



15 October 2021

(21-7831)

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Original: English

WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 12 AND 13 JULY 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 12 and 13 July 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting,² the objectives of the meeting were: (a) to hear the reports of the facilitators of the Discussion Groups respectively on 'Scope' and 'Facilitation of the Entry and Temporary Stay of Business Persons for Investment Purposes' (Movement of Business Persons – MBP); (b) to discuss provision 35 on 'Dispute Settlement'; (c) to discuss the 'Preamble' and provision 1 on 'Objectives'; (d) to review the provisions in the 'text box' under title 31 'Measures against corruption'; (e) to discuss provision 36 on 'Final Provisions'; and (f) to conduct a stocktaking exercise to assess the progress achieved thus far and plan ahead for the second half of the year up to MC12. In addition, two text proposals were presented by Members respectively on provision 30 ('Responsible Business Conduct')³ and provision 31 ('Measures Against Corruption').⁴

1 TEXT CONTRIBUTION FROM THE DISCUSSION GROUP ON 'SCOPE' AND REPORT BY THE FACILITATOR OF THE DISCUSSION GROUP ON 'MOVEMENT OF BUSINESS PERSONS'

1.1. The facilitator of the Discussion Group on 'Scope', Mr. Manuel Chacón from Colombia, presented the Group's text contribution on the definitions of 'measure' and 'investment activities',⁵ both terms being used in the first paragraph of the 'Scope' provision (itself based on a text contribution presented by the Group at a previous meeting⁶). The facilitator reported that the Group's work on three other definitions ('investor of a Member', 'investment', and 'enterprise') and on possible exclusions from the scope of application of the Agreement was still ongoing.

1.2. The proposed definition of 'measure', based on Article XXVIII(a) of the GATS, was overall well supported by participants. A couple of delegations raised concerns regarding the last part of that definition, namely the phrase "or any other form", which they considered as too open-ended – in particular in light of the IFD Agreement's wide scope. Another participant expressed its openness to use the proposed broad definition of 'measure' based on the understanding that it would serve as a 'ceiling' to the overall scope of the future Agreement and that individual provisions of the Agreement may stipulate a narrower scope, as appropriate. Participants shared a common understanding that the 'scope' had to be seen as a package – also including the exclusions from the scope as well as certain definitions. A couple of delegations advocated that the scope included a reference to the Agreement's facilitation objective. The proposed definition of 'investment activities', which covers the whole investment lifecycle (pre- and post-establishment phases), was also well received. A Member, however, reserved its position on this definition, reiterating its concerns about covering the pre-establishment phase. Another Member questioned the use of the term 'maintenance'.

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/35 dated 8 July 2021.

³ Document INF/IFD/RD/77 dated 13 July 2021.

⁴ Document INF/IFD/RD/78 dated 15 July 2021.

⁵ Text contribution submitted by the 'Discussion Group on Scope' on the definitions of 'measure' and 'investment activities' circulated to all Members on 9 July 2021.

⁶ Text contribution submitted by the 'Discussion Group on Scope' on the first paragraph on 'Scope' circulated to all Members on 14 June 2021.

1.3. The facilitator of the Discussion Group on 'Movement of business persons for investment purposes' (hereafter 'MBP'), Mrs. Debora Ponce from Guatemala, informed the plenary that the Group's last meeting had focused on a draft on a possible 'Transparency provision for MBP'. In this regard, the facilitator informed that she would circulate within the Discussion Group a revised version of this working provision incorporating suggestions made by participants during the discussions. Participants who took the floor considered that the draft on a possible transparency provision was going in the right direction. A Member stated that it saw a possible way forward for a provision on transparency but was unprepared to engage in a discussion on the administration of MBP measures as well as on any procedural requirements. A few Members expressed their openness to engage in discussions on administrative procedures as well.

2 DISCUSSION OF THE 'PREAMBLE' AND PROVISION 1 ON 'OBJECTIVES'

2.1. Participating Members discussed the Preamble of the future IFD Agreement together with the provision on 'Objectives', focusing on their respective functions, with a view to avoid overlaps between the two. Regarding the Preamble, which provides context for the application of the future Agreement, participants emphasized key points to be included, notably: the rationale behind the future IFD Agreement (facilitation/simplification), the importance of a predictable regulatory environment and international cooperation, the link to sustainable development and the SDGs, the special needs of developing and LDC Members, the specific consideration to be given to the situation of small and medium-sized enterprises, and Members' right to regulate. The importance that the Preamble reflected, in a balanced manner, the key elements contained in the future IFD Agreement was emphasized. Some participants favoured using in the Preamble the more generic term 'investment' instead of 'cross-border' investments.

2.2. Regarding a provision on 'Objectives', several participating Members saw value in including such a provision, while others were still reviewing whether a provision on 'Objectives' was needed. Recognising that there were many overlaps among the different proposals contained in the 'Preamble' and 'Objectives' provisions, the Coordinator suggested that he prepared 'Revised Draft Text' to streamline the provision on 'Objectives'.

