



WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 8 AND 9 MARCH 2021

Summary of discussions by the Coordinator¹

An open-ended negotiating meeting of the Structured Discussions on Investment Facilitation for Development, coordinated by Ambassador Mathias Francke (Chile), was held on 8 and 9 March 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting², the purpose of this meeting was: (a) to continue the negotiations on an Agreement on Investment Facilitation for Development; (b) to discuss the three newly added provisions of the Revised Draft Text prepared by the Coordinator, circulated to all Members on 2 March 2021; (c) to discuss the 'firewall' provisions based on the outcome report of the 'Discussion group on scope-firewall'; and (d) to hold focused discussions on the concept of 'authorization'.

1 CONTINUATION OF THE NEGOTIATIONS BASED ON THE INFORMAL CONSOLIDATED TEXT

1.1. Participating Members managed to complete the second review, in negotiating mode, of the remaining provisions based on the latest version of the informal consolidated text,³ alongside any other available text proposals by Members not yet incorporated into it. Negotiations resumed where they had been adjourned at the 9 February 2021 meeting. Unless otherwise specified, references to sections, elements and paragraphs hereafter refer to the informal consolidated text.

1.1 Business obstacle alert mechanism (element 18 in section IV)

1.2. The discussion was based on a specific proposal by a Member who explained that its proposed business obstacle alert mechanism constituted a 'central point' where investors could register concrete challenges that they faced – for instance, with obtaining an authorization. In its country, such a mechanism had been put in place in 2020. Currently, the proponent's authorities were in the process of further automating the system with a view to providing an online centralized platform. The proponent explained that the mechanism was inspired by the 'Trade Obstacle Alert Mechanism', implemented under an initiative of the International Trade Centre, which allowed companies to post online information, queries and reports about the challenges they faced in their daily export and import operations. While several delegations conceded that such a mechanism could be usefully applied to improve the investment environment and facilitate both the attraction and retention of foreign direct investment, they saw it as a voluntary mechanism, rather than as part of a future multilateral investment facilitation agreement.

1.3. Several Members asked for further clarification of the practical aspects regarding the implementation of such a mechanism. They pointed out the functional similarities and potential overlaps between the two proposed mechanisms, the business obstacle alert mechanism, and the proposed investment facilitator – both of which they considered as challenging to implement. It was suggested that, instead, the proposal could be included as part of a future work program, or for the exchange of good practices in the future WTO Committee on Investment Facilitation.

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/31 dated 2 March 2021.

³ Document INF/IFD/RD/50/Rev.9 dated 2 March 2021.

1.2 Domestic supplier databases (element 20 in section IV)

1.4. The discussion was based on a revised proposal on domestic supplier databases presented by a Member.⁴ The proponent explained that its revised proposal was framed as an encouragement and that it accommodated Members' previously identified concerns on the need to limit Members' responsibility derived from the use of such databases by clearly stating that Members shall not be liable for the information shared in such databases, particularly where they were maintained by the private sector (e.g., by a business association).

1.5. Many participating Members saw value in including the revised provision on domestic supplier databases in the future Agreement and considered such databases as a useful instrument to help matching foreign investors with domestic suppliers – including MSMEs. The Coordinator stated that he would propose some 'revised draft text' on this element, while accommodating some of the concerns expressed by a couple of participating Members.

1.3 Responsible business conduct (element 26 in section VI)

1.6. The discussion was based on a new proposal by a Member⁵ – in addition to those already included in the informal consolidated text. The proponent explained that the first paragraph of its proposal – built on existing proposals made by other Members – reaffirmed the importance Members placed on internationally recognized responsible business conduct standards, guidelines, and principles. The proposal explicitly provided flexibility by making it clear that Members were only recognizing those international standards that they had endorsed or that they supported. The second paragraph of the proposal called for Members to encourage investors to maintain meaningful engagement and dialogue with Indigenous peoples and local communities. Many participants welcomed the new proposal, which streamlined some of the proposals already contained in the informal consolidated text.

1.7. Many participating Members saw the inclusion of a provision on responsible business conduct in the future Agreement as contributing to sustainable investment and development. The title 'responsible business conduct' was preferred to the term 'corporate social responsibility', which was used more for private philanthropic activities of companies. Also, the title of Section VI ('Cross-cutting Issues') was viewed as misleading and needed to be replaced. Some concerns were raised regarding the identification of those international standards and guidelines that not all participating Members had endorsed or were supportive of. Finally, several delegations considered that it was important also to include in the provision an explicit reference to 'due diligence', which was an important concept for responsible business conduct.

