



WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 11 AND 12 MAY 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 11 and 12 May 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting,² the purpose of the meeting was: (a) to hear the reports of the facilitators of the Discussion Groups on 'Scope' and the 'Movement of Business Persons (MBP)'; (b) to continue the discussions on the inclusion of a 'Most-Favoured Nation' (MFN) treatment provision; (c) to discuss Section III *TER* of the 'Easter Text' on 'Transfer and subrogation'; (d) to review as a whole the 'plain text' in Section IV (including provisions on focal points, domestic supplier databases, domestic regulatory coherence and cross-border cooperation) of the 'Easter Text'; and (e) to discuss provision 30 on 'Responsible business conduct' contained in Section VI of the 'Easter Text'. In addition, time was set aside at the beginning of the meeting for the Member which had submitted a text proposal on specific transparency provisions to explain the specific changes its proposal would introduce to the relevant provisions of the 'Easter Text'.

1 DISCUSSION ON SPECIFIC TRANSPARENCY PROVISIONS (SECTION II OF THE EASTER TEXT)

1.1. Following the introduction of a text proposal on specific aspects of certain transparency provisions³ at the last negotiating meeting on 19 April 2021, the proponent further explained how its proposal would be incorporated in the relevant transparency provisions of the 'Easter Text'.⁴ The text proposal was overall well supported by participants. A delegation, who had voiced concerns at the previous negotiating meeting on some specific aspects of the proposal, informed the plenary that, following further bilateral consultations with the proponent, it might be able to support some of the proposed changes. For the time being, however, the delegation in question reserved its position, pending ongoing consultations in its capital regarding notably the proposed changes to provision 7.1 on 'Single information portal', and in particular the addition of the terms "*or series of websites*". The delegation considered that such addition might dilute, and cause the provision to depart from, the concept of 'Single information portal'. Another participant raised similar concerns.

1.2. On a different note, a delegation suggested harmonizing the language used to refer to the 'beneficiaries' ("*investors, other interested persons and other Members*") across provisions 5 and 6 in Section II of the 'Easter Text'.

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/33 dated 7 May 2021.

³ Document INF/IFD/RD/73 dated 7 April 2021.

⁴ Consolidated Document by the Coordinator ('Easter Text'), document INF/IFD/RD/74 dated 12 April 2021.

2 REPORTS BY SMALL/DISCUSSION GROUPS

2.1. The facilitators of the discussion groups respectively on 'Scope' and on the 'Facilitation of the Entry and Temporary Stay of Business Persons for Investment Purposes' (Movement of Business Persons – MBP) informed the plenary about their ongoing work and future envisaged steps.

2.2. Since the last intersessional meeting, the Group on 'Scope' met once, on 7 May 2021. Meetings followed the same transparent approach that characterized the overall IFD Structured Discussions, with invitations to meetings being sent to all WTO Members and providing the opportunity for all Members to express their interest in participating in the Group's meetings. Participating delegations agreed on the three parts to be addressed by the Group as a priority, namely: the main 'Scope' provision ('*chapeau*'); a number of key terms that were crucial to define the 'Scope' ('definitions'); and thirdly, the different exceptions to the 'Scope'. Currently, the Group was focusing on a possible 'landing zone' (consensus language) for the main 'Scope' provision. The facilitator reported that, although further discussions were needed, convergence on a possible text for the '*chapeau*' of the 'Scope' provision was starting to emerge.

2.3. The facilitator of the Group on MBP, which met for the first time on 30 April 2021, informed the plenary that the conceptual discussion based on some guiding questions she circulated ahead of the Group's meeting, had contributed to a better understanding of participants' positions. Questions had been raised in the Group about whether investment facilitation also included the movement of associated businesspersons. The group also discussed the concepts of transparency and procedures on MBP-related applications, and the relation between Sections II and III of the 'Easter Text' and existing proposals on MBP. Finally, the facilitator also informed the plenary that some of the proponents on MBP had expressed the wish to invite international organizations to make a presentation on the importance of MBP with regard to investment facilitation, as well as for the Secretariat to present MPB-related provisions in RTAs, at the plenary meeting.

