



**WTO STRUCTURED DISCUSSIONS ON
INVESTMENT FACILITATION FOR DEVELOPMENT**

COMMUNICATION FROM THE EUROPEAN UNION

*EU Proposal for WTO disciplines and commitments relating to
investment facilitation for development*

The following communication dated 25 February 2020 is being circulated at the request of the delegation of the European Union.

1 INTRODUCTION

The EU is fully committed to the WTO Structured Discussions on Investment Facilitation for Development. In this context, it will seek to negotiate a comprehensive and ambitious set of WTO disciplines and commitments, to be endorsed by as many WTO Members as possible. The EU supports the open, transparent and inclusive character of this process.

To this end, the EU proposes to negotiate a series of WTO disciplines and commitments relating to investment facilitation for development, corresponding to the structure of the Coordinator's streamlined text.

This proposal is without prejudice to the EU position with respect to the final negotiated outcome, which in some cases may depend on the level of support for individual provisions. The EU also reserves the right to table additional text proposals on other issues in the course of the negotiations.

2 TEXT PROPOSALS FOR THE DIFFERENT WTO RULES UNDER DISCUSSION

2.1 Scope, objectives and general principles

Not included in the streamlined text:

"Objectives"

1. Members recognise the importance of foreign direct investment for the development of their economies and the achievement of the goals defined under the 2030 Agenda for Sustainable Development of the United Nations.

2. Members affirm their commitment to create a better investment climate between them and hereby lay down the necessary arrangements for the facilitation of foreign direct investment.

Corresponding to item 1 (scope) of the streamlined text:

1. This Agreement applies to measures adopted or maintained by Members affecting the establishment and operation of foreign direct investments.

2. Measures by Members include those of general and sector-specific application that affect foreign investors and their investment.

3. This Agreement does not apply to:

[subject to a proposal at a later stage]

4. For greater certainty, this agreement does not create new or modify existing commitments relating to the liberalisation of investments, nor does it create new or modify existing rules on the protection of international investments or investor-state dispute settlement.

5. A Member's obligations under this Agreement shall apply to measures adopted or maintained by:

- a. the central, regional and local governments and authorities of that Member; and
- b. non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

6. In fulfilling its obligations and commitments under this Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.

Corresponding to item 2 (most-favoured nation treatment) of the streamlined text:

The EU sees value in applying the most-favoured-nation (MFN) principle to the provisions of this Agreement. As regards the concrete language and possible exceptions to the application of this principle, the EU intends to submit a proposal at a later stage.

2.2 Transparency and predictability of investment measures

Corresponding to item 3 (Publication and availability of measures and information [including by electronic means] of the streamlined text:

1. Each Member shall publish¹ promptly or otherwise make publicly available in writing and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application with respect to any matter covered by this Agreement in such a manner as to enable investors or persons seeking to invest to become acquainted with them.

2. Each Member shall make available via electronic means such as a website and, where practicable accessible through a single portal, and update to the extent possible and as appropriate, the following:

- a. laws and regulations specifically addressing foreign direct investment, where they exist;
- b. restrictions and conditions applying to foreign direct investment; and
- c. contact information of relevant competent authorities.

3. Each Member shall make available, where practicable via electronic means such as a website and accessible through the single portal referred to in paragraph 2, and update to the extent possible and as appropriate, a description that informs governments, investors, and other interested parties of the practical steps needed to invest in its territory. This description should cover, inter alia, the requirements and procedures related to:

- a. company establishment and business registration;
- b. connecting to essential infrastructure such as electricity and water supply;
- c. acquisition and registering of property such as land ownership rights;
- d. construction permits;
- e. resolving insolvency;
- f. capital transfers and payments;
- g. the payment of taxes; and
- h. public incentives offered to investors and persons seeking to invest.

¹ For purposes of these disciplines, "publish" means to include in an official publication, such as an official journal, or on an official website.

4. If a Member requires authorisation for an investment in its territory, the Member shall promptly publish² or otherwise make publicly available in writing the information necessary for investors or persons seeking to invest to comply with the requirements and procedures for obtaining, maintaining, amending and renewing such authorisation. Such information shall include, *inter alia*, where it exists:

- a. the requirements and procedures;
- b. fees;
- c. technical standards;
- d. procedures for appeal or review of decisions concerning applications;
- e. procedures for monitoring or enforcing compliance with the terms and conditions of licenses or qualifications;
- f. opportunities for public involvement, such as through hearings or comments; and
- g. indicative timeframes for processing of an application.

