were submitted prior to the meeting – one on measures against corruption⁴ and another one addressing the preamble, the objective, the scope and definitions, and corporate social responsibility.⁵

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 Document INF/IFD/W/25, dated 18 September 2020.

³ Sections IV, V, VI and VII of the informal consolidated text (INF/IFD/RD/50/Rev.2, dated 15 July 2020).

⁴ Document INF/IFD/RD/54, dated 21 September 2020.

⁵ Document INF/IFD/RD/55, dated 24 September 2020.

2.2. The proposal on measures against corruption was presented as part of the discussion on element 27 below. In presenting the other proposal, which addressed different provisions of the framework,⁶ the Member concerned focused on two aspects that had motivated the proposal. Firstly, while the scope of this initiative remained limited to facilitating investments through administrative improvements and the promotion of international cooperation and communication with relevant stakeholders, the provisions of the future framework could interfere with investment obligations set out in other IIAs, including their interpretation. In this regard, it was important to reduce those risks and avoid unintended consequences. Secondly, in a number of instances, regulatory measures and the right to regulate of States had been called into question by investors in ISDS arbitral tribunals. In this context the inclusion of corporate social responsibility standards in the future framework was of great importance to re-balance the rights and obligations of investors and Members, for example, by encouraging the adoption of responsible business conduct and best practices regarding environmental, human rights, labour, transparency and taxation matters, among others.

2.3. The Coordinator informed participating Members that a revised version of the informal consolidated text, including the written proposals presented thus far would be circulated to all Members prior to the next meeting.

3 INFORMAL THEMATIC DISCUSSION

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

3.1 Section IV: Contact / Focal point / Ombudsperson types of mechanisms, arrangements to enhance domestic coordination and cross-border cooperation on investment facilitation

3.1.1 Element 18: Contact / focal point /ombudsperson types of mechanism / National Investment Facilitator

3.2. Two participating Members presented proposals related to this element.

3.3. The first Member introduced its proposal for a national investment facilitator. The proposal called on Members to designate, establish or maintain a National Investment Facilitator, who would help investors navigate the host country's regulatory framework so that investments can be implemented faster and smoothly. Another objective of the proposal was to clarify the functions of the different types of mechanisms (e.g. contact points, enquiry points) referred to in the informal consolidated text. According to the proposal, the national investment facilitator would facilitate the settling of grievances between the government and the investor(s) and would take up the functions of the enquiry point, while the contact points would be in charge of technical assistance and capacity building. He further clarified that the proposal did not require Members to necessarily establish an investment facilitator on a de novo basis – they could designate an already established institution (e.g. an investment promotion agency) to fulfil the functions described in the proposal. The national investment facilitator would not replace competent agencies dealing with investment but would rather help investors deal with relevant procedures and paperwork.

3.4. The second Member presented its proposal. While reference was made in the text to different agencies (e.g. contact point, focal point, enquiry point), the proposal focused on the different functions that should be included in the framework and left the organization of the institutional structure to deliver those functions to each Member. The most important function was to respond to enquiries from investors. The proposal also foresaw allowing for the reception of enquiries from other Members, but this function was less important. Paragraphs 3 and 4 of the proposal called on Members to endeavor to establish or maintain appropriate mechanisms to assist investors to fulfill requirements, which was a central pillar of investment after-care services. In that regard, the proposal amounted essentially to a trouble-shooting mechanism, not a grievance mechanism. The proposal reassured Members that any information provided through any of these mechanisms was without prejudice as to whether the measure concerned was consistent with the investment facilitation framework. Referring to the other proposal, this Member considered that centralizing all

⁶ Document INF/IFD/RD/55, dated 24 September 2020.

these responsibilities in only one agency may be difficult to comply with. In that regard, he suggested that there should be flexibility regarding the institutional structure to fulfill those functions.

3.5. Several Members supported the proposal to designate or establish a national investment facilitator. Several others saw merit in the idea but considered that the concentration of all the functions in one single entity may be difficult to implement for a large number of governments. A number of Members suggested working on the basis of both proposals, focusing on the functions identified therein, but allowing Members the necessary institutional flexibility to implement them.

3.1.2 Element 19: Domestic Regulatory Coherence

3.6. One participating Member presented its text proposal on impact assessment of major regulatory measures within the scope of the framework. The proposal only encouraged Members to conduct such impact assessments and, in so doing, provide opportunity to domestic stakeholders to comment and take into consideration the potential impact of the proposed regulation on micro, small and medium-sized enterprises (MSMEs). In addition, drawing inspiration from article 8 of the TFA, the proposal encouraged Members to ensure inter-agency cooperation, thus implementing a whole-of-government approach in investment facilitation.