3 PROVISION 30 'RESPONSIBLE BUSINESS CONDUCT'

3.1. Participants discussed the proposal submitted by a Member for provision 30 on 'Responsible Business Conduct' (RBC).⁷ The proponent explained that the rationale behind its proposal was to consider the issue of how governments could encourage investors to voluntarily incorporate RBC standards. In this regard, the proponent clarified that its proposal was drafted as an alternative text formulation for this provision, focusing on Members' obligation to publish via electronic means those internationally recognized RBC principles and standards they endorsed or supported. Participants questioned the value added of the proposal, highlighting that these RBC principles and standards were usually already available online. Participants further considered that the substance of the proposal (limited to publication) was too narrow and that the RBC provision in the Easter Text⁸ already provided an adequate level of flexibility for Members to encourage the uptake of RBC principles and standards by investors. In this context, some Members provided examples to illustrate how this obligation could be implemented (e.g., by providing training to agencies and stakeholders on RBC principles, establishing a national contact point to support the implementation of RBC principles, and creating an ombudsperson for addressing claims of abuses arising from the operations of companies).

3.2. Following questions posed by the Coordinator at a previous meeting on the inclusion of the terms "Indigenous people" and "traditional communities" in the RBC provision, the proponent of the term "Indigenous people" explained that meaningful engagement with stakeholders and local communities was reflected in several international instruments on RBC – notably the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines on Multinational Enterprises. The engagement with "Indigenous people" was explicitly mentioned in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. The proponent of the term "traditional communities" clarified that it considered the RBC provision should not only refer to internationally recognised standards, but also to business practices and internal policies. In this

⁷ Document INF/IFD/RD/77 dated 13 July 2021.

⁸ Document INF/IFD/RD/74 dated 12 April 2021.

context, the proponent explained that the rights of traditional communities were stated in its country's domestic legislation as well as in local customary law.

4 DISCUSSION OF PROVISION 31 ON 'MEASURES AGAINST CORRUPTION'

4.1. Two participants introduced a Joint proposal for provision 31 on 'Measures Against Corruption',⁹ replacing their previous respective proposals. Proponents explained that it was drafted following a similar approach as the RBC provision, by referring to existing relevant international obligations on the matter. The proponents clarified that they had focussed the scope of their proposal on anti-corruption (removing references to terrorism financing, etc.) and included, as an option, the mention of money laundering.¹⁰ Many participants welcomed the more focused proposal, considering that it went in the right direction. A few participants reiterated their preference for a more detailed provision, modelled after the comprehensive text proposal by a Member included in the 'Easter Text', considering that it provided more clarity in terms of the obligations that Members would be undertaking on this matter. The proponent of that proposal clarified that its proposal did not expand or modify existing international instruments on anti-corruption. Rather, it was based on the United Nations Convention against Corruption (UNCAC) but restricted to investment facilitation-relevant matters.

4.2. Another delegation announced that it would submit a text proposal on this provision, explaining that, in its view, a short and simple provision would be more appropriate in the context of the future IFD Agreement, given that the anti-corruption issue was already addressed at length in other international instruments (notably UNCAC).

5 DISCUSSION OF PROVISION 35 ON 'DISPUTE SETTLEMENT'

5.1. Participating Members discussed provision 35 on 'Dispute settlement' contained in Section VII ('Institutional arrangements and final provisions') of the Easter Text, expressing their support for making disputes concerning the interpretation and application of the provisions of the future IFD Agreement subject only to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO. Participants supported a text proposal encouraging Members to resort to good offices, conciliation, and mediation for resolving their disputes. Regarding this proposal, a Member suggested making those non-adjudicative means for resolving disputes a prior step before invoking a panel. Most participants shared the view that it would be more appropriate to encourage the use of non-adjudicative mechanisms under the DSU – however *without* making them a mandatory step before resorting to adjudication.

5.2. Regarding exceptions, most participating Members favoured excluding both responsible business conduct and anti-corruption measures from the application of the DSU. A Member proposed to exclude the possibility of resorting to cross-retaliation under Article 22.3.(c) of the DSU given that the future IFD Agreement would not include market access commitments. Several participating Members indicated that they were still assessing whether the exclusion of non-violation complaints was needed. The Coordinator announced that he would present 'Revised draft text' on provision 35 on 'Dispute Settlement' based on the discussion at the meeting.

6 DISCUSSION OF PROVISION 36 ON 'FINAL PROVISIONS'

6.1. Participating Members discussed provision 36 on '**Final provisions**', stating that they were still considering the elements to be included under this provision, particularly the reference to Section V on 'Special and Differential Treatment' (S&DT). Some participants suggested including additional elements such as: accession of other Members (depending on the final legal architecture of the Agreement); implementation of S&DT categories B and C; entry into force; as well as amendments. A Member suggested using the Trade Facilitation Agreement as a basis for the 'Final provisions' particularly in relation to the inclusion of a clause relating to implementation and special and differential treatment.

6.2. Participating Members also saw value in including a paragraph addressing the relationship between the future IFD Agreement and the rights and obligations of Members under other WTO

⁹ Document INF/IFD/RD/78 dated 15 July 2021.

¹⁰ It was argued that money laundering (illicit money flows) could, in certain cases, constitute a motive for outward FDI flows.

