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## WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

### NEGOTIATING MEETING HELD ON 26 AND 27 JANUARY 2022

#### *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 26 and 27 January 2022. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting<sup>2</sup>, the objectives of the meeting were to: (a) discuss the latest developments following the postponement of MC12, including the Joint Statement on Investment Facilitation for Development; (b) continue the discussion on provision 4 ("Most-Favoured Nation (MFN) Treatment"/Non-discrimination) based on the proposals submitted by Members and the draft text by the Coordinator contained in the Annex to the "Easter Text (Rev.5)"; (c) discuss the remaining "Special and Differential Treatment" provisions included in the text boxes in Section V of the Annex to the "Easter Text (Rev.5)"; (d) have a discussion on "Investment Facilitation Needs-Assessment" in preparation for a dedicated session on this matter tentatively planned for the 14-15 February meeting; and (e) discuss the definition of "Investor of another Member", based on a "text contribution" prepared by the Facilitator of the Discussion Group on "Scope". Due to lack of time, Japan's proposal on "Transfers and Payments" was not addressed at this meeting.

### **1 DISCUSSION ON LATEST DEVELOPMENTS FOLLOWING THE POSTPONEMENT OF MC12, INCLUDING THE DECEMBER 2021 JOINT STATEMENT ON INVESTMENT FACILITATION FOR DEVELOPMENT**

1.1. The Coordinator recalled that, following the postponement of MC12, participants in the Joint Initiative held a meeting at Ambassadors/Heads of Delegation level on 30 November 2021, chaired by the Vice-Minister of Chile, where they welcomed the remarkable progress achieved in developing a pro-multilateral Agreement on Investment Facilitation for Development (IFD), as well as the increased interest of non-participants in the Initiative. As a result of that meeting, over 110 participating Members – including nine new co-sponsors – issued a third [Joint Statement on IFD](#) on 10 December 2021.<sup>3</sup> At the January meeting, participants reiterated the two commitments stated in the December 2021 Statement: first, to conclude the text-based negotiations by 2022 on the basis of the "Easter Text" prepared by the Coordinator, and second, to further intensify outreach efforts towards other WTO Members. They also welcomed the new participants in the Initiative, namely, Albania; Antigua and Barbuda; Georgia; Maldives; Panama; Papua New Guinea; Solomon Islands; Uganda; and Zimbabwe.<sup>4</sup> Antigua and Barbuda, as new participating Member, took the floor to highlight the key role of investment facilitation in fostering economic recovery in the context of the COVID-19 crisis.

1.2. Looking ahead, participants agreed with the Coordinator's suggestion to focus on the priority work areas in the coming months with the aim of advancing on the text as much as possible and meet the target deadline for concluding the negotiations. Participants identified as the key pending issues the work on definitions (notably of the term "authorization", which is key to determine the scope of Section III on "Streamlining and Speeding Up Administrative Procedures"); possible

<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/42 dated 20 January 2022.

<sup>3</sup> Document WT/L/1130 dated 10 December 2021. The first and second Joint Statements on IFD were issued in December 2017 and November 2019 respectively.

<sup>4</sup> For a list of participating Members in the IFD initiative please refer to the IFD Dedicated Portal in the WTO website ([https://www.wto.org/english/tratop\\_e/invfac\\_public\\_e/invfac\\_e.htm](https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm)).

exclusions to the Scope of application of the future IFD Agreement; Most-Favoured Nation treatment (MFN)/Non-discrimination; as well as "Special and Differential Treatment" provisions (including investment facilitation needs assessments). Other issues that will require further discussions in the coming months were Responsible Business Conduct (RBC); Measures Against Corruption; and "Movement of Business Persons for Investment Purposes". The Coordinator announced that he will circulate a table with priority areas of work in the following months based on the schedule of meetings, ahead of the next negotiating meeting.

## **2 CONTINUATION OF THE DISCUSSION ON PROVISION 4 ON "MOST-FAVOURLED NATION (MFN) TREATMENT"/NON-DISCRIMINATION**

2.1. Participants discussed the proposals submitted by Members and the draft text by the Coordinator on a possible provision on MFN treatment/Non-discrimination, based on a comparative table sent by the Coordination ahead of the meeting.<sup>5</sup> One proposal and the text by the Coordinator are based on the "traditional" MFN principle, while the other proposal follows a Non-discrimination approach. Although some participants remained sceptical on the need to include an MFN clause in the future Agreement, they constructively engaged in the discussions. While several participants favoured the inclusion of a "traditional" MFN provision, stating that the text by the Coordinator could provide a starting point, others expressed preference for the alternative "Non-discrimination" provision. The active and rich discussion focused on the two exceptions to the MFN/Non-discrimination principle, which are contained in all of the three proposals.