3.7. Some Members supported the proposal. Others indicated that while regulatory impact assessments may be difficult to implement by many Members, in particular LDCs, they could still go along with the idea provided it was conveyed as a best endeavours' obligation. In that regard, one Member suggested that this may be an area in which developing countries and least-developed countries (LDCs) might get technical assistance. Questions were posed by some Members regarding the definition of "major regulatory measure"; the relationship between the opportunity to comment by stakeholders under this provision and the similar obligation in Section II; the scope of inter-agency cooperation foreseen; and the reasons for taking into consideration only the impact on MSMEs.

3.8. The proponent clarified that the general objective of the proposal was to encourage Members to conduct regulatory impact assessments, not to make an obligation to be implemented as of the framework's entry into force. While the consideration of other impacts of regulations could be envisaged – and the language could be improved along those lines – the proposal's intention was that the potential impact on MSMEs be taken into consideration as well. The intention was to limit the provision only to major changes to regulation or legislation. The obligation to provide stakeholders with the opportunity to comment was an encouragement – the intention was to learn about everybody's concerns and views, but not to oblige the regulator to take every single comment on board. The final paragraph of the proposal, which encouraged Members to ensure inter-agency cooperation aimed at facilitating investment and avoiding conflicting requirements for investors, which was an essential aspect of domestic regulatory coherence.

3.1.3 Proposed new element 20: Domestic Supplier Databases

3.9. One participating Member presented its proposal encouraging each Member to establish or maintain a domestic supplier database, which was aimed at assisting investors in finding domestic suppliers. The database would list relevant domestic suppliers in specific sectors, including potential subcontractors and service providers, and exhibit, inter alia, the following features, where possible: highlight local production and services capacity through company factsheets; be searchable by sector or industry, name of product or service, etc.; be linked to aftercare services for investors; be available online, preferably in the Single Portal; be available in one of the WTO official languages; be consistently updated. The proponent explained that the proposal resulted from requests by investment promotion agencies and the private sector. Such a database would greatly benefit SMEs in investment-recipient countries.

3.10. The Members who addressed the proposal saw merit in the idea, which was drafted as a best endeavours' obligation. Some of them explained that since this type of databases were usually maintained by industry associations, the provision could be revised to reflect the private sector's leadership in this area. Other Members considered that while requiring the future WTO Committee on Investment Facilitation to establish a global database of domestic suppliers, as foreseen in the proposal, might be difficult to implement, the potential role of the Committee in this area was worth considering.

3.1.4 Proposed new element 21: Cross-border cooperation on investment facilitation

3.11. One participating Member presented its proposal on this element. The proposal called on Members to designate a contact point to facilitate co-operation among Members. Areas for co-operation, according to the proposal, include the exchange of information and sharing of experiences regarding the implementation of the framework; the exchange of expertise on regulatory and institutional matters, including project evaluation assistance; the exchange of information with respect to investment opportunities; the collection and compilation of data and statistics relating to investments; the promotion of cooperation with a view to increasing investment for development, including investment in and by micro, small and medium enterprises.

3.12. One Member considered that the proposal contained interesting ideas. However, the areas of co-operation envisaged were of diverse nature and could be addressed separately, in different ways. In that regard, he explained that cooperation through contact points could be addressed in the context of element 18, while other areas of co-operation, such as the exchange of experiences in the implementation of the agreement or the exchange of expertise on institutional matters, could be addressed within the WTO investment facilitation Committee. The exchange of information on business practices, as well as the promotion of business partnerships, seemed to go beyond the functions of the WTO.

3.2 Section V: Special and differential treatment for developing and least developed country members

3.13. Two participating Members presented proposals related to this section. The first Member considered that provisions on technical assistance and capacity building should be as comprehensive as in the Trade Facilitation Agreement (TFA) and aimed at helping developing countries, and particularly LDCs, implement the obligations resulting from the framework. The crucial importance of technical assistance and capacity building for the implementation of the investment facilitation framework explained the comprehensive proposal that appear as paragraph 25.6 of the informal consolidated text. The proposal aimed at putting the investment facilitation framework at the same level of the TFA in terms of technical assistance and capacity building. Technical assistance and capacity building should be directed at countries that really needed it and must be assessed case-by-case.