5. No fee shall be imposed on any investor or person seeking to invest in a Member's territory for access to the information provided under this article.

Corresponding to item 3.3 (publication in advance and opportunity to comment) of the streamlined text:

1. To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member³ shall publish in advance:

- a. its laws and regulations of general application it proposes to adopt in relation to matters falling within the scope of this Agreement; or
- b. documents that provide sufficient details about such a possible new law or regulation to allow interested persons and other Members to assess whether and how their interests might be significantly affected.

2. To the extent practicable and in a manner consistent with its legal system for adopting measures each Member is encouraged to apply paragraph 1 to procedures and administrative rulings of general application it proposes to adopt in relation to matters falling within the scope of this Agreement.

3. To the extent practicable and in a manner consistent with its legal system for adopting measures each Member shall provide interested persons and other Members a reasonable opportunity to comment on such proposed measures or documents published under paragraph 1 or 2.

4. To the extent practicable and in a manner consistent with its legal system for adopting measures each Member shall consider comments received under paragraph 3.⁴

5. In publishing a law or regulation referred to in paragraph 1, or in advance of such publication, to the extent practicable and in a manner consistent with its legal system for adopting measures, a Member is encouraged to explain the purpose and rationale of the law or regulation.

6. Each Member shall, to the extent practicable, endeavour to allow reasonable time between publication of the text of a law or regulation referred to in paragraph 1 and the date on which investors must comply with the law or regulation.

² Members are encouraged to consolidate electronic publications into a single portal.

³ Members understand that paragraphs 1 to 4 recognize that Members have different systems to consult interested persons and other Members on certain measures before they are final, and that the alternatives set out in paragraph 1 reflect different legal systems.

⁴ This provision does not place any obligation on the final decision of a Member that adopts or maintains any measure for authorisation for an investment.

Corresponding to item 6.1 (disclosure of confidential information) of the streamlined text:

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

2.3 Streamlining and speeding up administrative procedures and requirements

Corresponding to item 7 (consistent, reasonable, objective and impartial administration of measures), item 8 (reduction and simplification of administrative procedures and documentation requirements) and item 9 (Clear criteria and requirements for administrative procedures) of the streamlined text:

1. Each Member shall ensure that all measures of general application within the scope of this Agreement are administered in a reasonable, objective and impartial manner.
2. If a Member adopts or maintains measures relating to the authorisation for an investment, the Member shall ensure that:
 - a. such measures are based on objective and transparent criteria;⁵
 - b. the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, where such requirements exist;
 - c. the procedures do not in themselves unjustifiably prevent fulfilment of requirements.

Corresponding to item 10 (authorisation procedures) and item 11 (treatment of incomplete and rejection of applications) of the streamlined text:

1. If a Member requires authorisation for an investment, it shall ensure that its competent authorities:
 - a. to the extent practicable, provide an indicative timeframe for processing of an application;
 - b. at the request of the applicant, provide without undue delay information concerning the status of an application;
 - c. to the extent practicable, ascertain without undue delay the completeness of an application for processing under the Member's domestic laws and regulations;
 - d. if they consider an application complete for processing under the Member's domestic laws and regulations⁶, within a reasonable period of time after the submission of the application ensure that:
 - i. the processing of the application is completed; and
 - ii. the applicant is informed of the decision concerning the application,⁷ to the extent possible in writing;⁸
 - e. if they consider an application incomplete for processing under the Member's domestic laws and regulations, within a reasonable period of time, to the extent practicable:
 - i. inform the applicant that the application is incomplete;
 - ii. at the request of the applicant identify the additional information required to complete the application or otherwise provide guidance on why the application is considered incomplete; and

⁵ Such criteria may include, *inter alia*, competence and the ability to supply a service, including to do so in a manner consistent with a Member's regulatory requirements, such as health and environmental requirements. Competent authorities may assess the weight to be given to each criterion. For greater certainty, this provision shall not be construed as creating additional market access rights and obligations of Members.

⁶ Competent authorities may require that all information is submitted in a specified format to consider it "complete for processing".

⁷ Competent authorities may meet this requirement by informing an applicant in advance in writing, including through a published measure that lack of response after a specified period of time from the date of submission of the application indicates either acceptance or rejection of the application.

⁸ "In writing" may include in electronic form.

iii. provide the applicant with the opportunity⁹ to provide the additional information that is required to complete the application;

however, if none of the above is practicable, and the application is rejected due to incompleteness, ensure that they inform the applicant within a reasonable period of time; and

- f. if an application is rejected, to the extent practicable, either upon their own initiative or upon request of the applicant, inform the applicant of the reasons for rejection and, if applicable, the procedures for resubmission of an application. An applicant should not be prevented from submitting another application solely on the basis of a previously rejected application.

