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WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 4 AND 5 OCTOBER 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 4 and 5 October 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting², the objectives of the meeting were: (a) to continue the review of Section III ('Streamlining and Speeding Up Administrative Procedures') of the 'Easter Text (Rev.1)'³ as a whole; (b) to discuss Section V ('Special and Differential Treatment for Developing and Least-Developed Country Members'); (c) to review provisions 21 on 'Focal Points' and 22 on 'Domestic Regulatory Coherence', and discuss provision 24 on 'Cross-border Co-operation on Investment Facilitation'; (d) to discuss Section IV *BIS* ('Home State Obligations'); (e) to discuss Section III *TER* ('Transfers and Payments'); and (f) to hold a conceptual discussion on the integration of the future IFD Agreement into the WTO legal structure. In addition, a text proposal on 'Non-Discrimination' was presented by a Member.⁴

1 CONTINUATION OF THE REVIEW OF SECTION III ('STREAMLINING AND SPEEDING UP ADMINISTRATIVE PROCEDURES')

1.1. Participating Members continued their review as a whole of Section III on 'Streamlining and Speeding Up Administrative Procedures' of the 'Easter Text (Rev.1)'. The section was widely supported; however, it was highlighted that before its finalization, further clarity was needed on the definition of key concepts (notably 'authorization') and, as a result, on the section's scope of application.

1.2. Members participating in the meeting welcomed provision 12 on '**Reasonable, Objective and Impartial Administration of Measures**', provision 17 on '**Use of ICT/E-Government**', and provision 18 on '**Independence of Competent Authorities**' – all of which did not contain any bracketed language. Regarding provision 13 on '**General Principles for Authorization Procedures**', a delegation suggested that the last sentence of footnote 16, which reaffirmed the exclusion of market access rights from the Agreement, could be removed, provided that such exclusion was clearly stated in the Agreement's provision on 'Scope'. As for provision 14 on '**Authorization Procedures**', some participating Members suggested removing the last part of paragraph 14.1(c) – namely the expression "*from the authority holding the original or the authenticated copy*" – to allow for more flexibility.⁵ Regarding paragraph 14.1(i), several Members favoured the inclusion of the term "in writing" (and the deletion of the brackets around it) to ensure that investors received written and well-founded replies from competent authorities.

1.3. Regarding provision 15 on '**Multiple Applications**', a Member raised a concern regarding the encouragement to use a single-entry point for the applications. It explained that a single investment could be subject to a range of separate authorizations and processes, which were quite different from one another. However, all other delegations who spoke, were comfortable with, and supported,

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/38 dated 30 September 2021.

³ Document INF/IFD/RD/74/Rev.1 dated 23 July 2021.

⁴ Document INF/IFD/RD/85 dated 30 September 2021.

⁵ Note that paragraph 14.1(c) is inspired from TFA Article 10:2.2 on 'Acceptance of Copies'.

the language of provision 15 including the bracketed last sentence (*"Members may use the single information portal referred to in paragraph 7.1 under Section II for that purpose"*), given the very flexible language used.

1.4. In paragraph 1 of provision 16 on **'Authorization Fees'**, participants supported the inclusion of the term 'investment activities' to replace the language spelling out the whole investment lifecycle⁶ – provided an agreement could be reached on the definition of 'investment activities'. In this context, a delegation reiterated its position that the definition of 'investment activities' should exclude the pre-establishment phase (i.e., the establishment and acquisition of an investment). Regarding paragraph 16.2, a participant asked whether some flexibility could be added to its wording owing to the fact that, in its legal system, authorization fees came into force only upon their publication (making it difficult for it to foresee a time period between the publication and the entry into force of such fees). Another Member noted the use of different wordings for emergency situations in the future Agreement: whereas paragraph 16.2 used the phrase "except in urgent circumstances" (based on TFA), paragraph 5.1 mentioned "except in emergency situations". Regarding provision 16 *BIS* on **'Authorization Fees – Financial Services'**, a delegation enquired whether the same footnote as currently attached to paragraph 16.1⁷ should also be included in paragraph 16.3. Concerning provision 19 on **'Appeal and Review'**, participants supported the inclusion of the term "or procedures" (and deletion of the brackets around it) in paragraph 19.1. A Member was still reviewing the bracketed language in paragraph 19.3(b).⁸ Lastly, on provision 20 on **'Periodic Review'**, participants supported the inclusion of the terms "measures of general application within the scope of this Agreement" in paragraph 20.1 and suggested removing the reference to the World Bank's ease of doing business index in paragraph 20.3, due to its discontinuation.⁹

2 DISCUSSION ON SECTION V ('SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING AND LEAST-DEVELOPED COUNTRY MEMBERS' – S&DT)

