Investment Facilitation:

History and the latest developments in the structured discussions

January 2020

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1.0 Introduction

The Twelfth Ministerial Conference (MC12) of the World Trade Organization (WTO), to be held in Nur-Sultan, Kazakhstan, in June 2020, is slated to see significant updates on the joint initiatives launched just over two years ago in Buenos Aires, Argentina. Among these processes are the structured discussions now underway to possibly develop a multilateral framework on investment facilitation, which currently involves 98 WTO Members as signatories. This framework, according to the joint statement that launched this process in December 2017, "shall not address market access, investment protection, and investor-state dispute settlement," and would encompass a set of areas designed at "facilitating foreign direct investments" (WTO, 2017b).

Whether this framework will be completed in time for the Kazakhstan conference remains unclear at this stage. The signatories of the joint statement are instead looking to see a "meaningful outcome" in June 2020, according to an update provided by the coordinator of the structured discussions, Chilean Ambassador to the WTO Eduardo Gálvez, during the WTO Public Forum in October 2019 (WTO, 2019b). The exact nature of that outcome remains to be determined and will depend on the various substantive meetings planned from February to June 2020.

This negotiating brief provides an overview of the structured discussions on investment facilitation. It outlines the current state of play as of January 20, 2020, while providing a detailed description of the process and context. The brief is designed for trade negotiators and places these discussions within the wider WTO context, both on investment-related issues and in relation to other developments involving the multilateral trading system.

The investment facilitation discussions are also notable in how they could widen the scope of investment governance issues brought into the realm of international trade governance. This negotiating brief therefore examines which investment-related issues are already captured in current WTO rules and how. It also notes the work underway at the national, regional and international levels on other areas of international investment governance, such as investment protection and market access, as well as investment facilitation efforts that have already taken place outside the WTO context.

Figure 1. Co-Sponsors of IF Joint Statement, Rev. 1, November 22, 2019.

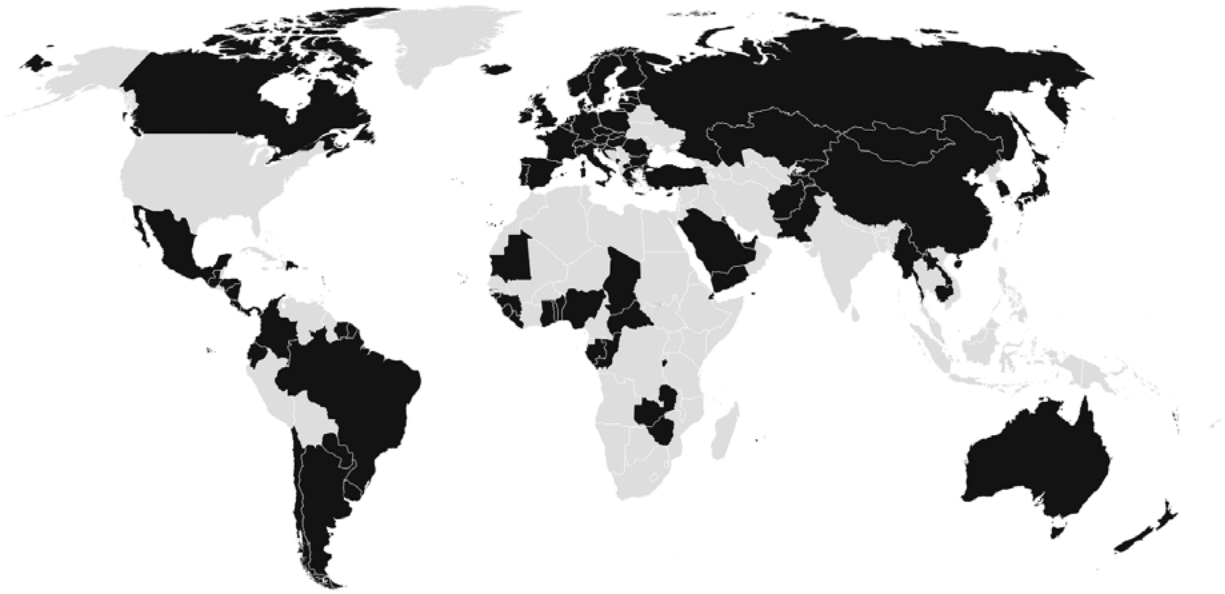

Table 1. LDCs that are or were previously co-sponsors of the joint statement. There are currently 14 LDCs that are co-sponsors, as of the November 2019 version of the joint statement.

