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## WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 7 AND 8 SEPTEMBER 2021

### *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 Ambassador Mathias Francke (Chile), was held on 7 and 8 September 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting<sup>2</sup>, the objectives of the meeting were: (a) to hear the reports of the facilitators of the Small/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 draft texts prepared by the Coordinator;<sup>3</sup> (c) to discuss Section V ('Special and Differential Treatment for Developing and Least-Developed Country Members'); and (d) to discuss Section IV *BIS* ('Home State Obligations'). The Coordinator also debriefed the group on the latest developments since the last meeting. Due to lack of time, the meeting did not address provisions 31 'Measures Against Corruption'; 30 'Responsible Business Conduct'; and 30 *BIS* on 'Establishment of Supplier-development Programmes' as stated in the annotated agenda. These issues will be discussed at the following meeting.

## 1 LATEST DEVELOPMENTS SINCE THE LAST MEETING

1.1. The delegation of Peru announced that it had formally joined the Initiative, emphasizing that, in light of post pandemic recovery, investment facilitation played an important role in attracting foreign investment and promoting sustainable development. Participants welcomed Peru as new (105<sup>th</sup>) participant in the negotiations. The Coordinator reminded the group that, since the last meeting in mid-July, five communications had been submitted by Members, including new text proposals on Section V ('Special and Differential Treatment (S&DT) for Developing and Least-Developed Country Members'),<sup>4</sup> a key focus for the coming months. In addition, the Coordinator briefly introduced the 'Easter Text – Revision 1',<sup>5</sup> which incorporates the progress achieved by participants since April 2021 (including further 'convergence text'), as well as new proposals submitted by participants since then. With the aim of organizing the work efficiently in the run-up to MC12, the Coordinator presented an indicative table laying down the 'Priority Work Areas'<sup>6</sup> for the second half of the year, based on priority topics identified by participants in the July stock-taking session.

## 2 DISCUSSION OF THE TEXTS PREPARED BY THE COORDINATOR

2.1. The Coordinator introduced draft texts, prepared under his responsibility, respectively on the Preamble; provision 1 on 'Objective'; provision 2 on 'Scope'; provision 24 on 'Cross-border cooperation on investment facilitation'; and provision 35 on 'Dispute settlement'.<sup>7</sup> The draft text for

<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/37 dated 27 August 2021.

<sup>3</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021.

<sup>4</sup> Documents INF/IFD/RD/80 dated 21 July 2021; INF/IFD/RD/81 dated 5 August 2021; and, INF/IFD/RD/82, dated 9 August 2021.

<sup>5</sup> Document INF/IFD/RD/74/Rev.1 dated 23 July 2021.

<sup>6</sup> 'Priority Work Areas', circulated to all Members on 27 August 2021.

<sup>7</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021.

the **Preamble** was well received and deemed to adequately reflect the main elements of the future IFD Agreement. The text includes twelve recitals addressing, among others, the relationship between trade and investment; the promotion of sustainable development; MSMEs; support to developing and LDC Members for implementation of the Agreement through technical assistance and capacity building (TACB); sustainable investment; and the right to regulate. Participants also expressed the view that some elements could be further streamlined or consolidated. Some participants also provided concrete drafting suggestions such as to replace the word 'reinforcing' by 'complementary' in the first recital on trade and investment. Some delegations suggested to move the reference to the 'Sustainable Development Goals' (SDGs) upper (possibly merging it with the recital on the importance of investment for promoting sustainable development); but one delegation stated a preference for deleting the reference to SDGs. Another delegation suggested to add a reference to transparency in the third recital. While a few delegations suggested to mention dispute prevention in the Preamble, others considered that this notion was already covered under domestic coordination. Regarding the recital on the right to regulate, it was suggested to replicate the formulation used in the 2017 Joint Ministerial Statement. Some Members questioned whether the exclusions on market access, investment protection and Investor-State dispute settlement should be mentioned here instead of solely in the Scope provision. Finally, one delegation presented its text proposal to add in the Preamble elements linked to sustainable development such as the participation of women, youth, minorities, indigenous peoples and underrepresented groups.<sup>8</sup> Delegations indicated their intention to revisit the Preamble when the substantive provisions will be more advanced.

2.2. On '**Objective**', the Coordinator explained that the text aimed at reflecting the ultimate goal of facilitating investment, which is to increase the flow of investment among Members, particularly to developing and LDC Members.<sup>9</sup> Participants discussed the actual objective of the future Agreement, expressing different views on whether facilitating investment was the objective, or only a means to the end of promoting the flow of investment in order to foster sustainable development. Members emphasized the need to read the 'Objective' provision in conjunction with the Preamble and 'Scope' to ensure consistency and to avoid unnecessary overlaps. While some participants questioned the need for a provision on 'Objective', others saw value in including this provision, stating that it would provide clarity on what Members aim to achieve with this Agreement. Several participants suggested including the element of 'facilitation' in the Objective by stating that the purpose of the Agreement was to 'facilitate' (rather than increase) the flow of [foreign direct] investment. Some delegations indicated a preference for the term 'investment', without specifying 'foreign direct'.