2.1. Under this agenda item, participants discussed 'Draft Text'¹⁰ prepared by the Coordinator on provision 25 on **'General Principles'** of Section V, which was overall well received. This provision was deemed key as it lays the ground for the subsequent, more operational S&DT provisions in that Section. The 'Draft Text', which built on Members' text proposals as well as past discussions, aimed at streamlining those proposals, in order to allow participants to focus on key text alternatives. As to the different formulations for providing Technical Assistance and Capacity Building (TACB) in paragraph 25.2, participants expressed diverging views – some supported the use of the term 'shall'; while others favoured the term 'should' in line with the Trade Facilitation Agreement (TFA) approach. The latter group emphasized the need for balance between the possibility for recipients to self-designate and the requirement for donors to provide TACB. Participants also discussed the different formulations relating to TACB in the context of needs assessments, which were deemed important to help developing and least-developed countries with the categorization of provisions. Two delegations announced their intention to submit a text proposal on self-assessment to help clarify Members' understanding on this issue. Regarding provision 29 on **'Technical Assistance and Capacity Building'**, the same two delegations invited interested Members to participate in consultations to develop common ground and a possible text on S&DT and notably on TACB, ahead of MC12.

3 TEXT PROPOSAL ON 'NON-DISCRIMINATION'

3.1. Participants discussed on a preliminary basis a **text proposal on 'Non-Discrimination'** recently submitted by a Member as an alternative to the provision on Most-Favoured Nation (MFN) treatment. The proponent explained that its proposal, which departed from MFN language commonly used in WTO Agreements, aimed at avoiding the use of the term 'treatment'. Instead, it focused on the principle of 'non-discrimination' with respect to the application of provisions in the future IFD

⁶ Namely the phrase "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment".

⁷ The footnote states: "Authorization fees do not include fees for the use of natural resources, royalties, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision".

⁸ Bracketed language in paragraph 19:3(b): "; and a decision based on the evidence and submissions of record or, where required by its law, the record compiled by the administrative authority".

⁹ See the full statement on ['World Bank Group to Discontinue Doing Business Report'](#).

¹⁰ 'Texts for Discussion at the Negotiating Meeting on 4 – 5 October 2021', restricted document without document symbol, dated 28 September 2021; p. 3.

Agreement. Several participants welcomed the proposal, viewing it as in line with the nature of the IFD Agreement and as a good basis for discussion. In the ensuing discussion, questions were raised on the interpretation of the term 'other Members' in the first paragraph of the text proposal; as well as on the absence of an exception for Bilateral Investment Treaties (BITs) and the absence of a reference to the non-importation clause – unlike the proposed alternative provisions on MFN treatment. Some Members questioned such a departure from well-known language. Many participating Members were still considering the proposal and said they would revert back with comments at the next meeting.

4 DISCUSSION ON SECTION IV ('FOCAL POINTS, DOMESTIC REGULATORY COHERENCE AND CROSS-BORDER COOPERATION')

4.1. Participating Members reviewed provision 21 on '**Focal Points**', focusing on the two remaining bracketed phrases. A number of participants saw value in including, in paragraph 21.3, examples of additional functions that focal points could carry out (such as seeking to resolve problems of investors); while two Members preferred not to include such examples. Two other Members asked for clarifications on the difference between the functions of focal points laid out, respectively, in paragraphs 21.1(a) and (b). A delegation answered that paragraph 21.1(a) concerned situations in which an investor submitted a question to the focal point; whereas paragraph 21.1(b) related to assisting investors to obtain information from competent authorities, including assistance with administrative procedures. Participants welcomed provision 22 on '**Domestic Regulatory Coherence**', which did not contain any brackets.

4.2. Regarding provision 24 on '**Cross-Border Co-operation on Investment Facilitation**', the Coordinator presented further streamlined 'Revised Draft Text' prepared under his own responsibility.¹¹ While many participants welcomed the 'Revised Draft Text' as adequately reflecting previously expressed comments, two Members were still analysing it and thus had to reserve their position. Questions were asked about the definition of "domestic investors" and what the "exchange of information on domestic investors" was supposed to cover (both in paragraph 24.2(b) of the 'Revised Draft Text'). Participants considered that the indicative list of cooperation areas among Members' competent authorities should not be too prescriptive. They viewed sub-paragraphs 24.2(f) and (g), originally proposed by a Member¹², as pertaining to investment *promotion* (rather than facilitation) and thus, as going beyond the scope of the IFD Agreement. Finally, two participating Members questioned the need to include language on bilateral cooperation – in addition to multilateral cooperation – in the IFD Committee.

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

5.1. Participating Members discussed a text proposal submitted by two Members on '**Home State Obligations**' included in Section IV *BIS* of the 'Easter Text (Rev.1)'.¹³ Some participants reiterated their concerns about whether this provision was within the scope of the Agreement, arguing that some of its elements pertained to investment promotion. Other Members viewed that some elements in the text proposal, which were linked to transparency and the sharing of experiences in the Committee, could be included in the future Agreement, under the relevant provisions. Some participants reiterated their concerns regarding the sharing of information on the operations of individual companies/investors as well as on adopting measures to facilitate *outward* investment – which, they argued, was not covered by the future Agreement. The proponents informed that they would revisit their text proposal in view of submitting a revised proposal.