Least Developed Countries (LDC) Co-Sponsors of Joint Ministerial Statement on Investment Facilitation for Development		
7 original co-sponsors in Buenos Aires in December 2017	Cambodia Guinea Lao People's Democratic Republic Liberia Myanmar Benin Togo	
Joined after Buenos Aires	Afghanistan Burundi Central African Republic Chad Democratic Republic of the Congo Djibouti	The Gambia Guinea-Bissau Mauritania Sierra Leone Vanuatu Yemen Zambia

2.0 Current Aspects of International Investment Governance Captured in WTO Rules

Within the existing WTO agreements, a few of them already have provisions that relate directly to investment. These include the General Agreement on Trade in Services (GATS), specifically in terms of services supplied under "Mode 3." Within the context of the GATS, Mode 3 refers to those services provided by "a services supplier of one Member, through commercial presence in the territory of another Member." This is described under GATS Article I:1.c (WTO, 1994d).

The WTO Agreement on Trade-Related Investment Measures (TRIMS), for its part, has a scope limited exclusively to how certain investment measures may also affect trade in goods. It prohibits Members from applying trade-related investment measures that would not comply with the General Agreement on Tariffs and Trade (GATT) provision on national treatment, or that would not comply with the provision requiring the elimination of quantitative restrictions aside from "duties, taxes or other charges," with certain exceptions. These involve Articles III and XI of the GATT, respectively (WTO, 1994c).

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also features some provisions that refer explicitly to investment, such as Article 70 on the protection of existing subject matter. The implications of the TRIPS Agreement's intellectual property rights rules on foreign investors, as well as the evolution of TRIPS-plus provisions in bilateral investment treaties (BITs), have also been the subject of significant analysis (Boie, 2010).

Investment also comes up within the context of one of the WTO's plurilateral agreements, specifically the Government Procurement Agreement (GPA) from 1994 and its revision from 2011. For example, Article IV on the revised GPA's general principles includes, within its provision on non-discrimination, the requirement that GPA parties do not "treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership," as specified in Article IV:2(a) (WTO, 2011b). The subsequent sub-paragraph of the non-discrimination provision notes that parties cannot discriminate against a "locally established supplier" based on where that supplier has sourced the goods and services on offer (WTO, 2011b; Anderson & Müller, 2017).

3.0 Early History of Investment in the WTO Context: From Singapore to Nairobi

The replacement of the GATT system—which had previously governed international trade between its contracting parties—with the WTO in January 1995 was followed by a decision in December 1996 to establish a set of new working groups. This was part of a broader effort to understand how certain issues not in the organization's rulebook at that time might be related to trade and whether they should be brought into the organization in some manner. These issues included investment, competition policy, transparency in government procurement, and trade facilitation, collectively referred to as the "Singapore issues." Ministers also recommended that the working groups on investment and competition policy look to the discussions underway within the United Nations Conference on Trade and Development (UNCTAD) and other organizations that could help inform this work. This was agreed as part of the Singapore Ministerial Declaration, which also considered the WTO's future work program in relation to the provisions in the Marrakesh Agreement that established the organization on the potential for future reforms in various areas (WTO, 1996).

Upon the launch of the Doha Development Agenda at the 2001 ministerial conference, these four working groups were directed to craft negotiating modalities for their respective negotiating subject areas, with the intention of having ministers adopt by explicit consensus these modalities at the next ministerial conference and start negotiations (WTO, 2001). On the relationship between trade and investment, paragraph 20 of that declaration referred to "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity building in this area" (WTO, 2001).

Among the areas of work on investment included "the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members" (WTO, 2001). Among other points, the declaration also stressed the importance of the development dimension within this framework, as well as accounting for Members' varying capabilities, and noted that the framework would need to "reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest" (WTO, 2001).

While the Doha Ministerial Declaration had set out the deadline of agreeing on negotiating modalities by explicit consensus among Members by the Fifth Ministerial Conference, which became the Cancún Ministerial Conference of September 2003, that deadline was missed when the meeting closed without consensus, including due to disagreement on those modalities. Some Members floated the idea of adopting a plurilateral approach to negotiations on these issues,

either at the WTO or in other forums, an approach that was ultimately mooted amid concerns over the precedent this would set. Questions also remained over how these Singapore issues would fit with the rest of the Doha Development Agenda (ICTSD, 2003).

Three of the Singapore issues were then dropped after 2004 by decision of the General Council (WT/L/579), while negotiations were launched on trade facilitation. (Text of the "July package" – the General Council's post-Cancún decision) In the years since, the subject of whether to consider investment again in the WTO context was largely dormant, with efforts of WTO Members largely devoted to advancing negotiations on the Doha Round as a single undertaking. The negotiations on the Doha Round itself were due to conclude in January 2005, and instead faced repeated setbacks, despite the development of the 2008 draft modalities, e.g., on agriculture and non-agricultural market access (NAMA), and related chairs' texts that emerged over the years. The talks were ultimately declared at an impasse in the "Elements for Political Guidance" that formed the "consensus part" of the Ministerial Conference Chair's Statement at the 2011 ministerial conference in Geneva (WTO, 2011a).