3 CONTINUATION OF THE DISCUSSION ON THE 'MOST-FAVOURLED-NATION (MFN) TREATMENT' PROVISION

3.1. Participating Members continued their discussion on the possible inclusion of a 'Most-Favoured-Nation (MFN) Treatment' clause in the future Agreement, based on a text proposal submitted by a Member at the intersessional meeting on 30 April 2021.⁵ The proposal includes a '*chapeau*' stipulating the MFN treatment obligation with respect to the application of provisions set out in the Agreement; two exceptions, respectively for recognition measures and for certain types of bilateral, regional or multilateral agreements; as well as a 'firewall' provision.

3.2. The discussion generated a high level of engagement by participants who exchanged detailed views on the specifics of the proposal and possible formulations for such clause. The question of whether the MFN clause would apply only among the 'Parties' to the future IFD Agreement, or to all WTO Members was left aside for the time being. Many participating Members who intervened saw value in including a carefully crafted and circumscribed ("with respect to the application of provisions set out in this agreement") MFN language, paired with a corresponding firewall provision, in order to emphasize the pro-multilateral character of the initiative.

3.3. On the other hand, however, several Members reiterated their concerns on the application of an MFN provision and questioned its need/value added in the IFD Agreement context, stressing that most provisions of the Agreement would likely anyhow apply on an MFN basis in practice. A couple of delegations reiterated their concerns regarding the application of an MFN provision at the sub-federal level – also expressing concerns on the inclusion of an MFN provision in light of the broad scope of the future IFD Agreement (likely coverage of all stages of an investment) and the breadth of the definition of the term "measure". Two delegations suggested that, if an MFN provision was to be included in the IFD Agreement, the latter should provide ways for the signatories to make reservations from the MFN obligation.

3.4. Regarding the text of the MFN proposal, many participants considered that the drafting was going in the right direction, although further clarification and modification of some terms used in the proposal were deemed necessary. The proponent replied to questions that had been raised at the

⁵ Document INF/IFD/RD/75 dated 29 April 2021.

last meeting regarding some of the terms employed in the 'chapeau' ("immediately and unconditionally"; "like situations" *versus* "like circumstances"); as well as the meaning of some terms qualifying the exceptions to the MFN obligation "abolish substantially all barriers" or "approximation of legislation"), as well as the exclusion of recognition measures from the MFN application. On the chapeau of the proposal, several participants expressed a preference for using the phrase 'like circumstances' (in lieu of 'like situations'). Regarding the proposed exception to the MFN treatment for recognition measures, a participant pointed to differences compared with Article VII of GATS, which addresses the same type of exceptions. Finally, on the non-importation clause, participating Members shared the view that it was necessary to include such clause and widely supported its formulation in the proposal, which was based on the text contribution submitted by the 'Discussion group on scope-firewall' to the plenary meeting on 9 February 2021.

3.5. At the end of the discussion, the Coordinator announced that he would reflect further and possibly prepare text on a possible MFN treatment provision based on text proposals submitted by Members as well as comments made by participants at this, as well as earlier meetings.

4 DISCUSSION ON 'TRANSFERS AND PAYMENTS'

4.1. Under this agenda item, participants discussed a Member's revised proposal on 'Transfers and Payments',⁶ replacing its former proposal on 'Transfers and Subrogation' contained in Section III *TER* of the 'Easter Text'. The proponent explained that its revised proposal took into consideration comments made by Members on the previous text proposal. The revised proposal aimed to ensure that measures relating to transfers and payments were based on objective and transparent criteria. Several participants considered that this provision was related to investment protection, which is explicitly excluded from the negotiations. While others held the view that the proposal was already covered by provision 13.2(a) in Section III of the 'Easter Text', and therefore, saw no need to include it.