6 DISCUSSION ON SECTION III TER ('TRANSFERS AND PAYMENTS')

6.1. Under this agenda item, Members discussed Section III *TER* ('**Transfers and Payments**') of the 'Easter Text (Rev.1)', which includes the revised proposal submitted by a Member.¹⁴ The proponent reiterated the relevance of its proposal in particular to the pre-establishment phase of the investment lifecycle. It emphasized that the proposal did not pertain to investment protection, which is explicitly excluded from the scope of the future IFD Agreement. A delegation supported the

¹¹ 'Texts for Discussion at the Negotiating Meeting on 4 – 5 October 2021', restricted document without document symbol, dated 28 September 2021; p. 2.

¹² See section 2.2 of document INF/IFD/RD/83; p.3.

¹³ Document INF/IFD/RD/80; pp. 1-2.

¹⁴ Document INF/IFD/RD/76.

proposal, whereas another delegation expressed reservations on the text and held the view that it went beyond the scope of the future IFD Agreement. The proponent informed that it would consult with individual delegations to see how their specific concerns could be addressed.

7 CONCEPTUAL DISCUSSION ON THE INTEGRATION OF THE FUTURE IFD AGREEMENT INTO THE WTO LEGAL STRUCTURE

7.1. Following upon an academic discussion on the 'possible options to give legal effect to the outcome of the negotiations on investment facilitation for development' held on 31 May 2021, participants for the first time discussed among themselves the **integration of the future IFD Agreement into the WTO legal structure**, based on guiding questions circulated by the Coordinator.¹⁵ While recognizing that the integration of negotiated outcomes from Joint Statement Initiatives into the WTO legal structure was a systemic issue that went beyond investment facilitation for development and was linked to the broader WTO reform discussion, participants discussed the different legal options namely: incorporation as a stand-alone agreement either as an Annex 4 or as an Annex 1 Agreement¹⁶; incorporation in GATT/GATS schedules; or IFD Agreement applied on a provisional basis with a view to its future incorporation into the WTO legal structure. While discussing these options, participants had in mind the *specificities* of the IFD Agreement, namely its scope (coverage of both, goods and services sectors); the *erga omnes* application of most of its provisions, which would *de facto* be implemented on a non-discriminatory basis, thereby benefiting all WTO Members; and its strong development component providing for comprehensive technical assistance and capacity building for its implementation.

7.2. In general, participants stressed that the 'first-best option', by far, was to achieve a multilateral outcome, thus under Annex 1 of the WTO Agreement. In this regard, they highlighted that the IFD Agreement aimed at helping *all* Members, particularly developing and LDC Members, to implement investment facilitation reforms to attract and increase investment flows. Several participants stressed the fact that the IFD initiative had been launched by developing countries, and that over a hundred Members were currently participating in the negotiations.

7.3. Highlighting the pro-multilateral nature of the IFD initiative, participants discussed the *pros* and *cons* of the different above-mentioned legal options for incorporating the results of the negotiations in the WTO rulebook. Given the specificities of the future IFD Agreement, most participants considered that incorporating it as a stand-alone Annex 4 'Plurilateral Agreement', applied on an MFN-basis (or with its benefits accruing to all WTO Members), would be a valid 'second-best option'. Participants were cognisant that this option would, like the first-best option, equally require consensus. A delegation flagged that, in its interpretation, although an Annex 4 Agreement would not create any obligations or rights for non-participants, nothing prevented participants from *voluntarily* extending the benefits to non-participants. Regarding the inclusion of an MFN provision in the future Agreement, participants viewed that, although it could facilitate the consensus required, the decision to integrate the outcome of the IFD negotiations into the WTO legal structure critically depended on other factors – notably on political trade-offs in the broader WTO context, WTO reform issues, etc.

7.4. While some participants were open to explore the 'scheduling approach', most considered that this approach was not appropriate notably given the scope of the future IFD Agreement (covering both goods and services). It was argued that scheduling obligations related to investment in goods and services respectively under GATT and GATS schedules of commitments could result in a piecemeal approach and a fragmented, sub-optimal implementation of the Agreement. A participant stated that the inclusion into schedules of commitments could create expectations that the IFD Agreement covered market access. Other options discussed included the possibility of amending the WTO Agreement to create a new 'Annex 5' to incorporate the outcomes of 'open plurilateral' initiatives, as well as adopting the future IFD Agreement on a provisional/interim basis **pending its incorporation into the WTO Agreement**. A participant highlighted the need to think 'out of the box' and stated that it was exploring the possibility of resorting to Article IX of the WTO Agreement on 'Decision-making'. While stating their readiness to explore the different options more

¹⁵ Guiding questions prepared by the Coordinator, circulated to all WTO Members on 29 September 2021.

¹⁶ Pursuant, respectively, to Article X:9 and X:1 of the WTO Agreement.

in-depth once the time would be ripe, all participants stressed that the **priority was to advance on the text of the Agreement**, particularly its substantive disciplines and S&DT Section.

8 NEXT MEETING

8.1. The Coordinator informed participating Members that, as foreseen in the 'Schedule of Meetings for April – MC12,¹⁷ the next intersessional meeting would take place on 20-21 October 2021.

¹⁷ Document INF/IFD/W/29/Rev.2 dated 22 April 2021.