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Page: 1/5

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WTO STRUCTURED DISCUSSIONS ON INVESTMENT FACILITATION FOR DEVELOPMENT

NEGOTIATING MEETING HELD ON 15 AND 16 JUNE 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 15 and 16 June 2021. As indicated in the annotated agenda circulated to all WTO Members ahead of the meeting², the objectives of the meeting were: (a) to hear the reports of the facilitators of the Small/Discussion Groups; (b) to discuss a revised version of Section II ('Transparency of investment measures') of the 'Easter Text' prepared by the Coordinator; (c) to discuss a revised version of provision 30 on 'Responsible Business Conduct' under Section VI ('Sustainable investment') of the 'Easter Text' prepared by the Coordinator; (d) to discuss text prepared by the Coordinator on a possible Most-Favoured Nation (MFN) Treatment provision; and (e) to continue the discussions on a proposed revised 'Transfers and Payments' provision. A dedicated session on implementation, technical assistance and capacity building was held in the afternoon of 15 June 2021.

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

1.1. The facilitators of the Discussion Group on 'Scope' and of the Small Group on 'Movement of business persons for investment purposes' informed the plenary about their on-going work and future steps.

1.2. Since the last intersessional meeting, the Group on 'Scope' held one meeting, on 14 June 2021, which was well attended (more than 40 delegations attended – including some non-participants). After six rounds of discussions on issues related to the overall scope of the future IFD Agreement, the facilitator presented the Group's text contribution on the first paragraph, or 'chapeau', of the 'Scope' provision.³ The text contribution contained brackets, as participants could not agree at this stage on the verb to best capture the measures to which the future IFD Agreement would apply (i.e., measures "affecting", "relating to", or "governing" investment activities). The facilitator explained that the text contribution on 'Scope' had to be drafted broadly enough in order to cover all the provisions of the future IFD Agreement, including for instance those related to transparency and sustainable investment. The facilitator also explained that, given the nature and objective of the future agreement, the text contribution aimed at covering the whole investment lifecycle, as reflected by the term "investment activities". Finally, the facilitator explained that the Group would continue its work on the other two important components of the scope, namely key definitions, and possible exclusions from the scope.⁴ Participating Members widely welcomed the Group's 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/34 dated 9 June 2021.

³ Discussion Group's text contribution for discussion at the plenary negotiating meeting on 15-16 June 2021, sent to all Members on 14 June 2021.

⁴ At the negotiating meeting on 11-12 May, the facilitator had reported to the plenary that participants identified three components of the Scope namely a "chapeau" containing the central scope provision, key definitions used in that provision, and exceptions to the scope.

contribution and expressed their appreciation to the facilitator for his dedication and the progress achieved.

1.3. Discussions ensued, notably on whether the scope should reflect the concept of "facilitation", or not – and on the need for two separate articles (on 'Scope' and 'Objectives') or on whether to combine the two provisions into the same article. Regarding 'Scope', most participating Members favoured a broad scope by using the term 'affecting' or 'relating to'; while others favoured a narrower scope. Several delegations suggested deferring this discussion to a later stage of the negotiations – when the substantive obligations of the Agreement would be further developed. Most participants advocated that the future Agreement covered the entire investment lifecycle; while a delegation favoured covering the post-establishment phase only.

1.4. The facilitator of the Small Group on 'Movement of business persons for investment purposes' (hereafter 'MBP'), which met for the second time on 3 June 2021, informed the plenary that the discussion had focused on the different options to include MBP elements into the text of the future IFD Agreement (stand-alone section versus incorporation in existing relevant section(s) of the 'Easter Text', particularly Section II on Transparency). The discussion had contributed to a better understanding of participants' positions and revealed that further work was needed to determine *which* MBP elements participating Members could envisage to possibly include – before deciding *where* to include them. The next meeting of the Small Group would take place on 24 June 2021.