5 REVIEW AND DISCUSSION OF PROVISIONS IN THE 'EASTER TEXT'

5.1 Section IV (Focal points, Domestic supplier databases, Domestic Regulatory Coherence and Cross-border Cooperation)

5.1. Under this agenda item, participating Members conducted a review of the 'plain text' in Section IV as a whole. Participants overall supported the Easter Text, with some of them making specific suggestions. Regarding provision 21 on 'Focal Points', participating Members largely supported the text as contained in the Easter Text, while some reiterated their concerns particularly on the possible additional functions that Members may decide to assign to focal points, such as to seek resolve problems of investors or persons seeking to invest or recommend measures to improve the investment environment.

5.2. Regarding provision 22 on 'Domestic Regulatory Coherence', participating Members supported the provision (encouragement to carry out prior impact assessments) and further discussed the bracketed language contained in paragraphs 22.2 and 22.3. Regarding paragraph 22.3 on cooperation between competent authorities responsible for investment-related procedures, participating Members' views differed on the need to include the bracketed language "in accordance with its legal system".

5.3. Participants also discussed provision 23 on 'Domestic supplier databases', including the track changes contained therein. Most participants welcomed the modifications included in the Easter Text (in track changes). Two Members reserved their positions, suggesting that domestic supplier databases might be better suited for inclusion in a future Work Programme.

5.4. Lastly, on provision 24 on 'Cross-border Co-operation on Investment Facilitation', several participants saw value in including such provision in the IFD Agreement while suggesting some modifications to the text. Some participants questioned the need to list the specific areas of cooperation, while others expressed concerns regarding the multiplicity of contact points in the IFD Agreement.

⁶ Document INF/IFD/RD/76 dated 10 May 2021.

5.2 Provision 30 on 'Responsible Business Conduct' contained in Section V of the Easter Text

5.5. Participants discussed in detail provision 30 on 'Responsible Business Conduct' (RBC) including the track changes contained therein. All participating Members who intervened but one expressed their support for including a provision on RBC in the IFD Agreement – including the reference to internationally recognised principles, policies and guidelines – considering that it would contribute to the sustainable development goals and promote sustainable investment. One delegation did not consider RBC as forming part of an Agreement on investment facilitation and voiced concerns regarding the enforcement of such a provision under the WTO dispute settlement mechanism.

5.6. Overall, participating Members supported the draft text, although proposing some modifications. A Member suggested reintroducing a paragraph it had previously proposed, pertaining to engagement and dialogue with Indigenous peoples and local communities. Another Member suggested deleting the reference to international principles and standards of RBC contained in the footnote to paragraph 30.1, while many other participants supported referring to leading instruments in this field. A Member reiterated its proposal to also include the UN Global Compact in footnote 42, and suggested that, in addition to indigenous people, also "traditional communities" be added in paragraph 30.1. Another Member raised concerns on the accuracy of the legal drafting of the provision – asking how a Member could "encourage" investors and enterprises to apply RBC principles when these were in essence voluntary, and private businesses had the discretion to voluntarily incorporate them, or not. Two participants raised similar concerns on the implementation of the RBC provision and pointed to potential conflicts with some participants' domestic laws, which prohibited companies to pursue interests other than purely shareholders' interests.

5.7. The Coordinator announced his intention to prepare a revised version of provision 30 on RBC in time for the meeting in mid-June, taking into consideration some of the comments made by Members at this meeting.

6 NEXT MEETING

6.1. The Coordinator informed participating Members that a two-day intersessional meeting would be held on 31 May and 1 June 2021. Its main purpose would be to address certain provisions of the 'Easter Text' (with an overall review of Section II 'Transparency of investment measures', and a discussion on provision 31 on 'Measures against corruption') as well as to hold conceptual discussions on 'Definitions' and on a possible 'Future work program'. In addition, an academic discussion on possible options to give legal effect to the outcome of the IFD negotiations would take place in the afternoon of 31 May, in the margins of the intersessional meeting.