The subsequent ministerial conference in 2013 saw ministers adopt the Trade Facilitation Agreement (TFA) and select other deliverables from the agriculture and development negotiations as part of a Doha Round "early harvest." At the Nairobi Ministerial Conference in December 2015, the issue of whether to continue with the Round, or whether to consider negotiating on "new issues" while advancing on existing issues where possible, took centre stage. More specifically, Members were debating whether to reaffirm past ministerial conference declarations and statements, as had been common practice until that juncture and included the reaffirmation of the Doha Ministerial Declaration and its associated mandate, or whether to avoid doing so and instead chart a different course.

After round-the-clock negotiations, ministers in Nairobi ultimately adopted a ministerial declaration that noted that Members have "different views" on the reaffirmation of the Doha agenda and past ministerial decisions while referring to their shared commitment to "advance negotiations on the remaining Doha issues" (Nairobi Ministerial Declaration, 2015). Such issues should be a matter of priority, according to the declaration, which also referred to the divisions among Members over whether to negotiate on issues that are not included in the Doha negotiating mandate. The declaration ultimately says that on such issues, any "decision to launch negotiations multilaterally on such issues would need to be agreed by all Members" (Nairobi Ministerial Declaration, 2015).

4.0 Work on Investment Facilitation in Other Contexts in Parallel

The work on investment facilitation in other forums, for its part, had shown advances. At the international level, these efforts were not of a rule-making nature, instead focused on providing guidance that countries could use for facilitating and promoting investments. The Organisation for Economic Co-operation and Development (OECD), for example, discussed the topic in their investment committee meetings and published a policy brief on the options to advance toward a multilateral approach for implementing the investment facilitation framework (Novik & de Crombrugghe, 2018). In September 2016, UNCTAD released the Global Action Menu for Investment Facilitation, which provided the most comprehensive guidelines to date on the range of investment facilitation measures that a country could implement either unilaterally or as a basis for international collaboration (UNCTAD, 2016).

UNCTAD has also been tracking the extent to which specific investment facilitation measures were implemented at the national level and through treaties. According to UNCTAD's most recent World Investment Report, a third of the investment measures that countries adopted at the national level for the year can be classified as investment facilitation and promotion measures (UNCTAD, 2019b). While facilitation measures are implemented at the national level, relevant provisions have also been integrated within treaties, most notably with Brazil's approach of negotiating Cooperation and Facilitation Investment Agreements (CFIAs) with interested partners in lieu of negotiating BITs (Cinelli Moreira, 2018; Bernasconi-Osterwalder & Brauch, 2015).

In addition to intergovernmental organizations, the topic was also debated in other political forums, notably the G20 coalition of advanced and emerging economies. In 2016, under China's presidency of the G20, the newly established Trade and Investment Working Group (TIWG) advanced the endorsement of the G20 Guiding Principles for Global Investment Policymaking, a non-binding document setting out nine principles such as the importance of implementing investment efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses. Under Germany's subsequent presidency of the G20, more investment facilitation-related proposals were put forward, and G20 Members considered the adoption of a non-binding package on investment facilitation that would complement the guiding principles. These were ultimately dropped, however, and the initiative has not moved forward in the G20 context in recent years.

5.0 The Re-emergence of Investment in the WTO Context: Post-Nairobi to Buenos Aires

As discussions on investment facilitation gained steam in other international bodies, so too did it at the WTO. On March 20, 2017, the MIKTA group, an informal partnership between the countries of Mexico, Indonesia, Korea, Turkey and Australia, organized the first informal workshop on the topic at the WTO. Subsequent informal workshops were organized by another coalition of countries, known as the Friends of Investment Facilitation for Development (FIFD), a group comprising some developing country Members. These initial Members included Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Korea, Mexico, Nigeria and Pakistan; the group has since expanded. In conjunction with these workshops in Geneva, the FIFD co-sponsored a workshop at the regional level in a bid to encourage inputs and viewpoints from capital-based policy-makers held in Abuja, Nigeria in November 2017.

During these various informal workshops, interested Members, together with experts and representatives from international bodies, debated the rationale for negotiating an investment facilitation agreement at the WTO, including the extent to which investment facilitation issues should be addressed by trade frameworks. Proponents argued that, given the growing interlinkages between trade and investment through 21st century globalized supply chains, investment facilitation had to be treated as a trade-related issue belonging under the mandate of the WTO. Other Members argued that investment facilitation, though it may affect trade, remains an investment policy issue in its own right, and warned about possible fragmentation of the international investment governance regime.