2 DISCUSSIONS OF TEXTS PREPARED BY THE COORDINATOR

2.1 Discussion of a revised version of Section II of the 'Easter Text' prepared by the Coordinator

2.1. The Coordinator presented a revised version of Section II ('Transparency of Investment Measures') of the 'Easter Text',⁵ which was updated based on comments/suggestions made by participating Members during previous meetings, as well as on a proposal from a Member on specific transparency provisions discussed notably at the meeting on 11-12 May 2021. The revised text, which was overall well supported by participating Members, contains only a few remaining brackets, notably in provision 7 on 'Single Information Portal'.

2.2. Regarding provision 7, which is drafted as an encouragement, while most participating Members supported the revised text and expressed flexibility on the remaining open issues, a Member suggested additional flexibility language to be included therein (notably to make the list of measures and information indicative). Regarding the alternative terms referring to a single information portal at the end of paragraph 7.1, most Members advocated a pragmatic solution, namely, to end the sentence after the term "electronic publications"; while the same Member as above favoured the inclusion of the language "a website or series of websites".

2.3. Two Members reserved their positions on provision 8 ('No Fees Imposed for Access to Information') pending further consultations. On provision 10 ('Notification to the WTO'), participants approved to notify to the future Committee on Investment Facilitation only 'significant' changes to laws or regulations of general application. A Member suggested for Section II to have more of a "best-endavour" approach.

2.2 Discussion of a revised version of provision 30 on 'Responsible Business Conduct' prepared by the Coordinator

2.4. During the discussion on a revised version of provision 30 on 'Responsible Business Conduct' (RBC),⁶ many participating Members reiterated their support for a meaningful RBC provision in the future IFD Agreement, which they considered of central importance to attract and retain sustainable investments. Overall, participating Members welcomed and supported the revised text by the Coordinator. Two Members supported the inclusion of a text proposal by a Member whereby "each Member should encourage investors/enterprises operating within its territory to undertake meaningful engagement and dialogue with Indigenous peoples and local communities" – expressing

⁵ Revised version of Section II of the 'Easter Text' circulated to all Members on 8 June 2021 (document without document symbol).

⁶ The revised version of provision 30 ('Responsible Business Conduct') has been circulated to all Members on 11 June 2021 (document without document symbol).

their preference to have this provision as a stand-alone paragraph rather than in a footnote. Other delegations indicated that they were still considering this text proposal. A delegation reiterated its opposition to the inclusion of an RBC provision in the future Agreement, stating that such provision placed obligations on investors rather than on Members. Another delegation presented a text suggestion at the meeting aimed at significantly softening the language of the RBC provision – by deleting the (indicative) list that identifies some of the principles, standards and guidelines on RBC as well as the reference to existing international instruments on RBC, which currently appears in a footnote (such as the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises).

2.3 Discussion of text on 'Most-Favoured Nation' (MFN) treatment prepared by the Coordinator

2.5. Participating Members discussed the text suggestion on a possible MFN Treatment provision prepared by the Coordinator⁷ aimed at facilitating the discussion, based on text proposals submitted by participating Members⁸ as well as detailed comments made by participants at previous meetings held in April and May 2021. The discussion showed a high level of engagement, both on the part of those delegations supporting the inclusion of an MFN provision in the IFD Agreement, and those who expressed doubts about the value-added of such a provision.

2.6. Participants discussed the concept of 'likeness' and the distinction between "like situations" and "like circumstances". Most delegations saw no fundamental difference between the two terms, but the majority favoured "in like circumstances", as it was more familiar in their treaty practice, further clarified by jurisprudence, and also used in the GATS Annex on Telecommunications.⁹ A few delegations suggested adding a footnote to clarify the meaning of "like circumstances" – with a couple of them pointing to the "Drafters' Note on the interpretation of "In Like Circumstances" under Article 9.4 (National Treatment) and Article 9.5 (MFN Treatment)" in the CPTPP.¹⁰ Among those delegations who questioned the need for an MFN provision in the future Agreement, two sought for clarification on the application of MFN treatment in relation to sub-federal levels. A delegation asked to clarify that the MFN obligation related to discrimination *based on nationality* (whereby just a simple difference of treatment between investors did not, in and on itself, constitute a breach). Another delegation suggested using a non-discrimination provision in the future IFD Agreement instead of an MFN provision, and announced that it would present language in this respect. Some delegations stated that they did not support the inclusion of an MFN clause because they did not see much added value to it, while it could pose risks in the context of dispute settlement.

