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## WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

### NEGOTIATING MEETING HELD ON 7 AND 8 DECEMBER 2020

#### *Summary of discussions by the Coordinator<sup>1</sup>*

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 7 and 8 December 2020. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting<sup>2</sup>, the purpose of this meeting was two-fold: (i) for the Coordinator to debrief Members about the main take-aways from the two open-ended inter-sessional meetings held on 23 and 27 November 2020 respectively; and (ii) for Members to complete, in negotiating mode, a first review of all the remaining sections and provisions of the future Agreement on Investment Facilitation for development ("IFD") as framed in the latest version of the informal consolidated text.<sup>3</sup>

The discussions focused on: definitions; MFN treatment; single portal; focal/enquiry point/investment facilitator; special and differential treatment; institutional arrangements and final provisions; as well as the preamble and objectives. 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 INTER-SESSIONAL MEETINGS HELD ON 23 AND 27 NOVEMBER 2020**

1.1. The Coordinator summarized the main take-aways of the two intersessional meetings held on 23 and 27 November 2020 respectively. At the 23 November intersessional meeting, Members held a conceptual discussion on the insulation of the future Investment Facilitation Agreement from international investment agreements (IIAs), and on how best to mitigate spill-over effects between the two – so-called "firewall" provisions. The discussion proved very useful and showed significant convergence amongst many participating Members on the desirability of a multi-pronged firewall approach, with appropriate provisions under different sections of the agreement (notably under "scope", "MFN treatment" and "dispute settlement"). The discussion also revealed the readiness of many Members participating in the negotiations to constructively seek solutions to address these issues.

1.2. At the intersessional meeting held on 27 November 2020, participating Members had reviewed new drafting suggestions ('revised draft text')<sup>4</sup> prepared by the Coordinator on a number of provisions in sections III and IV of the informal consolidated text, on which he had sensed significant collective interest and convergence. The newly added revised draft text concerned elements 9 ("Multiple applications") and 13 ("Appeal or review") in section III, as well as elements 16 ("Domestic

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<sup>1</sup> 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.

<sup>2</sup> Document INF/IFD/W/28 dated 2 December 2020.

<sup>3</sup> Document INF/IFD/RD/50/Rev.6 dated 4 December 2020. This document is being regularly updated to include the Members' latest text proposals and contributions.

<sup>4</sup> Revised draft text by the Coordinator (restricted document without document symbol) dated 23 November 2020, which was circulated to all WTO Members.

regulatory coherence") and 18 ("Cross-border cooperation on investment facilitation") in section IV of the informal consolidated text.<sup>5</sup>

1.3. Thereafter, the Coordinator updated participating Members on the five new text proposals that had been submitted since the last regular meeting<sup>6</sup>: a text proposal regarding authorization fees in the financial sector; a text proposal on the "firewall provisions"; and three revised proposals on, respectively, the single portal, domestic supplier databases and investment facilitator.<sup>7</sup> The latter three proposals were addressed in detail at the present meeting (see discussion under the following agenda item).

## 2 NEGOTIATIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

2.1. Participating Members managed to complete a first detailed review, in negotiating mode, of all the remaining sections and provisions of the future IFD Agreement based on the latest version of the informal consolidated text (INF/IFD/RD/50/Rev.6), namely: definitions and MFN treatment (section I); single portal (section III); focal/enquiry point/investment facilitator (section IV); special and differential treatment ("SDT", section V); institutional arrangements and final provisions (section VII); as well as the preamble and objectives.

2.2. On **definitions** (section I of the informal consolidated text), several participating Members reserved their more detailed comments to a later stage once the future Agreement's rules and obligations would be further advanced. Participating Members discussed the pros and cons of including a definition of "investment" in the future Agreement. Several participating Members stressed the importance that definitions be in line with the GATS, as well as the need to avoid any definitions that might create conflicts with IIAs. They expressed their opposition, in particular, to asset-based definitions of investment typically used in bilateral investment treaties and other IIAs. Whereas some Members converged on the desirability for the Agreement to focus on foreign direct investment (FDI), others preferred a coverage of 'investment' more generally. Several participating Members expressed reservations regarding the 10% equity threshold used as criterion to define FDI on the grounds that it was difficult to implement in practice. Some Members expressed a preference for using, instead, the definition of ownership and control of a company. Yet others were unsure of the need to include any definition of investment/investor/FDI given the Agreement's exclusion of market access and investment protection rights. Several participating Members expressed interest in including a definition of "measure" and "authorization", taking the GATS and services domestic regulation as a starting point.