Agreements. On this issue, most participants advocated a text formulation that would make a reference to the GATT 1994, GATS, and TRIMs Agreement. It was pointed out that the third paragraph of provision 36 on 'Final Provisions' concerning the non-application of the MFN clause to treatment accorded under a bilateral or plurilateral agreement (paragraph in black numbered 32.3 in the 'Easter Text', document INF/IFD/RD/74) would be addressed as part of a possible MFN provision. Similarly, the fourth paragraph concerning the relation between the IFD Agreement and other international agreements covering investment (paragraph in black numbered 32.4 in the 'Easter Text') would be addressed under the scope and possible exclusions. Thus, paragraphs 32.3 and 32.4 under provision 36 on 'Final Provisions' could be deleted.¹¹

7 STOCKTAKING OF WORK OVER THE PERIOD JANUARY-JUNE 2021 AND NEXT STEPS

7.1. WTO Director General, Dr Ngozi Okonjo-Iweala delivered opening remarks at the session – highlighting considerable progress of the negotiations and emphasizing that facilitating investment flows to developing countries would be essential to sustain and accelerate the post-pandemic economic recovery – including the global vaccine roll-out and scale up of manufacturing capacity, notably in developing and least-developed economies. She also stressed that a shared endeavour of all Members was key to create a more effective environment for doing business and more predictable conditions to attract sustainable investment flows. Given the urgent need to put global investment back on track, DG Okonjo-Iweala encouraged Members to keep advancing the negotiations with an aim to present a text showing substantial and meaningful progress at MC12.¹²

7.2. The Coordinator debriefed the plenary about the main outcomes of the informal bilateral consultations he had held with interested delegations ahead of the meeting.¹³ All delegations in these consultations had expressed satisfaction with the progress achieved in the first half of the year – especially considering that the negotiations had been launched only since September 2020. Many delegations in the consultations had highlighted that the Easter Text was a key point in the process, allowing participating Members to focus on a single negotiating text and on those parts that needed further work. Special mention had been made of the important work carried out by the facilitators of the two Discussion Groups respectively on 'Scope' and the 'Movement of business persons for investment purposes'. Many participating Members had expressed their overall satisfaction notably with Sections II and IV of the future Agreement. The importance of making further progress on the provision on 'Scope' (including related exclusions and definitions) as well as on the key Section V on 'Special and Differential Treatment for Developing and Least-Developed Country Members' had been emphasized. The questions of the integration of the future IFD Agreement into the WTO legal architecture and outreach to non-participating Members had also been mentioned by many delegations in the consultations.

7.3. At the meeting, participating Members took stock of, and expressed their satisfaction with, the progress achieved thus far. The Ambassador of China delivered a statement on behalf of the Friends of Investment Facilitation for Development (FIFD),¹⁴ echoed by several delegations, highlighting the significant progress achieved, and emphasizing the importance of the future IFD Agreement for the post-pandemic recovery and sustainable growth. He also stated FIFD's intention to intensify outreach efforts with a view to enhancing the understanding of the future Agreement's benefits. In particular, participants welcomed the substantive progress achieved in the negotiations on the basis of the 'Easter Text' circulated in April 2021, which was deemed a milestone in the negotiations as it had allowed participants to negotiate on the basis of a 'single text', helping them to focus their attention on those issues that required further work. Since the issuance of the 'Easter Text', negotiations had considerably progressed on key substantive pillars of the future IFD Agreement – particularly on Sections II on 'Transparency of investment measures' and III on 'Streamlining administrative procedures', as well as most parts of Section IV on 'Focal points, domestic regulatory coherence, domestic supplier databases and cross-border cooperation'. In this context, the Coordinator announced that, before the August break, he would circulate a revised version of the 'Easter Text' ('Easter Text – Revision 1') reflecting the advancement in the negotiations since April – with a view

¹¹ See p. 38 of the original version of the 'Easter Text' contained in document INF/IFD/RD/74.

¹² ['DG Okonjo-Iweala welcomes progress on investment facilitation'](#).

¹³ Prior to the meeting, the Coordinator conducted informal bilateral consultations with interested delegations at the beginning of July 2021.

¹⁴ Friends of Investment Facilitation for Development (FIFD), currently consisting of 18 developing countries.

to further facilitating the discussions and providing a clearer view of the contours of the future Agreement.

7.4. Participants commended the Coordinator for his leadership and effective approach, as well as the Secretariat for its support to the negotiations. They reiterated their satisfaction with the important work carried out by the facilitators of the two Discussion Groups in steering their respective Group towards producing convergence text.

7.5. Regarding next steps up to MC12, participating Members emphasized the importance, in the coming months, to focus on advancing notably the provisions on scope/objectives as well as Section V on S&DT. On the latter, many delegations considered that technical assistance and capacity building were key to help developing and LDC Members implement the future IFD Agreement. Members also stressed the importance of intensifying outreach activities towards the wider WTO Membership. All participants reiterated their commitment and readiness to actively engage and work towards an 'as clean as possible' text, highlighting the importance of a substantial outcome for MC12.