2.3. The Participants welcomed the draft text on the scope of application of the future IFD Agreement (titled '**Scope**'), which was based on the text contribution submitted by the Discussion Group on 'Scope', adding at the beginning the phrase "*with the aim of facilitating investments*".<sup>10</sup> A participant suggested to focus the scope on measures 'affecting investment facilitation'. On the relation between 'Scope' and 'Objective', and whether the former could incorporate the latter, some participants highlighted that the two provisions served different purposes, while others left open that possibility.

2.4. The revised draft text for provision 24 on '**Cross-border cooperation on investment facilitation**' was overall supported by participants.<sup>11</sup> While some participants requested to add new areas of cooperation, most delegations suggested to keep the list short and open. Regarding the possible areas for cooperation, some participants viewed that there was no need for paragraph 24.2 (d) as the chapeau of this paragraph already included language encouraging cooperation on matters falling within the scope of the Agreement and used the word 'may'. Participants also discussed a text proposal submitted by a Member suggesting additional areas of cooperation.<sup>12</sup> The proponent explained that its proposal, listing examples of joint activities between investment authorities, aimed at promoting facilitation agendas with a view to increasing investment for development. While some participants supported some of the areas in the list, most of them deemed it too specific, and cautioned about including additional elements. Several delegations indicated that they were still in the process of assessing the proposal. Regarding paragraph 24.3, several delegations advocated for

<sup>8</sup> Document INF/IFD/RD/83 dated 1 September 2021, page 2.

<sup>9</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021, page 3.

<sup>10</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021, page 3.

<sup>11</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021, page 4.

<sup>12</sup> Document INF/IFD/RD/83 dated 1 September 2021, page 3.

an encouragement language, viewing that Members should have flexibility to determine what types of cooperation activities they wished to inform the Committee.

2.5. Participating Members considered that the draft text for provision 35 on '**Dispute Settlement**'<sup>13</sup> was going in the right direction and reflected comments previously expressed by participants. Regarding the exclusion of non-violation complaints in paragraph 35.2, which contained a proposal in that sense, most delegations were still assessing the proposed text. Some Members viewed that excluding non-violation complaints could have systemic implications. Many participants saw merit in including paragraph 35.3, encouraging Members to resolve their disputes by resorting to good offices, conciliation, and mediation. Some participants suggested to exclude the possibility for resorting to cross-retaliation under Article 22.3.(c) of the DSU, considering that the future IFD Agreement will not address market access. All participating Members who intervened, except one, supported paragraph 35.4, which excludes the application of the DSU for matters arising under provisions 30 on 'Responsible Business Conduct' and 31 on 'Measures Against Corruption'.

### **3 DISCUSSION OF SECTION V ('SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING AND LEAST-DEVELOPED COUNTRY MEMBERS')**

3.1. Participating Members discussed Section V on '**Special and Differential Treatment for Developing and Least-Developed Country Members (S&DT)**' based on two text proposals<sup>14</sup> recently submitted, including a comprehensive joint text proposal complemented by an Annex on a 'Draft Indicative Investment Facilitation Needs Assessment Template'. Participants welcomed the text proposals as valuable inputs for the discussions on S&DT. The joint proponents explained that their proposal largely borrowed from the Trade Facilitation Agreement (TFA), aiming at complementing Section V of the 'Easter Text' with additional provisions as well as flexibilities, notably on notification of dates for implementation of categories B and C; early warning mechanism; expert group to support implementation of categories B and C; shifting between categories B and C; grace period for the application of the DSU; and Technical Assistance and Capacity Building (TACB).

3.2. The discussions focused on key differences between the proposed provisions and those of the TFA such as the inclusion of an obligation to assist developing and LDC Members with needs-assessments for categorization; longer transitional periods for notification and implementation, notably for category A measures (the proponents viewed the future IFD Agreement as including a wider set of measures and, thus, requiring longer transitional periods for implementation); the different formulations used for the provision on TACB ("shall" under the proposals vs. "should" as in the TFA); possible areas for TACB; as well as needs-assessment template to guide developing and LDC Members with categorization. Some questioned the need for longer implementation periods for category A measures, as well as the list of possible areas for cooperation, which in their view went beyond investment facilitation. On TACB, a number of participants questioned the language used in one of the recent proposals, which includes an obligation ("shall") to provide technical assistance and support for capacity building, while other participants supported the proposal. In this context, a number of participants suggested to keep the language as close as possible to the TFA. The Coordinator urged the proponents on S&DT to work together with the aim of finding common language, particularly on TACB.