2.7. Regarding possible exceptions to an MFN obligation, participants discussed the distinction and interplay between paragraphs 4.2(a) of the text prepared by the Coordinator (exception for treatment provided under International Investment Agreements) and 4.3 (firewall paragraph). Several participants explained that, in their view, the two paragraphs had different objectives and functions. Paragraph 4.2(a) would allow Members to provide 'preferential treatment' to an investor from certain partner countries based on an International Investment Agreement¹¹, without being required to extend such benefits to investors from other WTO Members/Parties to the IFD Agreement. Thus, paragraph 4.2 concerned the factual treatment granted to an investor stemming from an International Investment Agreement, whereas paragraph 4.3 was a 'non-importation' clause, which precluded the importation of provisions from International Investment Agreements into the IFD Agreement by stipulating that those provisions did not constitute 'treatment' for purposes of assessing a breach of the MFN provision contained in the IFD Agreement. In relation to the firewall paragraph, a participant favoured a provision referring in general to 'international agreements', as contained in the original proposal, in order to cover all IFD provisions. Participating

⁷ The text on MFN treatment prepared by the Coordinator was circulated to all WTO Members on 11 June 2021 (document without document symbol).

⁸ Proposals as contained in the 'text boxes' in document INF/IFD/RD/74 (Consolidated Document by the Coordinator – 'Easter Text') dated 12 April 2021 – pages 11 and 12, as well as in document INF/IFD/RD/75 dated 29 April 2021.

⁹ GATS Annex on Telecommunications, paragraph 5(a), footnote 15.

¹⁰ The Drafters' Note *inter alia* clarifies that: "the phrase 'in like circumstances' ensures that comparisons are made only with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry requiring consideration of the totality of the circumstances".

¹¹ Whether a separate agreement or an investment chapter in an agreement forming a free trade area or a customs union pursuant to Article XXIV of the GATT 1994 or the Enabling Clause, or an economic integration agreement pursuant to Article V of GATS.

Members also touched upon the criteria to be applied to exclude International Investment Agreements, particularly bilateral investment treaties, from the MFN obligation under 4.2(a).

2.8. Finally, participants discussed the exception for 'recognition' measures based upon an agreement or arrangement or accorded autonomously, and the lack of conditionality for such measures under the original proposal submitted by a Member in light of the absence of any reference to GATS Article VII therein. The proponent of the exception clarified that some 'mutual recognition' measures might take place outside the context of an international agreement (e.g., be granted autonomously), and thus, that there was a need for a separate exception clause. A Member reiterated its request for an exception from the MFN treatment obligation for reciprocity measures concerning authorization fees.

3 CONTINUATION OF THE DISCUSSION ON A 'TRANSFERS AND PAYMENTS' PROVISION

3.1. Participating Members continued discussing a 'Transfers and Payments' provision based on the revised proposal by a Member,¹² which had been first presented at the 11-12 May 2021 negotiating meeting. The proponent explained that its revised proposal pertained to the formulation/development of measures relating to transfers and payments and was thus related to paragraph 13.2(a) ('General principles for authorization procedures') in Section III of the 'Easter Text'. The proponent reiterated that its proposed text did not contain any element related to investment protection.

