DISCUSSION PAPER

THE PROPOSED INVESTMENT FACILITATION AGREEMENT AT THE WTO:

UNDERSTANDING THE INVISIBLE ELEMENTS OF BRAZIL'S PROPOSAL

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James J. Nedumpara and Sandeep Thomas Chandy

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THE PROPOSED INVESTMENT FACILITATION AGREEMENT AT THE WTO: UNDERSTANDING THE INVISIBLE ELEMENTS OF BRAZIL'S PROPOSAL

James J. Nedumpara and Sandeep Thomas Chandy*

Introduction

Since the Ministerial Conference at Singapore in 1996, some of the Member States of the World Trade Organisation ("WTO") have been deliberating on whether to include investment at the multilateral forum or not. For this purpose, the Singapore Ministerial formed a Working Group on the Relationship between Trade and Investment ("Working Group"). The subsequent Doha Ministerial Conference held in 2001 led to the formation of a new agenda to focus on the needs of developing and least-developed countries. In view of a sustained opposition from certain developing countries, investment and other Singapore issues[1] were, thereby, dropped from the Doha Work Programme.

More recently, at the time of the Buenos Aires Ministerial Conference in 2017 ("Ministerial Conference"), the WTO once again witnessed a revival of the debate on bringing investment within the scope of the WTO. This time, the debate shifted from investment protection to investment facilitation. A host of countries including China, Brazil, Argentina and Russia have submitted individual and joint proposals. Two groups—Friends of Investment Facilitation for Development ("FIFD"),[2] and Mexico, Indonesia, Korea, Turkey, and Australia ("MIKTA")—also submitted proposals on investment facilitation. Due to an inability to strike a consensus on investment facilitation at the Ministerial Conference, the proponents were able to produce only a joint statement "to pursue structured discussions with the aim of developing a multilateral framework on investment facilitation".[3] With this statement, the issue of inclusion of investment has once again entered the limelight.

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* James J. Nedumpara is Head and Professor of Centre for Trade and Investment Law, Ministry of Commerce & Industry, Government. of India; Email:headctil@iift.edu; Sandeep Thomas Chandy is a Research Fellow at the Centre for Trade and Investment Law, Ministry of Commerce & Industry, Government. of India. The opinion expressed in this paper are the authors' own and do not reflect the position of their organization.

[1] The four issues introduced to the WTO agenda at the Singapore Ministerial Conference were trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation.

[2] Members of the FIFD group are Argentina; Brazil; Chile; China; Colombia; the Gambia; Hong Kong; Kazakhstan; Liberia; Mexico; Mauritania; Nigeria; Pakistan; Qatar; Republic of Korea and Uruguay.

[3] The joint statement had the support of 70 Member states. The members are Argentina; Australia; Benin; Brazil; Cambodia; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Guatemala; Guinea; Honduras; Hong Kong, China; Japan; Kazakhstan; Korea, Republic of; Kuwait, the State of; Kyrgyz Republic; Lao People's Democratic Republic; Liberia; Macao, China; Malaysia; Mexico; Moldova, Republic of;

After the Ministerial Conference, Brazil, in a communication dated January 31, 2018, submitted an illustration of the proposed investment facilitation agreement ("Proposed Agreement").[4] The Proposed Agreement contains provisions for facilitating cross-border investments in the production of goods and supply of services. The stated objectives of this Proposed Agreement, as enshrined in its Preamble, include the need to enhance transparency, regulatory and administrative efficiency, and coherence in the legal and administrative framework of the host-State relating to the establishment, maintenance and expansion of investments. It further contains provisions for implementing e-governance and technical assistance for least developed countries. The Proposed Agreement also includes measures aimed at involving investors in policy and rulemaking, timelines for processing of applications, single electronic window, appeals and review, publication of laws and regulations, among others. The Proposed Agreement also provides for the creation of a national Ombudsperson within the host-State for addressing investor grievances and a Committee on Investment Facilitation within the WTO. Recourse to dispute settlement measures under the terms of the WTO Dispute Settlement Understanding ("DSU") has also been made available.