Another fundamental question debated during these workshops was the potential impact of binding provisions subject to dispute settlement, versus the implementation of investment facilitation measures on a best-efforts basis. Some Members that have disagreed with calls for binding provisions on investment facilitation have instead suggested that Members should coordinate their efforts at the international level through voluntary means, such as through UNCTAD or similar platforms. In response to such concerns, proponents pointed to the TFA as an example of the usefulness of an enforceable international framework to catalyze the resources needed and political will to undertake deep-rooted reforms of institutions at the national level.

Concerns were also raised relating to developing and LDC Members' capacities to address such issues and the risk of diverting their limited resources away from negotiating the remaining Doha issues.

Alongside these workshops, various written proposals were submitted by certain Members on the type of provisions or features that could form the basis of an investment facilitation agreement, such as its measures on transparency, administrative efficiency and international coordination. While mostly similar, there were some notable differences and innovations among the submissions (ICTSD, 2017).

The Argentina/Brazil communication, JOB/GC/124, includes among the elements that could feature in an "instrument on investment facilitation" a potential provision on corporate social responsibility that would be applied voluntarily, along with provisions on transparency, single electronic window, and formalities and documentation requirements, among others. The proposal also refers to the idea of setting up National Focal Points or Ombudspersons, along with including possible provisions on special and differential treatment, including a reference to the TFA category approach and an exemption for LDCs on applying a future investment facilitation agreement's commitments (WTO, 2017c).

While most of the proposals focused on disciplines from a host-country perspective, the Chinese communication, JOB/GC/123, included the idea of considering efficiencies from a home-country perspective (WTO, 2017d).

The Russian communication, JOB/GC/120, included various possible issues for discussion for future investment-related WTO rules. Among these were dispute prevention and resolution, as well as domestic regulation, transparency, the option for Members to self-assess implementation of new rules, and the option of investors providing comments to governments, and also indicated that future talks could expand the scope to cover market access. (WTO, 2017a).

These efforts, among others, culminated with a group of 70 WTO Members endorsing the Joint Ministerial Statement on Investment Facilitation for Development at the Eleventh Ministerial Conference held in Buenos Aires, Argentina, in December 2017.

That statement announced the plans for structured discussions on an investment facilitation framework, which would "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention" (WTO, 2017b).

These discussions were also meant to consider how such a framework would fit within the context of the wider WTO rulebook, as well as considering investment-related developments, including on investment facilitation, in other forums and contexts. The framework would also need to "[facilitate] greater developing and least developed country Members' participation in global investment flows," naming this as a "core objective" (WTO, 2017b). As noted in the introduction to this brief, signatories have stated that the discussions should not include issues of market access, investment protection, or investor–state dispute settlement.

6.0 Structured Discussions on Investment Facilitation Since 2018

Following the Buenos Aires ministerial conference, the signatories to the joint statement began holding "structured discussions" on investment facilitation, with the first phase of work devoted to putting together a checklist of issues under each area named in the joint statement. This led to a checklist of just over 81 issues, completed in 2018. The following phase of work from January to June 2019 was devoted to the submission and discussion of text-based examples of possible investment facilitation measures to include in a possible framework or measures that could be adapted to serve those purposes. These examples were submitted by signatories to the joint statement, as well as non-signatories who were participating in the meetings as observers, along with the group coordinator under his own responsibilities. Examples were drawn from the TFA, BITs, national legislation and the services chapters of free trade agreements, among others (WTO, 2019c–2019g).

These discussions of text-based examples led to the development of a compendium featuring the submissions to date. In the stock-taking and next steps meeting of July 18, 2019, participating WTO Members also requested that the group coordinator prepare and circulate a compilation capturing the state of play of the elements for a multilateral framework on investment facilitation for development. The July–December 2019 meetings have since been devoted to discussing the seven sections of that working document, in a bid to determine where there is convergence, along with streamlining that text so that it could serve as a basis for potential future negotiations.

7.0 Overview of the July 2019 Working Document

The Working Document of July 24, 2019, prepared by the group coordinator is intended to help Members further develop the elements for the possible multilateral framework, without prejudging their positions or views on issues under discussion. It is heavily bracketed and remains a restricted text for Members only; the analysis below is based on the version seen by the authors (WTO, 2019h).

Building on the earlier compendium of text-based examples (INF/IFD/RD/5/Rev.3), the working document focuses on areas of convergence emerging from discussions of those examples between January and June 2019. Accordingly, it only covers issues for which more than one text-based example was provided, merging examples with similar text, when possible, or otherwise providing different options and alternatives through the use of square brackets.