3.2. Two participating Members supported the revised proposal. Another participant asked the proponent why a separate provision specifically addressing transfers and payments would be needed given that the proponent considered its proposed provision as already covered by provision 13.2(a) in Section III of the 'Easter Text'. Another participant reiterated its concern that the proposed provision pertained to investment protection – owing to the inclusion of language referring to "indemnity, guarantee or insurance contract" which, in its view, pertained to subrogation and investment protection.

4 DEDICATED SESSION ON IMPLEMENTATION, TECHNICAL ASSISTANCE AND CAPACITY BUILDING

4.1. A dedicated session on implementation, technical assistance and capacity building, was held in the afternoon of 15 June (the programme of the dedicated session, including relevant background materials and hyperlinks to presentations made, is available on the dedicated IFD portal [here](#)). The session comprised two successive and complementary discussion panels.

4.2. The first panel focused on **lessons learnt from the implementation of the Trade Facilitation Agreement (TFA)**, with representatives from recipient and donor Members, as well as the World Bank Group and the Global Alliance for Trade Facilitation. The two recipient Members shared their key 'lessons learnt' from the TFA implementation – stressing the need for high-level political commitment and governance to support ratification and implementation, and for the framework to involve both public and private actors in its implementation. Allowing for *regional* implementation for developing countries and LDCs, which were members of regional economic integration unions, and allowing countries the flexibility to move measures from Category B to C to account for exogenous shocks such as the current COVID-19 pandemic or natural disasters, were highlighted. The importance of technical assistance and capacity building (TACB) at early, organisational stages – in order to carry out accurate needs assessments identifying implementation gaps, as well as to formulate precise requests for donors' TACB support – was stressed by speakers from both recipient and donor countries. Also, it was essential to create and support an 'ecosystem' of agencies and partners ready to support developing countries and LDCs to implement the future agreement. Speakers deemed the TFA provisions to constitute useful guidelines for prospective TACB beneficiary and donor countries. The TFA was seen as very successful in leveraging interest and funding from international organizations and donor countries.

4.3. The second panel focused on **lessons learnt from international organizations (IOs) active in the implementation of investment facilitation reforms/measures**, with the participation of representatives from the WBG, UNCTAD, ITC, OECD, IDB, and WEF, sharing their

¹² See document INF/IFD/RD/76 dated 10 May 2021.

on-the-ground experience in helping developing countries and least-developed countries. Ahead of the session, each IO representative had been asked to 'rank' twelve concrete investment facilitation areas/measures discussed in the IFD negotiations and to select three, which he/she considered as having the strongest development impact while being challenging to implement. The rankings provided by the speakers are hyperlinked in the [programme](#). Transparency of investment measures was considered as having a high impact on sustainable investments inflows while being a relatively "low hanging fruit". UNCTAD and ITC stressed the importance of simplifying procedures and domestic supplier databases. Simplifying procedures first required a comprehensive mapping of all the administrative procedures that foreign investors had to go through for setting up a business – collecting information from all the competent authorities involved in those procedures. The importance of policy coherence, stakeholder consultations and a whole-of-government approach to investment facilitation was emphasized by the OECD, IDB and WEF. Finally, the WEF representative proposed to launch a new [Global Alliance to Enable Action on Sustainable Investment](#), or "EASI Alliance", building on how the Global Alliance for Trade Facilitation had helped implement the TFA.

4.4. At the end of the dedicated session, the Coordinator encouraged participating Members to submit text proposals regarding implementation, S&DT and TACB.

5 NEXT MEETING

5.1. The Coordinator informed participating Members that, as foreseen in the 'Schedule of Meetings April – MC12',¹³ an intersessional meeting would be held on 2 July 2021 with a view to addressing the following issues: to conduct an overall review of Section III on 'Streamlining and Speeding Up Administrative Procedures'; to discuss provision 35 on 'Dispute Settlement' contained in Section VII of the 'Easter Text'; and to discuss Section V on 'Special and Differential Treatment for Developing and Least-Developed Country Members'.

¹³ Document INF/IFD/W/29/Rev.2 dated 22 April 2021.