3.14. The other proponent explained that the scope of technical assistance and capacity building should be clarified. In that regard, capacity building should not become the purpose of the framework, but be adapted to the needs of each developing country-Member. Special and differential treatment must be given only to the Members that needed it and to the extent needed. This Member proposed that the extent of special and differential treatment be discussed at a later stage. Flexibilities for the implementation of the framework will depend on the actual content of substantive provisions. He added that paragraph 25.4 (cooperation with other international organizations) overlapped with paragraph 28.5 and was therefore not necessary.

3.15. All Members that intervened considered that special and differential treatment should be an integral part of the framework. Some of them considered that, development being a fundamental purpose of the investment facilitation framework, a high standard of special and differential treatment should be achieved. From that perspective, they supported in general the TFA approach. However, one of them drew Members' attention to the challenges faced in the TFA context with regard to donor engagement, adding that further information on developing and LDC Members' experience with TFA implementation would be useful.

3.16. Other Members considered that discussing special and differential treatment provisions at this stage of the negotiations was premature. The objective was to establish a set of practices that all Members would apply. The actual scope of flexibilities and technical assistance would depend on the type of commitments in the framework. One of them further considered that granting permanent exceptions for certain categories of countries was not necessarily development-friendly. Rather, what was development-friendly was to accompany those countries in the process of implementation. The implementation of some obligations would require additional resources, but others would not. He added that special and differential treatment had to be assessed on a case-by-case basis, based on needs, and time limited. He concluded that if obligations in the investment facilitation framework

ended up being comparable to the commitments reached in the TFA, then the TFA model could be a starting point for the conversation on this.

3.3 Section VI: Cross-cutting issues

3.3.1 Element 26: Corporate social responsibility/responsible business conduct

3.17. Three Members presented their proposals on this element.

3.18. The first Member explained that the obligations envisaged in the proposal applied to governments – there were no direct obligations for enterprises. The proposal called on Members to support the dissemination and use of relevant internationally agreed instruments, which had been adopted by most Members, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises and related due diligence guidance. The proposal also envisaged this as a working area of the future Committee on Investment Facilitation, and called for co-operation with relevant international organizations active in this field.

3.19. The second Member stressed that the proposal amounted to a best-endeavours' obligation. It stipulated that, in accordance with its laws and regulations, each Member should encourage enterprises operating in it or subject to its jurisdiction to voluntarily incorporate in their internal policies corporate social responsibility practices, provided that each Member shall not adopt or maintain measures for the purposes of this paragraph which imposed a new or more burdensome requirement on such enterprises.

3.20. The third Member explained that its proposal sought to establish a better balance between investors and host countries. In that regard, responsible business conduct (RBC) obligations reminded investors of their responsibilities. The proposal put forward a list of voluntary RBC principles to encourage investors to incorporate certain standards with a view to contributing to sustainable investment in the host country. The intention was not to create RBC standards. Finally, the proposal did not make reference to specific international instruments in this area since many Members had not taken part in their drafting or were not party to them.

3.21. Members that intervened on this element supported the inclusion of provisions aimed at strengthening the social responsibility of investments. Some of them enquired about the difference between the expressions "responsible business conduct" and "corporate social responsibility", which seemed to be used indistinctively. One Member agreed that Members should be encouraged to adopt best practices in this area, but clarified that, not being a member of the OECD, a cross-reference to an instrument emanating from that organization would not be possible. Regarding the latter, some delegations suggested that, drawing from the experience in other investment treaties, reference could be made to multilateral instruments in this area and to those to which a Member was signatory.

3.3.2 Element 27: Measures against corruption

3.22. Three Members presented their proposals on this element. The first proponent, whose proposal had been submitted just before the meeting, considered that preventing and combatting corruption was essential to the purpose of these discussions - creating a transparent, efficient and predictable environment for facilitating cross-border investment. Incorporating robust anti-corruption provisions in this agreement would be relevant and would add value to it. The provisions set out in the proposal enumerated specific steps that each Member should take to prevent and combat corruption as it related to foreign investment. The proposal was based on the CPTPP Chapter on Transparency and Anticorruption and other regional trade agreements, which in turn had adapted the obligations of the United Nations (UN) Convention against Corruption to the international trade context. The scope of this proposal was limited to measures to eliminate corruption with respect to matters covered in the agreement and recognized that the definition of offences covered were reserved to each Member's law. Furthermore, the proposal required Members to adopt or maintain measures to combat corruption, encouraged Members to adopt or maintain measures that promote integrity among public officials, sought to increase public awareness and recognized the important role that the private sector and society can play in the prevention and combating of corruption in matters affecting international investment.

