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Investment facilitation: leaving the past behind*

by

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The [Joint Ministerial Statement on Investment Facilitation for Development](#),¹ co-sponsored by 70 WTO members during the Ministerial Conference in December 2017, has initiated a dialogue on investment facilitation at the WTO. In a particularly challenging moment for multilateral decision-making, the statement was co-sponsored by members from virtually all the informal groupings at the WTO, including least-developed countries; the African group; developed countries; the BRICS; African, Caribbean and Pacific countries; small, vulnerable economies; and the Bolivarian Alliance for the Americas. Since then, some 30 more WTO members have joined the informal dialogue organized by the Friends of Investment Facilitation for Development.²

India introduced investment facilitation into the WTO in 2016 with a proposal on “Trade Facilitation in Services Agreement”.³ In 2017, Russia circulated a proposal specifically focusing on investment facilitation,⁴ which was soon followed by a Chinese proposal.⁵ Brazil subsequently submitted a draft agreement on investment facilitation⁶ inspired by its Cooperation and Facilitation Investment Agreement (CFIA) template—a bilateral treaty premised on binding rules on investment facilitation. For Brazil, investment facilitation is about transparent access to information about the regulatory and institutional environment in the host country; the streamlining of procedures associated with incoming FDI; and the post-establishment relationship between host countries and investors. Brazil negotiated CFIA’s since 2015 with developing countries in Latin America, Africa and India, and two of them have already entered into force.

In a recent *Perspective*,⁷ Kavaljit Singh raised questions relating to the discussions on investment facilitation at the WTO. We offer insights and clarifications from the Brazilian approach to advance this conversation:

- Multilateral disciplines at the WTO, as those adopted by any other international rule-making institution, deliberately affect the policy space of its members on the whole range of areas covered by its agreements, from services to public stockholding for food security. Still, an agreement on investment facilitation will not prevent members “to choose the tools that are consistent with their peculiar

administrative structures.” Rather, it would help members to implement a basic legal framework in this area.

- Under the Brazilian proposal to the WTO, national policy decisions related to foreign investment are not subject to dispute-settlement provisions. The latter are limited to the implementation of the proposed agreement. Likewise, the most-favored-nation clause in the draft does not apply to policy matters.
- Certainly, many investment measures are taken at sub-federal levels, and most of Singh’s concerns relate to these levels. In contrast, Brazil advocates to focus primarily on the federal level; sub-federal measures would be left for a later stage. This view is premised on the understanding that the implementation of facilitation measures at the federal level is already complex since it has an impact on a wide range of disciplines, involves numerous competent authorities and affects different procedures.
- Regarding the single electronic window, Brazil proposes voluntary participation by sub-federal entities. If the latter so choose, they could add their own establishment approval procedures to the single electronic window managed by the federal government. While the Brazilian proposal seeks to encourage all spheres of government to achieve digitalization and integration, only federal authorities would be mandated to follow the envisaged rules.
- The approval process for inward investment sometimes requires the involvement of a large number of agencies. Investors are asked to approach each of them individually, sometimes facing overlapping requirements. This is avoided with single windows, which channel interactions by setting up one-stop shops. This is precisely the reason why single electronic windows can have a real facilitating role for governments and investors, especially when multiple authorities are involved.
- Singh also raises concerns about the “vast responsibilities” allocated to national focal points. The Brazilian draft only requires focal points to implement the agreement. These responsibilities will add to those already associated with the implementation of the “wide range of investment-facilitation measures at the national and sub-national levels” being carried out by “most members.” There is nothing suggesting that national focal points would set policies or include sub-federal levels.

Importantly, the Joint Ministerial Statement clearly states that the investment facilitation discussions “shall not address market access, investment protection, and investor-state dispute settlement.”⁸ By excluding these controversial issues, WTO members are able to focus on an issue that directly contributes to improving the domestic governance of developing countries without reviving the negative experience of past multilateral investment discussions. This is the value-added of investment facilitation.

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¹ WT/MIN(17)/59.

² The “Friends” are: Argentina, Brazil, Chile, China, Colombia, Guatemala, Hong Kong (China), Kazakhstan, Liberia, Mexico, Mauritania, Nigeria, Pakistan, Qatar, Republic of Korea, The Gambia, and Uruguay.

³ Felipe Hees and Pedro Mendonça Cavalcante, “Focusing on investment facilitation – is it that difficult?,” *Columbia FDI Perspectives*, no. 202, June 19, 2017.

⁴ JOB/GC/120.

⁵ JOB/GC/123.

⁶ JOB/GC/169.

⁷ Kavaljit Singh, “Investment facilitation: another fad in the offing?,” *Columbia FDI Perspectives*, no. 232, August 13, 2018. The subsequent quotes refer to this *Perspective*.

⁸ WT/MIN(17)/59, para. 4.

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