The following are some of the preliminary comments on Brazil's Proposed Agreement. Some elements of the Proposed Agreement will be analysed in greater detail, if it is considered essential.

1. Scope of the Proposed Agreement

The scope of the Proposed Agreement is stated in Article 1.1 which reads as follows: "This Agreement applies to facilitation measures by Members affecting the admission, establishment, acquisition and expansion of investments in services and non-services sectors.". The key term of this provision is the term "investments" itself. Interestingly, this term is undefined in the Proposed Agreement. In a general sense, foreign investment involves a transfer of tangible or intangible assets from one country to another under total or partial control of the owner of the assets.[5] Foreign investments can take place in the form of greenfield

Montenegro; Myanmar; New Zealand; Nicaragua; Nigeria; Pakistan; Panama; Paraguay; Qatar; Russian Federation; Singapore; Switzerland; Tajikistan; Togo; and Uruguay

[4] World Trade Organisation, General Council, Communication from Brazil, *Structured Discussions On Investment Facilitation*, WTO Doc. JOB/GC/169, (February 1, 2018).

[5] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8-9 (2010).

investments, mergers and acquisitions, portfolio investments, among others. Purportedly, the scope of the Proposed Agreement could include each of these forms of investment.

Among the various types of investments, Foreign Portfolio Investment ("FPI") is generally a controversial area and is often excluded from investment protection treaties. The International Monetary Fund ("IMF") defines portfolio investment as "cross-border transactions and positions involving debt or equity securities, other than those included in direct investment or reserve assets".[6] The distinguishing elements between FPI and Foreign Direct Investment ("FDI") are (i) their short-term objective; and (ii) separation between, on the one hand, management and control of the underlying entity and, on the other, the share of ownership in it.

Therefore, the broad coverage of investment in Brazil's Proposed Agreement is a matter of concern. India's Model BIT 2016 has explicitly excluded FPI.[7] In the current form, the Proposed Agreement has a potential for covering FPIs in view of the absence of a definition for "investment".

2. Potential Coverage of the Pre-establishment Investment Measures

India's Model BIT and the recent Office Memorandum[8] clearly emphasize the need for excluding any "pre-establishment" coverage of investments. It is true that a number of investment facilitation measures, indeed, deal with the admission of investment. However, India's traditional approach has been to oppose granting of pre-establishment rights in investment treaties as States would lose their sovereign right to screen the investments at the admission stage.[9]

3. Absence of a Definition for "*investor*"

[6] International Monetary Fund, Balance of Payments and International Investment Position Manual (BPM6).
[7] India's Model Bilateral Investment Treaty, Art 1.4 (i).
[8] Government of India, Ministry of Finance, Department of Economic Affairs, Office Memorandum – *Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties* (Feb. 8, 2016).
[9] Working Group on the Relationship between Trade and Investment, India – Views on Modalities for Pre-Establishment Commitments Based on a GATS-Type Positive List Approach, WTO Doc. WT/WGTI/W/150, (October 7, 2002).

The Proposed Agreement neither defines nor delineates the term "investor". This is again a matter of concern especially when the Proposed Agreement grants rights on matters of admission, establishment and expansion relating to investment facilitation. For merchandise trade, it is possible to identify its country of origin based on the criteria identified in the applicable provisions on Rules of Origin. However, for cross-border flow of investments, currently, there exists no such rules for determining the source of investment, thereby, permitting various types of investors such as indirect and minority investors or their respective States to claim violation of treaty obligations. The Proposed Agreement does not delimit the scope of investor which may have undesirable and unintended consequences for WTO Members. The practice of investors lobbying and shopping for governments to bring WTO disputes is a growing phenomenon in international dispute resolution. Although only Member States are permitted to initiate disputes against another Member State under the provisions of the WTO DSU, it is common knowledge that sometimes investors influence developing and least-developed countries to initiate disputes before various dispute resolution forums or international tribunals. A few recent examples of this trend include the challenges against Australia's plain packaging requirements by Ukraine[10], Indonesia[11], Honduras[12], Dominican Republic[13], and Cuba[14] before the WTO. It was alleged that the tobacco majors influenced and financed the complaining States to raise the dispute before the WTO.[15] Under the DSU, a Member State has broad discretion in deciding whether to bring a case against another Member. In other words, a Member need not necessarily prove actual injury to raise a dispute.[16]