1.4 Measures against corruption (element 27 in section VI)

1.8. Participating Members reviewed the text proposals included under element 27 of the informal consolidated text. One of the proponents explained that it had revised its text proposal⁶ to address concerns expressed by Members at a previous meeting, removing some of the elements that Members had found too prescriptive. Another proponent explained that its proposed footnote,⁷ which was added to another Member's text proposal, was to ensure that the anti-corruption provisions applied at all times.

1.9. Many delegations expressed their support to include provisions to prevent and fight corruption in the future IFD Agreement. A number of Members strongly supported referring to international anti-corruption instruments and standards in order to ensure that the disciplines defined under the future IFD Agreement would be in line with such international standards and would remain so in case the standards should evolve over time. In analogy to the provision on responsible business conduct, several delegations preferred to list in the text of the future Agreement only those instruments and standards adhered to, or supported by, the broad WTO membership. Many participating Members stressed the importance of keeping a balance between the approach on anti-corruption and the one on responsible business conduct in order to reflect the equal importance that Members attached to both issues. Finally, the point was made that the WTO dispute settlement

⁴ Document INF/IFD/RD/62 dated 26 November 2020.

⁵ Contained in document INF/IFD/RD/70 dated 8 March 2021.

⁶ Document INF/IFD/RD/71 dated 8 March 2021.

⁷ As stipulated under section 7 of its proposal contained in document INF/IFD/RD/66.

procedures shall not apply to matters arising from the application and enforcement of anti-corruption laws of Members.

1.5 General, Security and Financial Exceptions (elements 29, 30 and 30 bis in section VII)

1.10. Regarding the general and security exceptions, several delegations stressed the need for consistency with existing WTO agreements - advocating for the 1994 GATT and GATS language to apply *mutatis mutandis* to investment facilitation for development. A few participating Members reserved their positions with respect to the inclusion of the GATT exceptions. A delegation stated the need to have a more specific exception provision for taxation.

1.11. Turning to the financial exceptions, contained in element 30 *bis*, most participating Members saw value in including an exception for prudential measures in the financial sector. The discussion was based on the two proposals submitted by Members. Several participating Members saw merit in including a provision based on the prudential carve-out contained in paragraph 2(a) of the GATS Annex on Financial Services. A delegation questioned paragraph 2.7 of the informal consolidated text (based on the second sentence of paragraph 2(a) of the GATS Annex on Financial Services), arguing that it had self-cancelling effects that could disable the financial exceptions. Finally, several Members raised questions on paragraph 2.8 of the informal consolidated text,⁸ arguing that such a broad exception could possibly nullify some of the transparency provisions of the future Agreement.

2 DISCUSSION OF REVISED DRAFT TEXT PREPARED BY THE COORDINATOR

2.1. Participating Members reviewed the latest version of the Revised Draft Text⁹ put forward by the Coordinator covering three provisions based on Members' discussions held at the intersessional meeting on 9 February 2021. Overall, participating Members welcomed the latest version of the Revised Draft Text and estimated that the proposed language appropriately addressed the issues raised during previous discussions.

2.2. Regarding Article 3 on single information portal,¹⁰ participating Members welcomed its focus on the transparency aspects – including the new title of the provision, which includes the term "information". Several delegations, which did not have such a single portal in their domestic systems, were nonetheless ready to positively consider the proposed text given its flexibility language.

2.3. With respect to Article 10 bis on authorization fees applying to financial services (Section III), participating Members welcomed the revised draft text; some of them suggested regrouping the articles related to financial services into a dedicated annex or section.

2.4. Finally, concerning Article 15 on focal point(s) (Section IV), many participating Members supported the flexibility to establish "one or more" focal points as well as their responsibility to respond to enquiries from investors or persons seeking to invest (paragraph 15.1(a)). Concerning the possibility to assign additional functions to the focal point(s), such as problem-solving (paragraph 15.3), while several participating Members welcomed the flexibility introduced in the drafting, some reserved their positions on that paragraph.

