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Page: 1/4

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WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 9 AND 10 NOVEMBER 2020

Summary of discussions by the Coordinator¹

An open-ended negotiating meeting of the Structured Discussions on Investment Facilitation for Development, coordinated by Mr. Mathias Francke (Ambassador-designate, Chile), was held on 9 and 10 November 2020. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting², the purpose of this meeting was to continue the negotiations on a multilateral framework on investment facilitation for development – based on the latest version of the informal consolidated text³ and any other available text proposals by Members not yet incorporated into it. In keeping with the Joint Initiative's open, transparent and inclusive nature, all WTO Members had been invited to attend the meeting.

1 LATEST DEVELOPMENTS AND COORDINATOR REPORT ON THE RECENT INTERSESSIONAL MEETING

1.1. At the meeting, Chinese Taipei informed delegations about its decision to formally join the initiative and participate in the text-based negotiations on an investment facilitation framework. Its representative stressed its delegation's support for a comprehensive set of high-quality investment-facilitation rules to enhance foreign investments for development. The Coordinator welcomed the new participant, highlighting that the initiative now counted with the support of 106 WTO Members.

1.2. The Coordinator summed up the main outcomes of the open-ended intersessional meeting held on 29 October 2020 dedicated to the review of the 'Revised Draft Text' circulated under his responsibility.⁴ The latter covered most elements in Section II as well as seven elements in Section III of the informal consolidated text, based on Members' text proposals and discussions held at the September and October 2020 meetings.⁵ The meeting was very productive and revealed an important degree of convergence among participating Members, who considered the Revised Draft Text to provide a good foundation for moving to the next phase of the negotiations.

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

2.1. Two Members presented their recently circulated text proposals; both were well received by participating Members. The first Member who spoke presented its proposal⁶ containing preliminary views on the disciplines they wished to achieve in the negotiations as well as three concrete drafting proposals to insulate the future Agreement on Investment Facilitation for Development (hereafter 'IFD Agreement') from obligations in international investment agreements ('IIAs'). In the Member's view, in addition to the exclusion of market access, ISDS and investment protection, the future IFD

¹ This summary, prepared and circulated under the Coordinator's responsibility, provides a non-exhaustive, illustrative review of the issues addressed by Members at the meeting.

² Document INF/IFD/W/27 dated 3 November 2020.

³ Document INF/IFD/RD/50/Rev.5 dated 6 November 2020.

⁴ Document without symbol, dated 22 October 2020.

⁵ In Section II: elements 3. 'Publication and Availability of Measures and Information'; 4. 'Notification to the WTO'; and 5. [Specific Exceptions applicable to Transparency Requirements];

In Section III: elements 6. Reasonable, objective and impartial administration of measures; 7. General Principles for authorization procedures; 8. Authorization procedures; 10. Periodic review; 11 Use of ICT/e-Government; and 12. Independence of Competent Authorities.

⁶ Document INF/IFD/RD/57 dated 12 October 2020.

Agreement should include a provision banning the interpretation of its provisions as a basis of claims under IIAs. Furthermore, it should separate the scope of its obligations from other IIAs' obligations so that a breach under it could not be considered as a breach of any provisions under IIAs. Finally, in the context of MFN, the IFD Agreement should provide that it would not allow an importation of obligations from any other IIA into the IFD Agreement, and vice versa.

2.2. The second Member explained that its proposal⁷ had been developed with a focus on investors' concrete needs, notably the need to reduce uncertainty and red tape, and to be able to start operations in a timely fashion. Its communication proposed introducing three new tools into the IFD Agreement: the adoption of risk management techniques in investment authorisation processes; the 'silence is consent' principle; and a 'business obstacle alert mechanism'. A number of delegations viewed the proposed provisions, in particular the first two, as elements that could possibly be included under a future work programme rather than as obligations binding upon all Members.

3 TEXT-BASED NEGOTIATIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

3.1. Participating Members continued their negotiations based on the latest revision of the informal consolidated text⁸, alongside any other available text proposals by Members not yet incorporated into it. Unless otherwise specified, references to paragraphs hereafter refer to the informal consolidated text ('ICT').

3.1 Section III: Streamlining and Speeding up Administrative Procedures

3.2. Negotiations resumed where they had been adjourned at the 8-9 October 2020 meeting.⁹ Participating Members completed the review of the two remaining provisions in Section III of the ICT: appeal and review, and one-stop shop/single window types of mechanisms/single portal.