2. The competent authorities of a Member shall ensure that authorisation, once granted, enters into effect without undue delay, subject to the applicable terms and conditions.¹⁰

Corresponding to item 10.1 (Application timeframes and periods) of the streamlined text:

If a Member requires authorisation for an investment, it shall ensure that its competent authorities to the extent practicable permit submission of an application at any time throughout the year.¹¹ If a specific time period for applying exists, the Member shall ensure that the competent authorities allow a reasonable period for the submission of an application.

Corresponding to item 10.2 (acceptance of copies) and item 14 (use of ICT/e-government) of the streamlined text:

1. If a Member requires authorisation for an investment, it shall ensure that its competent authorities:

- a. taking into account their competing priorities and resource constraints, endeavour to accept applications in electronic format; and
- b. accept copies of documents, that are authenticated in accordance with the Member's domestic law, in place of original documents, unless the competent authorities require original documents to protect the integrity of the authorisation process.

2. Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for fees and charges collected by relevant competent authorities involved in the authorisation of investments.

Corresponding to item 12 (fees and charges) of the streamlined text:

1. Each Member shall ensure that the authorisation fees¹² charged by its competent authorities are reasonable, transparent, based on authority set out in a measure, and do not in themselves restrict the investment.

2. Each Member shall accord an adequate time period between the publication of new or amended fees and charges related to authorisation procedures and their entry into force, except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published.

Corresponding to item 8 (reduction and simplification of administrative procedures and documentation requirements), item 12 (fees and charges) and 13 (periodic reviews) of the streamlined text:

1. Each Member is encouraged to review, at intervals it deems appropriate, its measures of general application covered by this Agreement to determine whether specific measures it has implemented should be modified, streamlined, expanded or repealed so as to make the Member's investment facilitation regime more effective in achieving its policy objectives and in addressing the specific needs of micro, small and medium enterprises (MSMEs).

⁹ Such opportunity does not require a competent authority to provide extensions of deadlines.

¹⁰ Competent authorities are not responsible for delays due to reasons outside their competence.

¹¹ Competent authorities are not required to start considering applications outside of their official working hours and working days.

¹² Authorisation fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

2. Each Member is encouraged to periodically review its fees and charges with a view to reducing their number and diversity.

3. Members are encouraged to consider stakeholder feedback and make use of relevant international performance indicators such as the World Bank's ease of doing business score. Members are invited to share with the Committee their experiences in carrying out periodic reviews and policy recommendations resulting thereof.

Corresponding to item 15 (one-stop shop/single window-types of mechanisms) of the streamlined text:

Each Member shall, to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorisation. If a service is within the jurisdiction of multiple competent authorities, multiple applications for authorisation may be required.

Corresponding to item 16 (independence of competent authorities) of the streamlined text:

If a Member adopts or maintains a measure relating to authorisation for an investment, the Member shall ensure that the competent authority reaches and administers its decisions in a manner independent from any enterprise carrying out the economic activity for which authorisation is required.¹³

Corresponding to item 17 (appeal and review) of the streamlined text:

1. Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected investor, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting investment. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

2. The provisions of paragraph 1 shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Each Member shall ensure that the parties to the proceedings in paragraph 1 are provided with the right to:

- a. a reasonable opportunity to support or defend their respective positions and submit all relevant information; and
- b. a decision based on the evidence and submissions of record or, where required by its law, the record compiled by the administrative authority.

4. The decision in paragraph 3 shall, subject to appeal or further review as provided for in its law, be implemented by the authority entrusted with administrative enforcement.

2.4 Contact points and domestic regulatory coherence

Corresponding to item 5 (enquiry points), item 18 (contact point/focal point/ombudsperson types of mechanisms) and item 20 (cross-border cooperation) of the streamlined text:

1. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from investors or persons seeking to invest regarding the measures covered by this Agreement.¹⁴

2. Members are encouraged to respond to enquiries from enquiry points established by other Members under this Article in order to contribute to the effective application of this Agreement.

3. Each Member shall endeavour to establish or maintain appropriate mechanisms with the task of seeking to effectively resolve problems for investors or person seeking to invest that may arise from the application of any measure of general application covered by this Agreement. Such processes should be easily accessible, including for micro, small and medium enterprises (MSMEs), time-bound and transparent. They shall be without prejudice to any appeal or review procedures which the Member establish or maintain. They shall also be

¹³This provision does not mandate a particular administrative structure.