2.3. On **Most-Favoured-Nation (MFN) treatment** (section I), participating Members discussed the question of including an MFN treatment obligation in the future Agreement. Many participating Members saw value in, and supported, the inclusion of a *carefully defined* MFN treatment obligation in order to avoid the inadvertent importation (or exportation) of treatment from (to) other IIAs. They invoked, as an argument in favour of including an MFN provision, that many of the obligations envisaged under the future Agreement (notably transparency and good governance standards) in practice already applied without discrimination among Members. Participating Members also discussed the question of including an economic integration exception to preserve the preferential treatment that the parties to an economic integration agreement granted to each other. The MFN obligation was discussed also in relation to the scope of the Agreement and the "firewall provision". Further discussions on the question of MFN treatment were deemed necessary, and the Coordinator encouraged Members to submit drafting proposals in this respect.

2.4. Regarding **single portal** (section III), participating Members welcomed the revised proposal<sup>8</sup>, which contained more flexible language. While the advantages of a single portal for accessing relevant information, notably for investors, were widely acknowledged, a number of participating Members expressed concerns notably about its function as single-entry point for the submission and processing of all documents necessary for investment applications. This was deemed overly

<sup>5</sup> Document INF/IFD/RD/50/Rev.5 at the time. The document is regularly updated to include incoming Members' proposals.

<sup>6</sup> Regular meeting held on 9-10 November 2020.

<sup>7</sup> The five new text proposals are contained in documents INF/IFD/RD/59, INF/IFD/RD/61, INF/IFD/RD/60, INF/IFD/RD/62 and INF/IFD/RD/63 respectively.

<sup>8</sup> Contained in document INF/IFD/RD/60 dated 12 November 2020.

ambitious, as well as problematic in light of the institutional arrangements and allocation of competences in the investment field in several participating Members.

2.5. The two revised proposals tabled by a Member – a streamlined proposal on **investment facilitator**, and a revised proposal on **domestic supplier databases** redrafted as an encouragement<sup>9</sup> – were seen by participating Members as welcome steps in the right direction. Whereas a few participating Members stated they could accept the redrafted proposal on investment facilitator, several Members expressed concerns regarding a *mandatory* designation or establishment of a (single) investment facilitator vested with the wide-ranging competencies as foreseen in the proposal. Notably the resolution of problems faced by investors, stipulated in paragraph 18.1(c) of the proposal, was considered as challenging since many Members' investment promotion agencies (IPAs) did not have the mandate to perform any dispute resolution functions. Regarding **domestic supplier databases**, it was clarified that these did not necessarily have to be established and managed by a government but could also be run by the private sector. Participating Members acknowledged that such databases could be valuable both for foreign investors and domestic producers.

2.6. Participating Members considered special and differential treatment for developing and least developed country Members (**SDT**, section V) to be a key pillar of any future "meaningful" Agreement on investment facilitation for development. Technical assistance and capacity-building were also seen as key for its future implementation. The Trade Facilitation Agreement's flexible approach was seen as a good starting point in this respect. While some participating Members stated that SDT should be needs-driven, evidence-based and time-bound, others emphasized that the negotiations on section V (SDT) of the future agreement needed to be guided by a full appreciation of the flexibilities featuring in the TFA. A participating Member speaking on behalf of two Members suggested engaging in a process of national evaluation to determine what kinds of provisions were the likely candidates for categories A, B and C, and expressed the view that support needed to be made available to developing countries and LDCs to undertake such national assessments. Some Members announced their intention to submit proposals/text contributions on SDT in the future. A few participating Members suggested organizing an informal session in 2021 to learn from the TFA experience on implementation and SDT – regarding both challenges and things that worked well – possibly in presence of TFA experts.

2.7. On **institutional and final provisions**, all participating Members saw value in establishing a **WTO Committee on Investment Facilitation**. Several Members stressed that such a Committee should be given the necessary leeway to define its work program. Others advocated that its functions should be sufficiently well defined, to avoid lengthy debates on the Committee's rules of procedure in the future. Several participating Members advocated taking the institutional arrangements of the Committee on Trade Facilitation enshrined in TFA Article 23 as a starting point.