3.3. Participating Members re-affirmed the importance of provisions on appeal and review of administrative decisions, based on Article VI:2 of the GATS. They converged on the four-paragraph text proposal contained in the ICT – adding to it the second sentence of the first paragraph of the ICT, which was deemed a useful addition. The title of the element was changed to 'Appeal or Review' in recognition of the fact that Members did not necessarily maintain both procedures. From the discussion, 'appeal or review' emerged as an area of significant convergence, allowing the Coordinator to submit draft revised text.

3.4. Participating Members discussed the topic of one-stop shop/single window types of mechanisms/single portal with several reporting that they had established, or were in the process of establishing, a single portal with different functionalities. However, Members generally deemed a single-entry point for the submission and processing of applications as too sophisticated and challenging to make it a binding obligation under the IFD Agreement – even if they recognized, in principle, its merits for investors. Towards the end of that discussion, a Member presented a revised proposal on 'single portal', emphasising that it took into account its extensive consultations with a number of delegations. Many participating Members welcomed the revised proposal as more realistic and an important step towards finding possible common ground on this matter.

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

3.5. The negotiation on the mechanisms such as contact/focal point, ombudsperson and investor facilitator (element 18 of the ICT) was preceded by a conceptual discussion on the information and investor assistance mechanisms that appeared in the different sections of the ICT.¹⁰ Indeed, during past discussions, participating Members had noted an overlap between the functions of enquiry points (in Section II of the ICT) and some of the potential functions of the focal/contact

⁷ Document INF/IFD/RD/58 dated 23 October 2020.

⁸ Document INF/IFD/RD/50/Rev.5 dated 6 November 2020.

⁹ See summary in document INF/IFD/R/17 dated 23 October 2020.

¹⁰ The conceptual discussion was based on guiding questions and a comparative table of the mechanisms and functions foreseen in Members' current proposals sent in advance of the meeting. As announced in the Annotated Agenda for the 8-9 October meeting (document INF/IFD/W/26, paragraph 2.6), the provisions on Enquiry Points in Section II were addressed together with the different types of mechanisms in element 18 in Section IV.

point/Ombudsperson types of mechanisms (in Section IV of the ICT). The proposals submitted by Members under these two elements included a range of different obligations/functions (such as providing information, assisting investors and resolving their difficulties) as well as beneficiaries of the different mechanisms (investors and persons seeking to invest; other interested parties; governments). Thus, the conceptual discussion aimed at clarifying the objectives, functions and beneficiaries of these various mechanisms – so as to better devise the necessary institutional flexibilities to eventually implement them, as well as the drafting and placement of specific provisions in the IFD agreement.

3.6. In that regard, Members distinguished between three main functions and associated mechanisms: firstly, the assistance of *investors and persons seeking to invest* including support with problem-solving – e.g., responding to questions investors might have regarding any matters or measures covered by the Agreement; assisting them in contacting the right competent authorities and going through the necessary procedures to carry out their project. These were deemed to be the main objectives and functions of the types normally performed by focal points/an investor facilitator. A second function was that carried out by the more traditional WTO enquiry points¹¹, which focused on replying to enquiries from *Members* including those channelled through Members' enquiry point(s) on matters regarding the *functioning and implementation of the IFD Agreement* (and potentially also replying to enquiries from investors and other interested parties on these matters). A third function concerned contacts between *Members* (including their agencies) notably to coordinate their cooperation on technical assistance and capacity building under the Agreement, which was generally carried out through contact points. The discussion made it clear that element 18 in section IV of the ICT focused mainly on the first function mentioned above – while other functions could possibly be addressed under other relevant sections of the agreement.

3.7. Thereafter, participating Members reviewed the text proposals included under element 18 of the ICT. Several Members voiced concerns about a mandatory obligation to designate a single agency entrusted with so many different functions and responsibilities. They emphasized that it was up to Members to make the ultimate designation of the competent authorities(s) and/or agencies entrusted with defined enquiry and assistance functions – in accordance with their legal system and current practices. Placing undue institutional burden on Members should be avoided. Following the discussion, the Member concerned announced that it would table a revised proposal on 'investment facilitator'.

3.8. Turning to the provisions on domestic regulatory coherence, many participating Members deemed it useful and beneficial to include into the Agreement a provision *encouraging* Members to carry out, in accordance with their respective rules and procedures, an impact assessment when preparing major regulatory measures – along the lines of the text proposal by a Member under element 19, with some adaptations to be made to its language.