[10] Request for Consultations by Ukraine, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS434/1 (March 15, 2012).
[11] Request for Consultations by Indonesia, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS467/1 (September 20, 2013).
[12] Request for Consultations by Honduras, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS435/1 (April 4, 2012).
[13] Request for Consultations by Dominican Republic, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS441/1 (July 18, 2012).
[14] Request for Consultations by Cuba, Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS458/1 (May 3, 2013).
[15] Andrew Martin, Philip Morris Leads Plain Packs Battle in Global Trade Arena, BLOOMBERG (Aug. 22, 2013, 12:01 PM), http://www.bloomberg.com/news/2013-08-22/philip-morris-leads-plain-packs-battle-in-global-trade-arena.html (last visited Mar. 10, 2017); Danny Hakim, U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures, NEW YORK TIMES (June 30, 2015), https://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html?_r=0.
[16] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

International investment law does not prohibit minority shareholders from bringing a dispute against the host State for affecting their rights.[17] Due to the inherent complex nature of indirect holdings among multi-national companies, it would be easy for an investor to show a prima-facie nexus to a State.

The nationality of investor (direct, indirect and minority) is critical in establishing nexus between a complaining Member State and the investor. A lack of clarity on the meaning of the term "investor" is bound to encourage parties to engage in "government shopping" investment/investment facilitation disputes.

4. ARTICLE 1.2 – Measures of General and Specific Application

Article 1.2 - "Facilitation measures by Members include those of general application and sector-specific that affect investors and their investment"

The wording of this clause seems to suggest that any and every measure that has a direct effect on the investor or their investment would be considered as "measure of general application". In *US-Underwear*[18], the Appellate Body noted that transitional safeguard measures applied by the United States were "measures of general application" within the meaning of Article X:2 of GATT 1994, a provision which is somewhat similarly worded to Article 1.2 of the Proposed Agreement. The short point is that Brazil's Proposed Agreement subsumes potentially all types of investment facilitation measures in its coverage.

5. ARTICLE 1.3 – Excluded Investment Measures

Article 1.3 of the Proposed Agreement clearly states that it excludes government procurement, public concessions and, investor-to-State dispute resolution ("ISDS"). It also unambiguously states that "market access" issues are excluded from the scope. However, the Proposed Agreement does not exclude the possibility of State-to-State dispute resolution implying that

[17] *CMS Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad-Hoc Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, at https://www.italaw.com/documents/CMSAnnulmentDecision.pdf; INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 42-46 (OECD, 2008).
[18] Appellate Body Report, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc. WT/DS24/AB/R (Feb. 10, 1997).

any potential violation of the Proposed Agreement could entail recourse to the WTO dispute settlement. This is further reinforced in Article 21.6 of the Proposed Agreement which states that the "[p]rovisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement…"

An important consideration is whether the fourth recital to the Preamble which highlight the need to seek avoidance of disputes could be internally undermined with provisions of the Proposed Agreement which permits the application of dispute settlement proceedings. A similar objective of avoiding disputes is indicated in Article 6(1)(d) of the Proposed Agreement. However, the Proposed Agreement does not provide for any exhaustion of local remedies or proceedings before the Ombudsman as a pre-requisite or pre-condition for invoking the WTO dispute settlement provisions.

6. ARTICLE 1.5 (b) – State Owned Enterprises

ARTICLE 1.5(b) – "A Member's obligations under this Agreement shall apply to measures adopted or maintained by: […] (b) any entity, including a national state enterprise or any other national body, when it exercises any governmental authority delegated to it by the central government of that Member."

