



Country Update

Trade and Investment in the Multilateral Trading System: EAC Stakeholder Perspectives

General Background and Introduction

The importance of investment and investment liberalization is recognized in the EAC region in general and in Uganda in particular. In order to attract foreign investment, the Uganda government enacted the Uganda Investment Code in 1991 which provides for the laws relating to both local and foreign investments in Uganda. The Code was amended in 2000 and is currently under review. The Uganda Investment Code Act also established the Uganda Investment Authority (UIA), a semi-autonomous investment promotion and facilitation organisation under the Ministry of Finance. The mission of the UIA is to promote and facilitate investment projects, provide serviced land, and advocate for a competitive business environment. The major subject of the amendments has been the extent

to which investments should be liberalized and the rights accruing to foreign investors.

The issue of establishing international rules on; and liberalizing investment at the multilateral level has been a subject of intense debate. The central question has been whether a multilateral framework for investment should be negotiated under the auspices of the World Trade Organization (WTO). There has been increasing disagreement on the potential merits of a WTO agreement on investment. The debate is complicated by the fact that despite the increasing Bilateral Investment Treaties (BITs) concluded there is as yet no evidence linking the conclusion of these investment agreements with increases in FDI inflows in the developing world.

Although it was agreed by the WTO member states that negotiations on an investment agreement will await the conclusion of the Doha Round, there have been intense discussion around the need to reform the international investment regime to make it more responsive to sustainable development in host countries. In fact, the question today is not whether to reform the international investment regime but how to do it. Thus, discussions are on not just in the WTO but also in other fora including in UNCTAD and World Bank.

Stakeholder views vary as to whether an investment agreement should be negotiated and concluded in the WTO. A seasoned Trade negotiator is of the view that negotiating an investment agreement at both the multilateral level and at the bilateral level presents both opportunities and challenges. At the multilateral level, weak countries like Uganda have an opportunity to form alliances and coalitions to defend and promote their interests. With such coalitions, it might be possible to have a good investment framework that can work for developing countries; and which can provide a basic framework for bilateral investment agreements. However, this might not be the case, given the fact that member states in the WTO who are more interested in promoting investor rights have more bargaining power. This skewed power dynamics between mainly the developed countries and the developing

countries is one of the reasons why the latter rejected negotiating an investment agreement in the WTO. A multilateral investment Agreement in the WTO has the danger of providing a one-size-fit –all agreement with limited flexibilities for least and developing countries. However, negotiating an investment agreement at bilateral level might not be beneficial to least and developing countries given the fact that in bilateral negotiations the weak are most often bullied. This unequal negotiating power leads to bilateral investment Treaties going beyond what might have been agreed on at the multilateral level, given the fact that a multilateral agreement provides a basic framework and any other agreement can go beyond that. However, the extent to which a bilateral investment treaty will go beyond what is agreed on at the multilateral level will depend on the negotiating capacity of the developing country party. Therefore, what countries like Uganda need to do is to strength national negotiating capacity and institutions. Uganda as a country should have a very good investment model treaty spelling out exactly how to promote investments as a tool for sustainable development. The model Treaty should be in line with domestic laws.

It was also pointed out that there are investment related processes and initiatives at the global level in which Ugandan negotiators and key stakeholders should be involved in. There are

proposals that the Aid for Trade (A4T) initiative be expanded to cover investment; and the Trade Facilitation Agreement would be expanded to cover investment, thus turning it into an investment and Trade Facilitation Agreement. The predominant narrative today is on Investment Facilitation.

Investment facilitation covers a wide range of areas, all with the ultimate objective of attracting investment, allowing investment to flow efficiently, and enabling host countries to benefit effectively. UNCTAD argues that to date, national and international investment policies have paid relatively little attention to investment facilitation. According to UNCTAD, in the overwhelming majority of the existing 3,304 International Investment Agreements (IIAs), concrete investment facilitation actions are either absent or weak. Against this background UNCTAD has put in place an Investment Facilitation Action Agenda which focuses on concrete implementation and facilitation steps which governments, developed or developing, who chose to welcome Foreign Direct Investment (FDI) can take to improve their competitiveness as an FDI destination; and provides practical recommendations to help governments attract more and better foreign investments and to do it more quickly and efficiently. The overall aim of such discussions is for WTO member states to come up with concrete strategies and action points that will

help shape a sustainable-development friendly international investment framework and improved global investment governance. The trade negotiator advises that Ugandan ambassadors and negotiators should take an active part in these discussions as they will shape the kind of international regime eventually agreed upon.