The working document contains possible text for preambular language and a total of 29 articles on potential elements of the multilateral framework identified so far, grouped in seven sections. Below we present an overview of those components, including notes on the content and apparent sources of the language of the proposed articles.

The **Preamble** reflects potential goals of the proposed framework: "to facilitate the increasing participation of developing countries in investment flows," "to increase investment, including in and by micro, small and medium enterprises" and "to provide investors…with a transparent and predictable regulatory environment, as well as with efficient procedures." Another goal, included in square brackets, is to encourage good corporate governance and corporate social responsibility. The Preamble also highlights the importance of investment for "the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and trade." Other paragraphs reaffirm Members' rights to regulate in the public interest and to seek legitimate public policy objectives, and their commitments to combat corruption and to promote transparency and good public governance. Much of the preambular language derives from Brazil's communication from January 2018, where it submitted a draft Investment Facilitation Agreement, prepared for illustrative purposes as the first submission made under the structured discussions, rather than as a proposed negotiating text (WTO, 2018).

Section I (Scope and General Principles) contains only two proposed articles, without providing a definition of "investment." **Article 1** (Scope) offers three alternative ways to define the types of measures adopted or maintained by Members that will be covered by the framework. While **Alternative 1** proposes broad coverage of "facilitation measures…related to foreign direct investment [in all sectors]," **Alternative 2** (which builds on Brazil's draft Investment Facilitation Agreement) proposes that the framework apply to "facilitation measures…affecting the admission, establishment, acquisition and expansion […] of investments in services and non-services sectors," whether of general application or sector-specific. It carves out certain areas, such as government

procurement and public concessions, as well as dispute resolution procedures and investment protection rules. **Alternative 3** proposes application to measures relating to licensing and qualification requirements and procedures that affect economic activities "through commercial presence in the territory of another Member."

Article 2 (Non-Discrimination) contains two alternatives. **Alternative 1** guarantees most-favoured-nation (MFN) treatment to investors and their investments, "with respect to the implementation of this framework." It does not clarify whether this would apply pre- or post-establishment of the investment.

Alternative 1 clarifies that the framework "shall not be construed as to prevent any Member from conferring or according advantages to investors of any other Member and their investments in the context of setting a common market or other forms of economic integration." This carve-out is frequently included in MFN clauses in investment treaties. For example, Article 2(5) of the 2019 Netherlands Model BIT provides, similarly to the working document: "No provision of this Agreement shall be construed as to prevent a Contracting Party from fulfilling its obligations as a member of an economic integration agreement such as a free trade area, customs union, common market, economic community, monetary union, e.g., the European Union, or as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference of privilege by virtue of its membership in such an agreement." (UNCTAD, 2019a)

Furthermore, **Alternative 1** provides that the framework would "not replace and does not add to nor detract from existing rights and obligations of Members under bilateral or plurilateral investment frameworks." It therefore attempts to distance the investment facilitation framework from investment treaties and chapters, while it is unclear how the framework could be prevented from affecting obligations of Members under other international agreements.

In turn, **Alternative 2** provides that "Investments of investors of each Member shall at all times be accorded […] treatment in the [territory] of any other Member"; the ellipsis is in the original text of the working document, which does not specify what standard of treatment would be accorded. It also prohibits impairment by unreasonable or discriminatory measures of the management, maintenance, use, enjoyment, sale or other disposal of investments. By proposing a standard of treatment (still to be determined) and a non-impairment obligation, this alternative would, in fact, provide post-establishment investment protection, even though the framework, according to the December 2017 joint statement, "shall not address…investment protection." (WTO, 2017b).

These two alternatives (MFN and non-impairment) reflect different approaches to investment protection by means of non-discrimination adopted (whether combined or in isolation) in many investment treaties and investment chapters in free trade agreements. For example, Article 9.5(2) of the 2018 Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) spells out the MFN obligation: "Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors

of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The wording of the non-impairment obligation in the second alternative to Article 2 of the working document is very similar to the non-impairment obligation under Article 10(1) of the 1994 Energy Charter Treaty: "no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal" (Energy Charter Conference, 2016).

Section II (Transparency and Predictability of Investment Measures) begins with **Article 3** (Publication and Availability of Measures and Information), which mandates Members to ensure the publication of many types of investment-related measures of general application (including laws, regulations and international agreements) and of information necessary for making an investment. It also proposes an obligation on Members to publish in advance and to provide an opportunity for "[interested persons and the other Members] [investors and other interested parties]" to comment on proposed measures. These publication obligations are accompanied by an obligation to notify the WTO Committee on Investment Facilitation (**Article 4**) and to maintain enquiry points for investors and other Members (**Article 5**). Finally, **Article 6** (Specific Exceptions Applicable to Transparency Requirements) clarifies that the provision does not require Members to disclose confidential information.

