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Defining investment in a future WTO agreement on investment facilitation for development

by

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The WTO negotiations on investment facilitation for development are scheduled to be concluded by the end of this year. Negotiators seek an Investment Facilitation for Development (IFD) Agreement that would enhance developing and least developed countries' participation in global investment flows.¹ The negotiations are based on a continuously updated text. While the current draft of this text defines certain key terms, the term “investment” has yet to be defined.

If negotiators decide to define investment, a critical consideration should be the way in which the WTO rule book deals with trade-related investment matters. Three WTO agreements are particularly relevant in this respect:

- the Agreement on Trade-Related Investment Measures (TRIMs Agreement),
- the General Agreement on Trade in Services (GATS), and
- the amended Agreement on Government Procurement (GPA).

While the investment-related provisions in these agreements do not constitute legally binding precedent, given the “stand-alone” character of a future IFD Agreement, they may usefully inform the discussion on how to define investment under a future IFD Agreement.

The TRIMs Agreement applies to investment measures related to trade in goods. It prohibits any such measure that is inconsistent with the GATT provisions on national treatment or the general elimination of quantitative restrictions. The Annex to the TRIMs Agreement contains an illustrative list of trade-related investment measures that are *per se* inconsistent with either GATT Art. III:4 or GATT Art. XI:1.² The measures mentioned in this list refer to, among others, the purchase, use, importation or exportation of products by an enterprise. Accordingly, trade-related investment measures in the sense of the TRIMs Agreement are typically linked to two elements: an enterprise, and products purchased, used, imported or exported by such enterprise.

The GATS covers measures affecting trade in services and defines “trade in services” by reference to four “modes” of supply. One of them is the “commercial presence” of a WTO member’s service supplier in the territory of any other WTO member. GATS defines “commercial presence” as any type of business or professional establishment within a WTO member’s territory, including through the constitution, acquisition or maintenance of a juridical person, for the purpose of supplying a service.³ This definition ensures that commercial presence captures foreign direct investment (FDI) in services; in fact, approximately two thirds of global FDI stocks are in services.⁴ Hence, commercial presence within the meaning of the GATS is characterized by two elements: a business or professional establishment within a WTO member’s territory, and the supply of a service.

The GPA, a plurilateral agreement, applies to any measure regarding procurement of goods, services or any combination thereof, for governmental purposes. To this end, the GPA also covers government procurement of goods or services offered by a supplier of a GPA Party.⁵ The GPA’s non-discrimination obligation requires, *inter alia*, that a locally established supplier not be treated less favorably than another locally established supplier based on the degree of foreign affiliation or ownership. This implies that, for purposes of the GPA, a supplier locally established in a GPA party may be a supplier that is affiliated with, or owned by, a person or a group of persons of another GPA party and offers goods or services for a particular procurement.

In light of the foregoing, it can be observed that the WTO rule book addresses trade-related investment matters by way of recourse to two elements: (i) a business or professional establishment by a WTO member’s person in another WTO member’s territory (ii) for purposes of providing goods or services.

Two consequences flow from these elements. Firstly, by requiring a business or professional establishment, the first element excludes an asset-based definition of investment. Secondly, by requiring that an established entity be engaged in a real economic activity through the provision of goods or services, the second element excludes an investment definition that includes portfolio investment, irrespective of economic sector.

Negotiators would be well advised to take account of the aforementioned two elements should they wish to define investment in a future IFD Agreement.

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¹ [Joint Statement on Investment Facilitation for Development](#), 10 December 2021, paras. 2 and 3.

² Panel report, [Brazil-Taxation](#) (WT/DS472/R, WT/DS497/R), para. 7.805.

³ [GATS](#) Art. XXVIII(d). “Commercial presence” includes the constitution, acquisition or maintenance of a juridical person, with the service supplier having to own or control that juridical person (GATS Art. XXVIII (m) (ii)). Ownership of a juridical person means beneficial ownership of more than 50% of the equity interest in it, whereas control of a juridical person means the power to appoint a majority of its directors or to legally direct its actions (GATS Art. XXVIII (n)).

⁴ M. Roy, [“The contribution of services trade policies to connectivity in the context of aid for trade”](#) (WTO Staff Working Paper, ERSD-2017-12), p. 5.

⁵ A “supplier” means a person or group of persons that provides or could provide goods or services, [GPA](#) Art. I (t).

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