Mr Obong a researcher is of the view that there are challenges within the international investment regime which have to be urgently addressed. Despite the economic importance of international investment, there is no overarching set of rules governing this subject matter. Therefore, there is a need to reform the international investment regime for increased flows of sustainable foreign direct investment. However, Uganda and other developing countries should be very active in this reform process to ensure that the current loopholes in the Bilateral Investment regime are addressed. Failure to actively promote and defend their interests might lead to a far worse international investment regime. Least and developing countries should ensure that their policy space to regulate is not further restricted; and that such existing negative implications of Bilateral Investment Treaties such as exposure to financial instability from free capital flows and balance-of-payments deficits are addressed.

The eventual international investment regime should allow host governments to impose performance requirements on investors and they should retain the right to direct investments in order to achieve national objectives. Mr. Obong is also of the view that since the purpose of an investment framework is to define the relationship between governments and international investors and to also provide the predictability and stability that long-term investments need in a coherent and transparent manner; such an instrument can be provided by either a multilateral or a plurilateral framework. The advantage with a plurilateral framework is that it will not be binding on those countries which are ready to join. This is an option which the Uganda negotiators and ambassadors should explore further.

For Ms. Assimwe, a Civil society activist, negotiating an investment agreement in the WTO is synonymous to further investment liberalization. Yet Uganda is already facing challenges of benefiting from the existing investors who do not provide decent employment and who are grabbing land from the citizens. There is no clear policy on which sectors the foreign investors should engage in resulting in unfair competition with local investors. She cited an example where foreign investors are engaging in petty trading. There is also no policy regarding joint venture leading to limited skills and technology transfer.

Government has to address the tension between seeking to attract FDI and benefit from it as much as possible, and minimize any negative effects. Achieving the right balance between the two has become a key challenge for many least and developing countries including Uganda. Therefore, the beginning place to reform the investment regime is at the national and regional level. Uganda should put in place investment policy frameworks that ensure that investments work for the people.

According to Ms. Assimwe, the ongoing review of the Uganda Investment Code is an opportunity for all citizens to participate in this process. She is of the view that Uganda should get assistance in the area of crafting these policies using examples from other countries such as India, Indonesia and South Africa. These countries have been able to put in place investment models that are in line with their national development aspirations. The domestic investment policy regime should set the parameters and guide Uganda's negotiations in the international investment policy regime processes.

Ms. Assimwe stresses that a new balance between investors and host countries is required; and the beginning place is the reassessment of the objectives of the investment agreements which should go beyond protection to include the promotion of

sustainable development. The Uganda government should make it clear that investment promotion and protection will be pursued to the extent that it supports local development and other key domestic development goals and public interests such as health, environment, human rights, consumer protection, anti-corruption, consumer rights and the promotion of internationally recognized rights such as labor rights. Uganda should further assert the right to introduce new rules and regulations on investments as is with the case of India's Investment Treaty Model.

The Indian model reaffirms "the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such investments". Therefore, any international investment regime should balance the rights and obligations of both the host countries and the investors, or else it will lose its legitimacy. Ms. Assimwe is also of the view that the WTO is not the right forum for an investment agreement as its mandate and competence is in trade. In any case the fundamental principles of non-discrimination and national treatment governing trade are not appropriate for investment. In addition, the rationale of the WTO is liberalization. Given these principles, negotiating investment in the WTO would negatively affect development in least and developing countries. Her proposal is that

developing countries should consider having strong national and regional investment model treaties; and at the international level have in place the UN binding Treaty on Transnational Cooperation (TNCs). The UN treaty should put in place international standards that can effectively regulate transnational and other business enterprises. Uganda negotiators and Ambassadors and other stakeholders including CSOs and the private sector should participate actively in this UN process.

Recommendations:

It is clear that the current investment regime has to be reformed. There is a need for a comprehensive reorientation of the global investment regime to balance investor protection with sustainable development. However, the reflection and review process should, for the time being, be at the national and regional levels.

The Geneva Ambassadors and the negotiators should:

Ensure that there is an appropriate investment framework at both national and regional levels. The regional level is important to avoid unnecessary competition for investors which leads to a race- to -the -bottom. In addition, the East African region is increasingly negotiating as a block. At the moment, there is limited

coherence in the way investment issues are handled at the national level given the overlapping mandates among the key ministries i.e. Ministry of Trade, Ministry of Finance and Ministry of East African Affairs. This issue should be urgently addressed. Capacity building for all key stakeholders on the ongoing investment dynamics is important for Uganda to decide on the kind of investment reforms to undertake.

The Geneva Ambassadors should also actively participate in all the investment related

discussions in the UN, UNCTAD, World Bank and other fora to appreciate the current opinions but also to champion the positions agreed upon at national and regional levels.

References:

UNCTAD (2016) *UNCTAD's Global Action Menu for Investment Facilitation*, May 31

Government of India (2015) *Model Text for the Indian Bilateral Investment Treaty*



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