Section III (Streamlining and Speeding Up Administrative Procedures and Requirements) proposes obligations on Members to ensure the consistent, reasonable, objective and impartial administration of measures (**Article 7**); the reduction and simplification of administrative procedures and documentation requirements (**Article 8**); and the establishment of clear criteria and requirements for administrative procedures (**Article 9**). Other provisions create guidelines for Members on authorization or approval procedures for investments (**Article 10**), the treatment of incomplete applications and the rejection of applications (**Article 11**), the establishment of fees and charges (**Article 12**), the periodic review of Members' administrative procedures and requirements with a view to streamlining them (**Article 13**); and the use of electronic systems (**Article 14**). **Article 15** contains four alternatives for types of mechanisms such as one-stop shops and single windows; while the first alternative (based on Article 9 of Brazil's submission on a draft Investment Facilitation Agreement) would create a binding obligation on Members to create Single Electronic Windows (SEWs), the other alternatives impose non-binding or best-effort obligations on Members to consider creating single-entry mechanisms. The section also includes a provision aimed at ensuring the independence of competent decision-making authorities (**Article 16**). **Article 17** contains two alternatives for binding obligations on Members ("shall") to establish, maintain or ensure an appeal and review process of administrative decisions; the first reproduces language found in free trade agreements concluded by Singapore, and the second derives from Brazil's submission on a draft Investment Facilitation Agreement.

Section IV sets out binding obligations ("shall") with respect to Contact Points/Focal Points/Ombudspersons—types of mechanisms that involve arrangements aimed at enhancing cross-border cooperation on investment facilitation and preventing disputes.

Article 18 sets out an obligation to set up the National Focal Point proposed in Article 6 of Brazil's submission on a draft Investment Facilitation Agreement, adding bracketed text to reflect suggestions by other Members. The Trade Facilitation Agreement also requires the establishment of "enquiry points" that have a similar role as the national focal points, namely, responding to questions from "governments, traders, and other interested parties" in relation to the publication of various types of information required under Article 1.1 of the TFA (WTO, 2013). These enquiry points under the TFA are not required to address grievances or help prevent disputes that may arise, unlike the contact point/national focal point/appropriate mechanism described in Article 18 of the working document.

Article 19 (Domestic Coordination) builds on language found in Article 25.2 (General Provisions) of Chapter 25 (Regulatory Coherence) of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), defining regulatory coherence and affirming the importance of expected benefits of regulatory coherence in the area of investment facilitation (UNCTAD, 2018). **Article 20** creates an obligation for Members to establish national committees on investment facilitation "to facilitate both domestic coordination and implementation of the provisions of this framework," similar to the national committees on trade facilitation required under the institutional arrangements of the TFA (WTO, 2013). **Article 21** mandates national focal points to promote cross-border cooperation on investment facilitation.

Section V outlines options for special and differential treatment (S&DT) for developing country and LDC Members. It includes a provision with two alternatives on general principles for S&DT (**Article 22**), as well as a provision, also with two alternatives, containing proposed S&DT criteria for implementation (**Article 23**).

Under the alternatives set out in **Article 23**, one version sets out different transition periods for the various commitments under the framework, with the potential of immediate application for some, and four or eight years for others. It also sets out the possibility of LDCs being fully exempted from some sections in the framework while noting that the transition period approach would apply should these Members graduate from being LDCs. The other version adopts a category-style approach that mirrors that of the TFA, where developing country and LDC Members would designate provisions for immediate implementation upon the framework's entry into force, known as Category A commitments; provisions that would require a transition period for implementation, known as Category B commitments; and provisions that would require a transition period as well as capacity-building support and technical assistance, known as Category C commitments (WTO, 2013).

Article 24 encompasses best-efforts obligations on technical assistance and capacity building for developing country and LDC Members to implement the framework, including through possible cooperation with other international organizations and the possible establishment of an Investment Facilitation Facility to manage voluntary contributions. The reference to such a facility is also drawn from the TFA, which was paired with the establishment of a Trade Facilitation Agreement Facility (TFAF) designed to help developing country and LDC Members

determine the support they need for implementing their TFA commitments; assess where such support could be obtained; and provide training materials and other tools that could help in fulfilling these commitments (TFAF, n.d.).

The cross-cutting issues covered in **Section VI** are micro, small and medium enterprises (MSMEs); corporate social responsibility (CSR); and anti-corruption.