Article 1.5 (b) extends the scope of measures to regulations maintained by State enterprises and any other entity which exercises authority delegated to it by the Central Government. It requires careful consideration on whether these "measures" should cover actions of a completely autonomous enterprise which acts purely on commercial basis and not as an instrumentality of the State. In *United States — AD/CVD (China)*, the Appellate Body of the WTO, while interpreting Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures ("ASCM"), held that a "public body" is not merely "any entity controlled by a government" but one that "*possesses, exercises or is vested with governmental authority*".[19] In a subsequent case, viz., in *United States — Carbon Steel (India)*, the Appellate Body interpreted the term "public body" as an authority which performs governmental functions and that the relevant entity must therefore be shown to have been vested with governmental

[19] Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011).

authority.[20] The delegation of governmental authority is also one of the ways of vesting government authority. However, this formal process of delegating authority need not be existing or evident in various Member governments. A more appropriate way of attributing State responsibility is to enquire whether the entity "possesses, exercises or is vested with government authority" by examining a host of other factors.[21] The position of the entity within the hierarchy of the government and its relationship with the government also matters. Express "delegation of authority" in itself need not be probative of State attribution. In *United States—AD/CVD (China),* the Appellate Body noted, "We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority".[22]

This test is more in alignment with the International Law Commission's ("ILC") Articles on State Responsibility.[23] Especially in the context of investment treaties, the International Centre for Settlement of Investment Disputes ("ICSID") Tribunal distinguished commercial actions performed by a public body from sovereign actions and held that the former cannot be attributable to the State.

> "284. The Tribunal concludes that the letters written by representatives of Cocobod, a public entity as described in Article 5 of the ILC Articles, constitute purely commercial acts, which cannot therefore be attributed to the Republic of Ghana.
>
> 285. Further, the Tribunal has found no evidence in the record of any instruction or direction from the Government to write the letters in question, or any control over their content or even their existence. The acts, therefore, cannot be attributed to Ghana under Article 8 of the ILC Articles."[24]

[20] Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R (Sept. 8, 2014).
[21] *United States- AD/CVD(China)*, ¶. 317.
[22] *United States- AD/CVD(China)*, ¶ 318.
[23] International Law Commission, Responsibility of States for Internationally Wrongful Acts. Text adopted by the ILC at its fifty-third Session (2001).
[24] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, (June 18, 2010).

In other words, the public body should have acted as an instrumentality of the State and purely commercial activities carried out by such entities should not be attributed to the State. The current version of Article 1.5 (b) of the Proposed Agreement has the potential to include most entities or enterprises of the Central Government which have delegated authority. Instead, it would be prudent to narrow the scope of Article 1.5 (b) to include public bodies only when it acts as an instrumentality of the State or performs sovereign functions.

7. ARTICLE 2 - Most Favoured-Nation Treatment

The Most Favoured-Nation (MFN) clause of Brazil's Proposed Agreement requires the host-State to accord treatment no less favourable to investors and investments of other Member States with respect to any "measure" covered by the Proposed Agreement. As already mentioned in this note, "measures" in accordance with Article 1.2 of the Proposed Agreement includes measures of 'general application and sector-specific (measures) that directly affect investors and their investment (emphasis added). The term "affect" has serious implications. In *EC- Bananas III,* the WTO Appellate Body considered the meaning of the term "affecting". The Appellate Body noted:

> "The ordinary meaning of the 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of the previous panels that the term 'affecting' in the context of Article III of the GATT is 'wider' in scope than such terms as 'regulating' or 'governing'".[25]

The Panel in *China- Publications and Audiovisual Products*[26] stated that the term 'affecting' covers not only measures which directly regulate or govern the sale of domestic and imported like products, but also measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of the imported products. Based on this approach, any process or transaction which might have an impact on an investment attributable to a government or a related entity could possibly come within the coverage of the Proposed Agreement.