3.23. The second proponent explained that the proposal aimed at clarifying the measures that Members were expected to apply in this area. The proposal therefore referred to the adoption of measures in conformity with the obligations under the UN Convention against Corruption.

3.24. The third proponent explained that its proposal required each Member to take measures against corruption, money laundering, terrorism financing, tax fraud and tax evasion, with regard to matters covered by this framework, in accordance with Members' legal system and internationally agreed standards endorsed or supported by that Member such as the UN Convention against Corruption and the OECD Guidelines for Multinational Enterprises, as well as the current standards in the field of international taxation.

3.25. While not negating the idea of including provisions on this matter, some Members questioned the comprehensiveness of the first proposal, including the selective reference to specific articles of the United Nations relevant convention. In replying to this question, the first proponent explained that his government did not consider anti-corruption to be just a tangential issue in the facilitation of investment – on the contrary, it was very pertinent. He further explained that the provisions from the UN Convention had not been repeated but had, rather, been adapted to this context, in order to make clear that these obligations would be mandatory and enforceable in the WTO.

3.4 Section VII: Institutional arrangements and final provisions

3.4.1 Element 28: WTO Committee on Investment Facilitation

3.26. One proposal addresses this element. The proposal spelled out the Committee's main functions and called on the Committee to maintain close contact with other international organizations active in the area of investment facilitation and to consult with investors and relevant stakeholders, as appropriate. The proposal also envisaged a discussion on the establishment of an Investment Facilitation Facility, emulating the TFA.

3.4.2 Elements 29 and 30: Exceptions

3.27. Two proposals addressed these elements. The first proponent explained that, for the sake of consistency with other WTO agreements, its proposal simply made the relevant articles of the GATT and GATS applicable to the provisions of this framework. The second proponent considered it important that the framework include security exceptions and exceptions to preserve financial regulation and policy.

3.28. One Member considered that exceptions should be discussed in light of the final provisions of the framework. Another Member supported the first proponent's approach with regard to general and security exceptions, but also saw merit in the inclusion of exceptions for financial regulation and policy.

3.4.3 Element 31: Dispute settlement

3.29. One proposal had been made on this element. It stipulates that for any dispute concerning the interpretation and application of the provisions of this Agreement, the parties shall only have recourse to the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The proponent explained that the proposal reinforced the exclusion of establishment rights and ISDS from the scope of the framework.

3.30. Most Members that intervened in this discussion supported the proposal. One Member however questioned the inclusion of a Dispute settlement chapter, given that the framework would not contain market access or national treatment obligations. Another Member referred to the placeholder for providing a grace period for the application of the DSU contained in Section V on SDT of the informal consolidated text.

3.4.4 Element 32: Final provisions

3.31. Two proposals had been presented on this element. In general, they both aimed at avoiding affecting the rights and obligations of Members under other WTO agreements. Some Members enquired as to the rationale for the reference to specific WTO agreements in both proposals.

4 ORGANIZATION OF WORK FOR THE PERIOD SEPTEMBER-DECEMBER 2020

4.1. Participating Members endorsed the proposed working methodology contained in the annex to the annotated agenda for this meeting.

5 NEGOTIATIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

5.1. On the second day of the meeting, participating Members started the negotiations on the investment facilitation for development agreement on the basis of the informal consolidated text, which includes the written proposals submitted by Members so far. They started the text-based negotiations by considering in detail the provisions in Section II on "Transparency of Investment Measures" of the informal consolidated text, focusing on the provisions regarding the "publication and availability of measures".

6 OTHER BUSINESS

6.1. The International Trade Centre (ITC) informed participating Members of the 3rd Virtual Capacity Building Workshop on "Implementing a Multilateral Framework on Investment Facilitation for Development", co-organized by the ITC, the German Development Institute (DIE), the World Association of Investment Promotion Agencies (WAIPA) and the World Economic Forum (WEF), and which was held online on 23 September 2020. The event, which was part of a broader project on investment facilitation by these institutions, aimed at building knowledge, gathering field level inputs, especially from the private sector, and building capacity in developing and LDCs to engage meaningfully in the negotiations. More than 150 persons attended the workshop. The ITC representative considered that, similar to trade facilitation, technical assistance and capacity building could play a key role in designing and implementing institutional and regulatory reforms for investment facilitation. He also drew Members' attention to an Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI prepared for the workshop. He added that the ITC stood ready to assist Members in their discussions on investment facilitation and in the implementation of investment facilitating institutional and administrative reforms.