Article 25 creates obligations on Members to establish websites with information designed for MSMEs, following the approach of and similar language to Article 24.1 (Information Sharing) of Chapter 24 (MSMEs) of the CPTPP (UNCTAD, 2018).

Article 26 on CSR offers four best-efforts language alternatives. **Alternative 1** reproduces the language in Brazil's draft Investment Facilitation Agreement, which ultimately builds on the CSR language contained in Brazil's CFIAs (Communication from Brazil, 2018; UNCTAD, n.d.). The provision sets out best-efforts commitments on investors and investments to contribute to sustainable development and to comply with a detailed list of voluntary CSR principles and standards, in accordance with domestic laws and international commitments. The list of principles and standards include environmental protection, human rights, local capacity-building, sound corporate governance, among others. **Alternative 2** features proposed language similar to that included in the European Union–Vietnam free trade agreement under Article 13.10(e) (European Commission, 2018). Here, WTO Members would commit to encouraging CSR, including through measures such as "exchange of information and best practices, education and training activities and technical advice." The alternative also includes reference to soft-law instruments on CSR. **Alternative 3** replicates the language included in the investment chapter of the CPTPP, specifically Article 9(17) (UNCTAD, 2018). It is limited to reaffirming the importance that each WTO Member encourage enterprises to voluntarily incorporate those CSR standards, guidelines of principles supported or endorsed by that Member, without specific mention to any such instruments. **Alternative 4** mirrors the language of the CSR provision included, by a 2017 amendment, as Art. G.14 *bis* in the investment chapter of the 1996 Canada–Chile free trade agreement (Organization of American States, 2017). Here, Members would reaffirm their best-efforts commitment to CSR standards, guidelines and principles that they support or endorse. The provision also states that Members "should" encourage companies to voluntarily adopt such CSR standards, guidelines, and principles; it also clarifies, through an illustrative list, the areas that they cover.

Article 27 on anti-corruption also offers four alternatives. **Alternative 1** includes language found in Brazil's CFIAs, with obligations on Members to adopt measures "to prevent and [fight] [combat] corruption, [money laundering and terrorism financing]." **Alternative 2** replicates the language of the binding obligation under Article 12(1) of the 2003 UN Convention Against Corruption: "Each Member shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures" (UNODC, 2003). **Alternative 3** reproduces exhortatory language from Guideline

VII (Combating Bribery, Bribe Solicitation and Extortion) of the 2011 OECD Guidelines for Multinational Enterprises (OECD, 2011). **Alternative 4** reproduces the binding obligation on investors and investments found in Article 10 (Common Obligation Against Corruption) of the 2012 Southern African Development Community (SADC) Model BIT (SADC, 2012).

Section VII contains institutional arrangements and final provisions. **Article 28** proposes two alternatives for the creation of a WTO Committee on Investment Facilitation, open to all Members, with regular meetings and a mandate to monitor and facilitate the operation of the potential framework. This committee is similar to the Trade Facilitation Committee established under the WTO TFA, tasked with monitoring the implementation of the agreement, including the notifications of which commitments have been designated by developing country Members as Category A, B, or C—respectively referring to immediate application; commitments that require a transition period; and those that require a transition period, capacity-building support and technical assistance. The second alternative is based on Brazil's draft Investment Facilitation Agreement, i.e., its submission from early 2018 under the structured discussions.

Article 29 (Final Provisions) clarifies that the obligations under this framework do not diminish Members' obligations under the 1994 General Agreement on Tariffs and Trade (GATT) and GATS, or their rights and obligations under the TRIMS Agreement.

Article 29 also states that the potential framework "shall not apply to treatment accorded by a Member under bilateral or multilateral international agreements in force or signed prior to" a certain year, or to "treatment accorded by a Member under an existing or future bilateral or multilateral agreement or arrangement establishing, strengthening or expanding a free trade area, a customs union, a common market, an economic union or a similar institution," or relating to certain sectors. The latter approach and language are found in several BITs concluded by Canada. The language proposed replicates Annex III (Exceptions to MFN Treatment) of the 2004 Canadian Model BIT (UNCTAD, 2004).

8.0 Looking Ahead to MC12: Schedule and next steps

The next step in the process, following the streamlining work conducted from July to December 2019, will be the distribution of an updated version ahead of the group's first organizational meeting of the year, planned for February 11 to 14, 2020. The group's work is then expected to intensify during follow-up meetings, which have been scheduled on a monthly basis and each takes place over a longer timeframe than previously, given the limited time remaining until MC12. There will be substantive meetings on March 12 and 13, 2020; April 21 to 23, 2020; and May 13 to 15, 2020. There will then be an MC12 preparatory meeting on May 28 and 29, 2020, according to sources familiar with the discussions.