3.9. Turning to element 20 of the ICT, participating Members discussed the text proposal submitted by a Member, which encourages (best-endeavour language) Members to promote the establishment of one or more domestic suppliers database(s) with the aim of helping investors. The proponent explained that the proposal stemmed directly from a request from SMEs in its country, and that such 'matchmaking' between investors and local firms was one of the services most widely provided by investment promotion agencies (IPAs). He further clarified that governments would not be liable for the content shared through these databases, and that these could be managed by the State, the IPA, the private sector or through a public-private partnership. Participating Members showed interest in the proposal albeit also voicing some concerns regarding its implementation in practice. Several Members stated that they did not maintain such databases. It was advocated that the text of the proposal be revised to make it clear: (a) that such databases did not imply any governmental 'stamp of approval' regarding the local firms included in them; and (b) that the list of features in the proposed provision was indicative. The proponent stated that it would submit a revised proposal.

3.10. Addressing the provisions on cross-border cooperation on investment facilitation, participating Members discussed the text proposal requesting Members to designate a contact point to facilitate the (bilateral) cooperation between Members on matters covered by the Agreement, including technical guidance or assistance and support for capacity building. The proponent explained that the proposed contact points were aimed at promoting Member-to-Member cooperation, among others, on technical assistance and support for capacity building. Several participating Members expressed

¹¹ Such as, e.g., the enquiry point foreseen in GATS Article III:4 on "Transparency".

concerns about the mandatory character of the proposed provision ("shall designate") and questioned the need to designate a single contact point for that purpose. Instead, they advocated the adoption of a more flexible approach letting governments decide how, and at what level, they wished to cooperate (e.g., between different government agencies, different national IPAs). It was also noted that, unlike in the context of the TFA, cooperation on investment issues was more multi-dimensional involving many different actors. Mandating such bilateral cooperation to be channeled through a *single* contact point was not necessarily deemed as facilitating communication between governments and agencies. Finally, several participating Members advocated that all provisions on technical assistance and capacity building be, as far as possible, clustered in one single section of the Agreement.

3.3 Section III *bis*: Temporary entry for investment persons/ Facilitation of movement of business persons for investment purposes

3.11. Participating Members engaged in a constructive discussion based on the two text proposals contained in Section III *bis* of the ICT. While the proposals attracted support from some Members, many delegations stated that the IFD Agreement shall not address immigration issues. At the same time, some delegations stated that the discussions could focus on the transparency aspects of the proposals. In response to calls from several Members, the two proponents said they would work towards a common text proposal to facilitate future discussions.

3.4 Section III *ter*: Transfers and subrogation

3.12. Following an introduction by the proponent, participating Members discussed the two proposed elements. While it was acknowledged that the rules applying to transfers of funds by investors should be clear and transparent, participating Members generally questioned the merit of including a free transfer rule into the IFD Agreement. Several Members considered transfers and subrogation as pertaining to investment protection. The proponent stated that it would revert back to Members.

3.5 Section VI, element 26: Responsible business conduct

3.13. Participating Members discussed the different text proposals promoting the uptake by enterprises and investors of responsible business practices and due diligence. Several participating Members expressed their preference for using the term 'responsible business conduct' (instead of 'corporate social responsibility', which was used more for philanthropic purposes). The discussion addressed, *inter alia*, whether and how to make explicit reference to relevant international instruments endorsed by each Member in this area.

4 NEXT MEETING

4.1. In his concluding remarks, the Coordinator announced that he would prepare revised draft text under his responsibility covering those elements discussed at this meeting, on which he detected sufficient collective interest and convergence. An intersessional meeting would be convened on 23 November 2020 to have a conceptual discussion in informal mode on the 'firewall' provisions and, thereafter, to continue the negotiations on responsible business conduct and measures against corruption (Section VI of the informal consolidated text).

4.2. Another intersessional meeting would be organized on 27 November to discuss the revised draft text referred to in the previous paragraph and continue the negotiations on other provisions of the informal consolidated text. Following that, as foreseen in the schedule of meetings, the next regular negotiating meeting would be held on 7-8 December 2020.

4.3. The Coordinator encouraged all Members wishing to do so to send their text proposals and/or contributions as early as possible before the December meeting. A revision of the informal consolidated text incorporating the latest written proposals would be circulated ahead of that meeting.