¹⁴It is understood that resource constraints may be a factor in determining whether a mechanism for responding to enquiries is appropriate.

without prejudice to the Member's rights and obligations under the Dispute Settlement Understanding.

4. Any information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.

Corresponding to item 19 (domestic regulatory coherence) of the streamlined text:

1. Each Member is encouraged to carry out, in accordance with its respective rules and procedures, an impact assessment of major regulatory measures within the scope of this Agreement, it is preparing.

2. When conducting such impact assessments, the regulatory authority of the Member may offer reasonable opportunities for any person, on a non-discriminatory basis, to provide comments and take into consideration the potential impact of the proposed regulation on micro, small and medium enterprises (MSMEs).

3. Each Member should ensure that its authorities and agencies responsible for procedures related to investment cooperate with one another and coordinate their activities in order to facilitate investment.

2.5 special and differential treatment for developing and least developed country members

Corresponding to item 21-25 of the streamlined text:

The EU considers special and differential treatment (SDT) including technical assistance as an important component of an investment facilitation agreement. The EU is of the view that the nature and scope of flexibilities needed as well as the concrete measures of technical assistance and capacity building depend on the types of commitments included in the final framework.

It is the EU's understanding that, instead of a one-size-fits-all approach to SDT, flexibilities and technical assistance need to reflect the different levels of development of Members. This involves an assessment of Members' capacities on a case-by-case basis as well as a needs-driven and evidence-based approach. SDT has to be time-limited, which means that it should be available until the particular objective that was pursued is met.

In this context, the EU considers the WTO Trade Facilitation Committee as a useful starting point for discussions. Discussions should take into account the existing work carried out by international organisations in the field of investment facilitation.

As regards the concrete language for this provision, the EU intends to submit a proposal at a later stage.

2.6 Cross-cutting issues

Corresponding to item 26 (corporate social responsibility) of the streamlined text:

1. Members recognise the importance of investors implementing due diligence in order to identify and address adverse impacts, such as on the environment and labour conditions, in their operations, their supply chains and other business relationships. Members shall promote the uptake by enterprises and investors of corporate social responsibility or responsible business practices with a view to contributing to sustainable development.

2. Members shall support the dissemination and use of relevant internationally agreed instruments such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises and related due diligence guidance.

3. Members agree to exchange information as well as best practices on issues covered by this article, including on possible ways to facilitate the uptake by enterprises and investors of corporate social responsibility, responsible practices and reporting, in the Committee. To this end, the Committee shall maintain close contact with relevant international organisations active in the field of corporate social responsibility or responsible business conduct.

Corresponding to item 27 (measures against corruption) of the streamlined text:

Each Member shall ensure that measures are taken to prevent and fight corruption, money laundering, terrorism financing, tax fraud and tax evasion, with regard to matters covered by

this framework, in accordance with its legal system and internationally agreed standards that have been endorsed or are supported by that Member such as the United Nations Convention against Corruption and the OECD Guidelines for Multinational Enterprises as well as the current standards in the field of international taxation.

2.7 Institutional arrangements and final provisions

Corresponding to item 28 (WTO committee on investment facilitation) of the streamlined text:

The EU sees value in establishing a dedicated WTO committee dealing with the implementation of this agreement and other matters of investment facilitation. In this context, the EU considers the WTO Trade Facilitation Committee as a useful model to build on. The EU sees a need to involve closely other international organisations active in the area of investment facilitation such as UNCTAD, OECD, ITC and World Bank. As regards the concrete language for this provision, the EU intends to submit a proposal at a later stage.

Corresponding to item 29 (general exceptions) and 30 (security exceptions) of the streamlined text:

GATS Article XIV, GATS Article XIV bis, paragraph 1 (a), (b) and (c), 1994 GATT Article XX and 1994 GATT XXI¹⁵ shall apply to the provisions of this Agreement.

Corresponding to item 31 (dispute settlement) of the streamlined text:

For any dispute concerning the interpretation and application of the provisions of this Agreement, the Parties shall only have recourse to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the World Trade Organisation.

Corresponding to item 32 (final provisions) of the streamlined text:

Notwithstanding the general interpretative note to Annex 1A to the Marrakesh Agreement Establishing the World Trade Organisation, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994 and GATS. In addition, nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Trade-Related Investment Measures.

¹⁵Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the World Trade Organisation and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.