2.8. Regarding **general** and **security exceptions**, many participating Members stressed the need for consistency with existing WTO agreements, advocating that the GATT/GATS' language for general and security exceptions should apply *mutatis mutandis* to investment facilitation for development – making those adaptations strictly necessary to cater for the Agreement's specific scope. Other participating Members called for more wide-ranging adaptations to be made, owing to the IFD Agreement's specific scope. Yet other Members signalled their flexibility as to the approach to be taken.

2.9. Regarding the **exceptions**, several participating Members saw value in including an exception for prudential measures in the financial sector. Others saw no need to include such an exception given that the Agreement did not cover market access and national treatment. The proponent of the provision on "Financial Exceptions" contained in the informal consolidated text stated its readiness to delete the footnote from its proposed text. Several Members raised questions with respect to paragraph 2.8 in that provision, arguing that the carve-out specified therein went beyond what was necessary for prudential reasons (and could, for instance, negatively affect transparency).

2.10. While there was significant support in favour of including general and security exceptions as well as an exception for prudential measures in financial services in the future Agreement, it was clear that further discussions would be needed on their specific wordings.

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<sup>9</sup> Revised draft proposals INF/IFD/RD/63 and INF/IFD/RD/62.

2.11. On **dispute settlement**, several participating Members stated their support for the text proposal stipulating that Members shall have recourse *only* to the WTO Dispute Settlement Understanding (DSU). Such language was seen as key also from the perspective of the firewall provision – with several delegations reiterating their support to a multi-pronged approach to "firewall", including a provision under dispute settlement. A few participating Members questioned the need to subject the future Agreement to the DSU's *adjudicating* mechanisms, given the Agreement's emphasis on facilitation and cooperation. Several participating Members highlighted the usefulness of alternative dispute settlement instruments, such as those foreseen in Article 5 of the DSU. A few participating Members pleaded for non-violation complaints to be excluded from any form of dispute settlement proceedings under the future Agreement. Also, the point was made that a separate article on "Consultations" needed to be added to the Agreement, as was the case in other WTO agreements. A participating Member spoke in favour of the inclusion of a provision stipulating that Article 22.3(c) of the DSU shall not apply to investment facilitation for development (to exclude cross-retaliation). Finally, a participating Member announced that it would present some technical modifications to its proposal on a firewall provision.

2.12. Participating Members had a constructive discussion on the **preamble and objectives**, showing a high degree of convergence notably on the Agreement's main objectives and the role of investment as a driver to achieve sustainable development. It was agreed that Members needed to revert to the preamble in more detail once the substantive provisions of the Agreement would have been finalized.

### 3 NEXT STEPS IN THE FIRST HALF OF 2021 (INCLUDING NEXT MEETING)

3.1. In his concluding remarks, the Coordinator shared with Members his assessment of the state-of-play of the negotiations – including those areas on which participating Members needed to focus their attention in 2021, as well as those provisions or sections on which further work amongst proponents was necessary. This overview by the Coordinator, in the form of a table entitled "*Investment Facilitation for Development Agreement – State of play (as of 8 December 2020)*", was circulated to all WTO Members by e-mail after the meeting.<sup>10</sup>

3.2. Also, the Coordinator announced that he would circulate further 'revised draft text', including new areas where he had detected sufficient convergence of views, as well as revisions to the previous version of the revised draft text<sup>11</sup> based on the discussions held at the intersessional meetings of 29 October and 27 November 2020. The 'revised draft text' by the Coordinator would be discussed at a meeting in January 2021.

3.3. The Coordinator informed Members that he would circulate a schedule of meetings for the first half of 2021 – proposing to hold 2-day negotiating meetings on a monthly basis, complemented by one-day intersessional meetings between them, as needed and appropriate.<sup>12</sup> He also announced his plan to conduct informal bilateral consultations with any interested delegations to discuss the way forward in the first half of 2021. Details of the organization of those bilateral consultations, which would be scheduled to take place around mid-January 2021, would be communicated to all Members after the meeting. Participating Members supported the proposed frequency of meetings and thanked the Coordinator for the significant progress achieved in 2020 despite difficult circumstances due to the Covid-19 pandemic.

3.4. The Coordinator encouraged all Members wishing to do so to send their text proposals or contributions as early as possible before the next meeting.

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<sup>10</sup> E-mail sent to all WTO Members on behalf of the Coordinator on 9 December 2020.

<sup>11</sup> Revised draft text by the Coordinator (restricted document without document symbol) dated 23 November 2020, which was circulated to all WTO Members.

<sup>12</sup> See document INF/IFD/W/29 dated 15 December 2020.