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[25] *Supra* at note 16.
[26] Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12 2009), ¶ 7.14

The Proposed Agreement also does not include the terms "like circumstances" or "like situations".[27] The notion of "likeness" is a fundamental element of the MFN treatment in WTO and there is abundant jurisprudence in this area. "Likeness", as a concept, is equally important in the context of international investment law. The absence of this notion could enable a dispute settlement panel to compare any category of foreign investors or investments to any other category and could potentially lead to a floodgate of litigation. Leaving such a fundamental concept undefined or unclear is risky and could only be inviting judicial creativity.

Given the broad scope of "measures" in the Proposed Agreement and the imputation that any measure which may affect investors or their investment could come within its coverage, the MFN clause in Article 2 is capable of providing substantive investment protection rights. It may not be the object or intent of the Proposed Agreement to confer such wide benefits, but it might *de facto* or indirectly provide such a broad coverage.

There is jurisprudential authority for the view that the MFN clause provides substantive guarantees to investors or their investments.[28] Although the MFN clause has to be interpreted in a manner compatible with the remainder of the provisions of the Proposed Agreement, one should also be wary of the directions in which this clause could evolve in WTO dispute settlement. In particular, a few terms in the Proposed Agreement raise concerns. The most prominent among them is the term "treatment" itself.

A. Scope of "treatment" under MFN Clause

The term "treatment" has both substantive and procedural connotations. The major interpretive issue in an MFN clause is the determination of the scope of "treatment" that should be accorded to the investment or the investor or both. The origins of the use of MFN in modern times in respect of access to another treaty is often traced back to the 1956 arbitral award in the *Ambatielos* claim. In this dispute, the Hellenic Government, on behalf of Mr. Ambatielos, invoked the MFN clause to establish a claim of denial of justice in view of the host-State failing to give "free access" to national courts for justice.[29] In the context of international investment law, this issue was resurrected through *Maffezini v. Spain* where an ICSID Tribunal accepted

[27] Comprehensive Economic and Trade Agreement between Canada and the European Union, Art. 8. 7.1.
[28] *Bayindir Insaat Turizm Ticaret VE Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.
[29] *Greece v. United Kingdom of Great Britain and Northern Ireland*, United Nations Reports of International Arbitral Awards, vol. XII, 83.

the claimant's argument that an MFN clause from a third State treaty could be used to bypass an eighteen (18) month waiting period before bringing a claim under the Bilateral Investment Treaty ("BIT").[30] However, in a subsequent arbitral award the Tribunal held that for procedural matters, MFN clause cannot be invoked.[31] This issue still remains controversial.

In the context of investment treaty arbitration/dispute settlement, the term "treatment" could envisage a range of matters including admission, establishment, acquisition, expansion, management, conduct, operation, maintenance, use, liquidation, sale or other categories of disposal. This list is by no means exhaustive, but it only highlights that a Tribunal may have a leeway to include any or some of these activities as falling within the concept of "treatment".

As tribunals and authorities still maintain divergent views on the exact scope of MFN and the contours of the term "treatment", the existence of the MFN clause should be subjected to strict scrutiny and viewed with extreme circumspection. The fact that the MFN clause is a fairly standard term in a multilateral agreement such as the WTO, it does not necessarily provide much of a solace to the parties who might be potentially affected by the breadth of this clause. Especially in view of the fact that India's 2016 Model BIT has specifically excluded any reference to MFN, the very insertion of MFN clause in Brazil's Proposed Agreement is against India's architecture of the 2016 Model BIT.

8. ARTICLE 9 – Single Electronic Window

The Proposed Agreement aims to create a Single Electronic Window ("SEW") which is required to be a "single entry point" for submission of documents for the admission, establishment and expansion of investments. The system is required to be designed in a way that once documents are submitted, through the SEW, there is no need to submit them to any other agencies or regulatory bodies. The submitted information is required to be protected by the Member States according to the provisions of the applicable legislation. The SEW is also required to be a point of information regarding policies, laws and regulations relating to the admission, establishment and expansion of investments. It is also required to publish in a

[30] *Emilio Agustin Maffezini v. Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), ICSID Reports, vol. 5, ¶ 49.
[31] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4, ¶ 111-112.

sufficiently precise and clear manner, the documents required, timelines for processing of applications and the details of agencies/regulatory bodies involved in the investment regime. Failure to provide requisite information through the SEW is excluded from the scope of dispute settlement under the Proposed Agreement.