3 DISCUSSION ON 'FIREWALL' PROVISIONS

3.1. The discussion on the 'firewall' provisions relating to the insulation of the future IFD Agreement from international investment agreements (IIAs) was based on the text contribution by the facilitator of the 'Discussion group on scope-firewall' circulated to all Members on 4 March 2021. The facilitator of the group presented the three firewall provisions included in the text contribution, respectively, under Scope, Most Favoured Nation, and Dispute Settlement. He explained that the text without brackets was supported by all Members participating in the Discussion Group, whereas views still diverged on the provisions appearing in between brackets.

⁸ The paragraph in question states that: "Noting in the framework applies to non-discriminatory measures of general application in pursuit of monetary and related credit policies or exchange rate policies".

⁹ Revised Draft Text by the Coordinator, restricted document without symbol, dated 2 March 2021.

¹⁰ See paragraphs 3.7 to 3.10. in Section II of the Revised Draft Text dated 2 March 2021.

3.2. As to the inclusion of a non-exportation clause under 'Scope' in the IFD Agreement, most participating Members saw value in including it in order to avoid that the future IFD Agreement be invoked in investor-state disputes under Members' respective IIAs. Regarding a possible non-importation clause under 'Scope' to prevent the use of IIA provisions for the interpretation of the IFD agreement, some Members considered it necessary, while others considered that such a provision was not needed.

3.3. With respect to introducing a firewall provision for purposes of clarifying the concept of "treatment" under the Most-Favoured-Nation (MFN) treatment, a few delegations reserved their position regarding the inclusion of an MFN provision in the future IFD agreement. Two delegations indicated their intention to submit proposals on the wording of the MFN provision in order to better define the "treatment" that should be accorded.

3.4. On "dispute settlement", all participating Members who intervened saw value in including a clause providing exclusive jurisdiction to the WTO dispute settlement system on disputes arising under the IFD agreement. A number of participating Members considered that the second paragraph under 'Dispute Settlement' in the facilitator's text contribution, which aimed at limiting the Panel's sources of interpretation when resolving disputes under the WTO DSU, was already covered by the first paragraph under 'Scope'.

4 CONCEPTUAL DISCUSSION ON THE CONCEPT OF 'AUTHORIZATION'

4.1. Participating Members discussed the concept of 'authorization' on the basis of the guiding questions circulated by the Coordinator in advance of the meeting. Regarding the application of the concept of 'authorization' to the different stages of the investment life-cycle, many delegations advocated applying this concept to the whole investment life-cycle, whereas some participants preferred to limit its application only to the initial stages of an investment – i.e., to the establishment phase, including the renewal of an investment.

4.2. Further to the discussion, participating Members provided examples on the types of procedures, decisions, and administrative actions that an authorization would cover at the different stages of the investment cycle. One delegation raised the question of whether an auction mechanism would be covered by the future agreement.

4.3. Concerning the need to specify that the provisions on 'authorization' under the future agreement apply with respect to an 'investor of another Member', several delegations stated that, while the same authorization would, presumably, apply to both domestic and foreign investors, the aim of the future agreement was to provide obligations with regard to foreign investors. Overall, participating Members saw value in including a definition of "authorization".

5 OTHER BUSINESS

5.1. Regarding outreach activities, the Coordinator informed participating Members that he had met with several WTO group coordinators. In addition, the Coordinator recalled that, on 24 February and 3 March 2021, he had participated in High-level Regional Roundtable discussions for the Caribbean and Africa, respectively organized by ITC, the German Development Institute, and the World Economic Forum together with local and regional partner organizations. The objective of these outreach efforts was to better understand Members' interests and concerns with regard to, and increase participation in, the negotiations.

5.2. Participating Members supported the proposal by the Coordinator to organize a debriefing session for relevant international organizations working in the field of investment facilitation in the margin of the next negotiating meeting in April 2021. Several participating Members expressed their appreciation to the Coordinator for his efforts and welcomed the proposed debriefing session. A delegation reported that it was planning to organize an outreach activity for Members of the Arab Group.

5.3. The Coordinator further informed participating Members of the creation of a new 'small group' on the facilitation of the entry and temporary stay of business persons for investment purposes, which would be facilitated by Guatemala. The small group would be open to all interested Members and would regularly report back to the plenary.

6 NEXT MEETING

6.1. The Coordinator informed participating Members that, an intersessional meeting would be held on 22 March 2021. Its main purpose would be to discuss the provisions newly added to, as well as further revised in, the Revised Draft text, and also to discuss the "firewall" provisions, for which the Coordinator would prepare a brief text. As foreseen in the schedule of meetings, the next regular negotiating meeting would be held in the second part of April 2021.