2.2. The *first* exception is to allow Members to provide more favourable treatment to preferential partners within agreements covering investment. While the aim of this exception was supported by participants, different views remain on the criteria to be adopted to qualify those agreements covering investment that would fall under this exception. In this regard, the proponent of the "Non-discrimination" provision indicated its intention to add in paragraph 4.2 a) of their proposal a reference to international investment agreements, in a manner similar to the text prepared by the Coordinator, in order to cover also bilateral investment treaties within that exception.<sup>6</sup> As for the *second* exception, which allows Members to provide preferential treatment relating to recognition measures (such as the recognition of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity) to certain parties based upon an agreement,<sup>7</sup> two participants inquired about the scope of this exception. They also sought clarification regarding the criteria to be applied to those measures or agreements, taking into consideration the conditions set forth in Article VII on "Recognition" of the GATS.<sup>8</sup> One participant flagged that, as this exception contains the term "authorization", the language of this exception would have to be revisited in light of the discussion on the definition of "authorization".

2.3. Participants also discussed the "firewall clause", which is included only in the two proposals that follow the "traditional" MFN approach. Many participants saw value in incorporating this firewall clause within the MFN/non-discrimination provision. A number of them also viewed that this clause should be as broad as possible as to cover provisions in other international agreements, besides those covering investment, which were addressed in the first exception.

2.4. Leaving aside the issue of the approach (MFN or Non-discrimination) contained in the first paragraph of the provision, it was made clear that further work was needed on the criteria that the exceptions would have to meet in order to benefit from the MFN exception. The Coordinator requested the two proponents to work together on this provision.

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<sup>5</sup> A comparative table on MFN treatment/Non-discrimination, document without symbol dated 13 January 2022.

<sup>6</sup> The additional text presented at the meeting by the proponent of the "Non-discrimination" provision to be added at the beginning of paragraph 4.2 a) reads as follows: "an International Investment Agreement, whether it is a separate agreement or an investment chapter in an agreement".

<sup>7</sup> The exception relates to measures providing for recognition, including the recognition of the standards or criteria for the authorisation, licencing, or certification of a natural person or enterprise to carry out an economic activity, or the recognition of prudential measures as referred to in paragraph 3 of the GATS Annex on Financial Services.

<sup>8</sup> Article VII.1 of the GATS provides that "for purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing, or certification of services suppliers and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based on upon an agreement or arrangements with the country concerned or may be accorded autonomously."

### **3 DISCUSSION ON THE REMAINING "SPECIAL AND DIFFERENTIAL TREATMENT" PROVISIONS**

3.1. Participants discussed the seven remaining "Special and Differential Treatment" (S&DT) provisions included in the text boxes in Section V of the Annex to the "Easter Text (Rev.5)" namely: provisions on "Implementation"; "Notification and implementation of category A"; "Notification of dates for implementation of categories B and C"; "Early warning mechanism- extension of implementation dates for provisions in categories B and C"; "Expert group to support implementation of category B and category C"; "Shifting between categories B and C"; and "Grace period for the application of the Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU). The joint proponents explained that these provisions are largely based on the Trade Facilitation Agreement (TFA). Overall, participants considered the TFA as a model for the S&DT provisions of the IFD Agreement and supported including the categorization approach based on self-evaluation in the IFD Agreement.

3.2. Regarding the notification and implementation periods for categories A, B and C, contained in the proposal, which differed from those in the TFA, many participants reiterated the importance of staying as close as possible to the TFA, unless there is a justification for departing from it. The proponents indicated that they were open to discuss those timeframes under the understanding that the needs assessments, which should start as soon as possible, would allow them to better evaluate the time and technical assistance and capacity building (TACB) needed to implement the provisions of the future IFD Agreement. Some Members also emphasized that those transitional periods should be read in conjunction with TACB provisions aimed at helping developing country and LDC Members implement the IFD Agreement. A number of participants also supported including TFA-like flexibilities (*i.e.*, early warning mechanism, shifting between categories and grace period for application of the DSU) viewing that they could add value to the categorization mechanism. The Coordinator indicated that the "Easter Text" would be updated to move the discussed proposals on S&DT to "plain text", comparing them to alternative TFA language, where applicable.