3.3. Besides, several participants showed interest in the proposal for a draft indicative needs-assessments template. A number of participants emphasized that needs-assessment was key for proper categorization of provisions, while some of them highlighted the importance of TACB in this context. In the proponents' view, the 'Easter Text' already provided a good indication of the provisions to be included in the future Agreement and, therefore, the needs-assessment process should start as early as possible and before the conclusion of the IFD Agreement. While not referring specifically to needs-assessments, other participants stated the importance of providing an early indication of the time needed to implement the different provisions prior to the conclusion of the future IFD Agreement. A delegation raised questions linked to 'institutional aspects' or how to operationalize TACB provisions.

<sup>13</sup> Texts by the Coordinator, restricted document without symbol, dated 6 August 2021, page 5.

<sup>14</sup> Documents INF/IFD/RD/80, dated 21 July and INF/IFD/RD/82, dated 9 August 2021; as well as Document INF/IFD/RD/81, dated 5 August 2021.

#### 4 REPORTS BY THE FACILITATORS OF THE DISCUSSION GROUP ON 'SCOPE' AND THE DISCUSSION GROUP ON 'MOVEMENT OF BUSINESS PERSONS FOR INVESTMENT PURPOSES'

4.1. The facilitator of the **Discussion Group on 'Scope'** reported that the Group, which met for the eighth time on 7 September, continued to discuss the 'Exclusions' on market access, investment protection, and Investor-State Dispute Settlement from the scope of application of the future IFD Agreement. The Group discussed two possible approaches to be employed in the drafting of the exclusion provision, namely the "non-application/coverage" approach (providing that the Agreement does not apply to/cover market access) or the "not conferring rights" approach (the Agreement does not confer market access rights). The facilitator reported that all but one of the intervening participants supported the "not conferring rights" approach. In addition, the Group discussed the definitions of "investor of another Member" and "Investment". Regarding the first one, various aspects of this term were addressed (e.g., the inclusion of the concept of "permanent resident", the possibility for Members to be considered as investors, and the reference to "applicable laws and regulations" when evaluating the nationality of an investor). As for "investment", discussions focused on the two possible approaches to define this term: an "enterprise-based" or "asset-based" approach. A delegation pointed out that the need for a definition on 'investment' had to be considered in light of the scope of the future Agreement, which excluded market access. Several participants stated that the focus should be on foreign direct investment (FDI), which is well reflected through the "enterprise-based" approach, while some others favoured a broader approach in order to take due account of the right of minority shareholders.

4.2. The facilitator of the **Small Group on 'Movement of Business Persons for Investment Purposes'** (hereafter 'MBP') reported that the Group was focusing on a draft transparency provision to facilitate the entry and temporary stay of business persons for investment purposes prepared by the facilitator and incorporating views expressed by participants. The discussions on this text had been positive, although some Members had requested additional time to complete their internal consultations. A delegation expressed concerns regarding the reference in the proposed transparency text to "appeal and review" and "indicative timeframes". The facilitator announced that the Group's next meeting would aim at continuing the discussions on this draft text with the aim of submitting a text contribution for discussion at the plenary.

#### 5 DISCUSSION ON SECTION IV *BIS* ('HOME STATE OBLIGATIONS')

5.1. Participants discussed a recently submitted joint text proposal on '**Home State Obligations**', included under Section IV *BIS* of the 'Easter Text (Rev.1)'.<sup>15</sup> The proponents explained that their proposal aimed at recognizing the role of home States in facilitating outward sustainable investment, by encouraging Members to adopt or maintain, and make publicly available, appropriate measures to facilitate outward investment in areas such as investment guarantees, insurance, investor support services and fiscal measures. The text also encouraged Members to share experiences and information on these matters in the Committee on Investment Facilitation. While some considered that home States could play a role in facilitating investment, others questioned whether the proposal was within the scope of the future Agreement, which concerns inward investment. Other participants considered that the adoption of measures to facilitate outward investment should be at Members' discretion. Some Members saw value on some elements of the proposal linked to the transparency of measures aimed at facilitating outward investments, as well as on encouraging Members to share information on such measures in the Committee.

#### 6 NEXT MEETING

6.1. The Coordinator informed participating Members that, as foreseen in the 'Schedule of Meetings April – MC12',<sup>16</sup> the next intersessional meeting would take place on 23 September 2021 with the objective to discuss the following issues: provision 31 on 'Measures Against Corruption'; provision 30 on 'Responsible Business Conduct'; a proposed provision 30 *BIS* on 'Establishment of supplier-development programmes'; and Section III ('Streamlining and Speeding Up Administrative Procedures') as a whole.

<sup>15</sup> Document INF/IFD/RD/80 dated 21 July, pp. 1-2.

<sup>16</sup> Document INF/IFD/W/29/Rev.2 dated 22 April 2021.