In principle, SEW appears as a genuine investment facilitation measure. The major concern with the SEW, however, is that the system would be required to subsume investment-related processes in the domain of sub-national governments. Implementation of the SEW system would depend on the participation of sub-national governments and their willingness to be part of the process for which timelines would be decided by the Central Government. The Proposed Agreement requires implementation of SEW within eight (8) years from the date of the agreement entering into force.[32]

In addition to the implementation challenges posed by the multi-level governance mandated by the Indian Constitution, there is a need to examine this provision in the broader context and scheme of treaty obligations envisaged by the Proposed Agreement. Examined in isolation, the provision on SEW appears as one of the less controversial aspects of the Proposed Agreement.

9. ARTICLE 10.2 – Processing of Applications

ARTICLE 10.2 - "If criteria are established, they shall be transparent and objective. No application shall be rejected based on the failure of the investor to fulfil criteria that the investor was not supposed to or could not know before the submission of the application"

This provision requires the Member States to be "objective" and "transparent" in all of its investment related measures. In elaborating the meaning of "objective" measures, a WTO Panel in *EC – Sardines* stated that "*[p]anels are required to determine the* ***legitimacy*** *of those objectives*" (emphasis added).[33] In *US – Tune II (Mexico*), the Appellate Body elaborated that the term "objective" implies that there must be an *"examination and a determination on the legitimacy of the objectives of the measure*".[34] Therefore, when the Proposed Agreement requires a "measure" to be objective, the particular "measure" would have to undergo a test of

[32] Proposed Agreement, Art. 16.3.
[33] Panel Report, *European Communities - Trade Description of Sardines*, WTO Doc. WT/DS231/R (May 29, 2002).
[34] Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (May 16, 2012).

"legitimacy" of objectives. This is an area where a dispute settlement panel can make possible incursions or encroachments into the policy space available to the Member governments.

When the Proposed Agreement requires any measure to be transparent in nature, it requires the Member to be precise and clear regarding various requirements. However, whether a procedure seeks the fulfilment of a certain requirement or not is an onerous burden to meet. The language in Article 10.2 closely resembles the language, albeit in a negative sense, of that of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement). The question whether a procedure does or does not prevent the fulfilment of a requirement is often a matter of subjective judgment and could be an undesirable inclusion in a trade facilitation agreement.

To summarize, a provision which requires the Members to have legitimate objectives while enacting investment facilitation measures is undesirable and raises concerns. As the expression "investment-related measures" itself is vague and undefined, requiring such measures to incorporate the substantive elements of "objectivity", "impartiality", "proportionality", etc. is potentially dangerous and unwanted.

10. ARTICLE 12.1 – Opportunity for Prior Comment on Proposed Legislations

"Each Member shall, in a manner consistent with its domestic laws and regulations, provide opportunities and an appropriate time period to investors and other interested parties to comment on proposed regulations affecting the admission, establishment, acquisition and expansion of investments"

This provision requires a Member to submit the proposed regulations associated with the admission, establishment and expansion of investments to investors and other interested parties for comments. This provision is not clear on whether a Member is required to submit only federal laws or is obligated to submit even subnational and local laws. There is a similar provision in the Trade Facilitation Agreement on goods as well. Article 2 (1) of that Agreement specifies the obligation of the Members to provide the traders and other interested parties to comment on the proposed introduction or amendment of new laws of general application

related to the movement, release and clearance of goods. The word "proposed regulations" is of general nature and its extent and scope are by and large undefined.[35]

11. ARTICLE 21.6 - Dispute Settlement

The fourth recital to the Preamble to the Proposed Agreement highlights the need to "avoid disputes on matters related to investment". This goal is inconsistent with Article 21.6 of the Proposed Agreement which deals with a binding dispute settlement mechanism, barring a few exceptions. This aspect has already been discussed *supra.*

The Proposed Agreement further states that all exemptions in GATT 1994, including some of the waivers, would apply to it as well. It is not clear how the exceptions under GATT 1994 could apply to an agreement on trade facilitation in services. The nature of exceptions and exemptions under the GATT/GATS are very different and need not be germane to a framework for investment facilitation. It is desirable to draft a stand-alone list of exceptions or exemptions.