As participants consider the next steps for the possible framework, they will also be considering how the obligations and overall framework would fit in the WTO, and whether the framework would serve as a standalone agreement or should instead be integrated within existing WTO agreements. If a separate framework is to be created, and if not all 164 WTO Members have signed on, then signatories will have to consider pursuing the plurilateral approach. There are a couple of options under which this could take place.

One option would be to agree on a "critical mass" agreement, similar to what was considered under the proposed Environmental Goods Agreement and what is used under the Information Technology Agreement and its expansion. Under a critical mass agreement, the parties to the agreement would need to surpass a certain threshold of world trade in the sectors covered, or in this case some investment-related threshold, in order to avoid a "free rider" problem. Upon reaching this threshold, signatories would then extend the benefits on an MFN basis, while only applying commitments to the subset (Bollyky, 2015).

The second option would be to undertake a plurilateral agreement approach that is similar to that of the GPA, in which both commitments and benefits would only apply to the subset. There would still need to be consensus among the WTO membership to add this agreement to Annex IV of the Marrakesh Agreement, where the other WTO plurilaterals are housed (WTO, 1994b; WTO, n.d.). Given that many investment facilitation-related provisions focus on transparency and would therefore by nature be applied on an MFN basis, the question is whether it would be feasible to restrict the application and what the legal implications would be.

The investment facilitation discussions are also taking place against a complex landscape, with the WTO grappling with a series of issues that will affect the overall functioning of the system, as well as its future direction. Many of these issues are expected to influence discussions at the Kazakhstan ministerial and are having a significant impact on the talks underway in Geneva. One core question will be how WTO Members address the current paralysis of the Appellate Body, in effect since early December 2019 after the terms of two more Appellate Body members expired. Only one Appellate Body member remains, meaning that there is no quorum for addressing any appeals. A difficult issue in its own right given the lack of clarity on how this will affect the

adjudication of disputes going forward, it also raises the question of how it may affect WTO negotiations, given that the mechanism for enforcing new rules will have lost one of its core features for the foreseeable future.

The multilateral negotiations on most Doha issues have shown limited advances, if any, in recent years, with the notable exception of the work under the Rules Negotiating Group to develop binding disciplines on harmful fisheries subsidies. That process is working toward achieving an outcome by the June 2020 ministerial, though the negotiations are technically and politically challenging and have missed prior deadlines for completion. Negotiations on agriculture, while highly active, are still determining what outcomes and level of ambition to aim for in Kazakhstan.

There is also an ongoing debate among WTO Members over whether to reconsider the organization's approach to S&DT and, if so, how. Currently, WTO Members can self-designate as developing countries for the purposes of one or more WTO agreements, allowing them to avail themselves of particular flexibilities, such as transition periods for implementing certain rules; being exempted from implementing certain provisions unless they receive the necessary capacity-building support and technical assistance; different thresholds for certain commitments, such as the limits for de minimis support under the WTO's agriculture rules.

The United States has submitted a proposed General Council decision that would set out four categories of WTO Members that would not be able to use S&DT in future WTO commitments while specifying that this would not affect their current arrangements (WTO, 2019a). The U.S. Ambassador to the WTO, Dennis Shea, has since clarified that "if a S&D provision is introduced in a WTO negotiation, the United States will indicate that it will not agree to that provision unless certain Members forego use of that provision" (U.S. Mission, 2019). Various other WTO Members have indicated that they have concerns over this proposed decision and have suggested other options, including developing a better understanding of how S&DT is currently used across the WTO agreements, among others. This debate is expected to have implications for current and future WTO negotiations, as well as for the system, and will likely continue in the months to come. It was raised most recently at the December 2019 meeting of the General Council.

The joint initiative on investment facilitation was one of several that were launched at the 2017 ministerial conference. The others include a joint initiative devoted to the trade-related aspects of electronic commerce, which has now advanced to negotiations among the participating WTO Members, as well as a non-negotiating joint initiative on MSMEs. The Informal Working Group involved in the MSME initiative has held various thematic sessions and other discussions on their work program and is considering possible text that could serve as a ministerial declaration in June 2020. Updates on those joint initiatives, as well as another effort among various WTO Members to develop a deeper understanding of the relationship between gender and trade, are all expected for the Kazakhstan ministerial.

There is a separate effort, also launched in Buenos Aires, to examine gender issues more closely in the WTO context, and progress on this work will be presented at the Kazakhstan ministerial. The investment facilitation working document does not include references to gender issues, which has long been the case in WTO agreements and negotiating documents.

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