### **4 DISCUSSION ON "INVESTMENT FACILITATION NEEDS-ASSESSMENTS"**

4.1. Participants held a first and rich discussion on "Investment Facilitation Needs Assessment" based on guiding questions prepared by the Coordinator in preparation for the "Dedicated Session on Needs Assessment" to be held together with the February negotiating meeting. Overall, participants shared the view that a process of investment facilitation needs assessments (*i.e.*, gap analysis and identification of technical assistance and capacity building needs) was key to support the on-going negotiations, the outreach efforts towards non-participants, as well as for future implementation. Dominica and Grenada who had requested the dedicated session informed about its region's intention to launch a pilot project on self-assessment in the region, while Lao PDR underlined the importance of needs assessment for LDCs, signalling its interest to also take part in a pilot project. Many participants, including both potential recipient Members (developing/LDCs) and donor Members, emphasized the importance of starting a process of investment facilitation needs assessment as soon as feasible. They shared the view that the TFA needs assessment could provide a good starting point for this process.

4.2. Furthermore, participants emphasized the importance of working closely with international organizations active in the field of investment facilitation, while also highlighting the importance of ensuring coherence in the process of IFD needs assessments. In this regard, they concurred in inviting relevant international organizations, namely, the ITC, OECD, UNCTAD, WBG, IDB and WEF to participate in the Dedicated Session. In addition, trade facilitation experts from the WTO Secretariat would be invited to the dedicated session to share their experience on the TFA needs assessments. Participants also agreed with the Coordinator's suggestion that the Secretariat starts working on a "Sample" for an Investment Facilitation Needs Assessment Guide, viewing that the TFA Self-Assessment Guide could constitute a starting point.

### **5 DISCUSSION ON THE DEFINITION OF "INVESTOR OF ANOTHER MEMBER", BASED ON A "TEXT CONTRIBUTION" PREPARED BY THE FACILITATOR OF THE DISCUSSION GROUP ON "SCOPE"**

5.1. Participants discussed the definition of "Investor of another Member" based on a "text contribution" prepared by the Facilitator of the Discussion Group on "Scope", drawing on the

discussions by the Group on this definition.<sup>9</sup> While many participants positively considered this text contribution, others expressed doubts on whether this definition was needed in the future IFD Agreement. Among those that supported including this definition, views remained diverse on the use of the phrase "engaging in investment activities" (*in lieu* of the phrase "that seeks to make an investment") as contained in the "chaussette" of the definition, with the aim to embrace the "pre-establishment phase". While in general, participants converged on the importance of covering the "pre-establishment" phase in order to comprise "potential investors" within this definition, they had different view on how best to address this in the text. Taking into account views expressed by participating Members in past discussion, the Facilitator also presented a definition of "Juridical person", complementary to the definition of "Investor of another Member", as it appears in Article XXVIII (l) on "Definitions" of the GATS. Discussions on these definitions will continue at the plenary in the future; while the Discussion Group on Scope will focus on "other possible exclusions" of the future IFD Agreement.

## 6 NEXT MEETING

6.1. The Coordinator informed participating Members that, as foreseen in the "Schedule of Meetings January-July 2022",<sup>10</sup> the next negotiating meeting would take place on 14-15 February 2022. At that meeting, participants will discuss, among others: a revised text proposal by Japan on "Transfers and Payments", which could not be discussed at this meeting due to lack of time; the MFN/non-discrimination provision (focusing on the principle); the definition of "authorization"; a text proposal on "Supplier-Development Programmes"; and a text proposal on "Home State Obligations". A "Dedicated Session on Investment Facilitation Needs Assessment" will take place in the afternoon of 14 February with the participation of international organizations working on investment-facilitation related matters. This dedicated session aims to provide an opportunity for developing and LDC Members, potential donor Members and relevant international organisations to exchange experiences and ideas on how best to plan for the conduct of investment facilitation needs assessments, including particularly the development of tools for such assessment.

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<sup>9</sup> Text contribution prepared by the Facilitator of the Discussion Group on "Scope" on the definition of "Investor of another Member", circulated to all WTO Members on 18 January 2022.

<sup>10</sup> Document INF/IFD/W/41 dated 19 November 2021.