12. Conclusion

The provisions of the Proposed Agreement are not entirely confined to trade facilitation measures alone, but verge on substantive obligations as well. The prominent examples include the scope of measures which includes any "measure" that could "affect" investors and their investments. The inclusion of an MFN clause which closely resembles a standard MFN clause in a BIT is another example. India has expressed strong reservations to unconditional MFN clauses in investment treaties and there is every reason to oppose an unconditional MFN clause in the context of an investment facilitation agreement. It is also surprising that the terms "like circumstances" or "like situations" are omitted or missing from the Proposed Agreement.

Interestingly, Article 1.3 of the Proposed Agreement unequivocally states that the agreement does not apply to "market access". The concept of "market access" is generally irrelevant in

[35] Article 2.1.1, Agreement on Trade Facilitation, Annex to the Protocol amending the Marrakesh Agreement establishing the World Trade Organization, WTO Doc. WT/L/940, November 28, 2014, General Council, WTO. Pg.5.

the context of an investment agreement. The key consideration is whether the agreement seeks to guarantee or ensure 'investor and/or investment protection rights'. For example, Article 15.1 of the Proposed Agreement states that any criteria established in investment-related measures shall be "objective". The term "objective" is not content-neutral and could implicitly include substantive elements. While a bulk of the provisions of the Proposed Agreement touches upon procedural matters such as notification of laws and regulation, prior opportunity for comment, single electronic window, processing of applications, appeal and review, and publication, a few elements in the Proposed Agreement have left enough drafting or interpretative ambiguity. If this Proposed Agreement is strictly aimed at ensuring investment facilitation, there is a need to obtain clarity on a number of provisions.

The Proposed Agreement identifies the actions or activities of entities, including State enterprises or other bodies to potential State responsibility. Under customary international law, a State is responsible for the actions of its organs. The key question is as to what activities undertaken by the State are binding on the State. The Proposed Agreement attributes responsibility for measures exercised by an entity or State enterprise where governmental authority has been delegated to such organs. The statutory delegation of governmental authority is often a formal matter and need not be discernible or manifested in every case. The more appropriate concept under public international law is whether an entity "possesses, exercises or is vested with government authority". In addition, in the Proposed Agreement, the term "state enterprises" has not been delineated to exclude commercial actions. Therefore, along with sovereign actions, even commercial actions would be considered as "measures" attributable to the State. It is a fact that State entities or enterprises can carry out government functions and commercial activities at the same time and the nature of both these activities could be entwined. It would be extremely important to avoid any conflation of identities for the purpose of attributing State responsibility.

In addition, the absence of a proper definition of key terms such as "investment" and "investor" would create ambiguities in operation of the Proposed Agreement. The ambiguities created by the absence of these definitions would allow the Proposed Agreement to be applied on various forms of investments and would also allow investors to go for 'government shopping'.

For settlement of disputes, the Proposed Agreement relies on the DSU under the WTO. Absence of exhaustion of local/domestic remedies as a prerequisite to recourse to WTO

remedies is a major shortcoming of the Proposed Agreement. It simply defeats the object and purpose of the fourth recital. In addition, the Proposed Agreement does not contain a stand-alone list of exemptions or exceptions, but merely provides a cross-reference to GATT 1994. The nature of exemptions and exceptions under the GATT/GATS is very different from the context of an investment facilitation agreement. It is, therefore, of paramount importance to have detailed and specific list of exemptions for investment facilitation, and not merely a reference to the exemptions or waivers under GATT 1994. To put it mildly, those type of exemptions, exceptions and waivers are simply irrelevant and non-applicable in most investment facilitation cases.