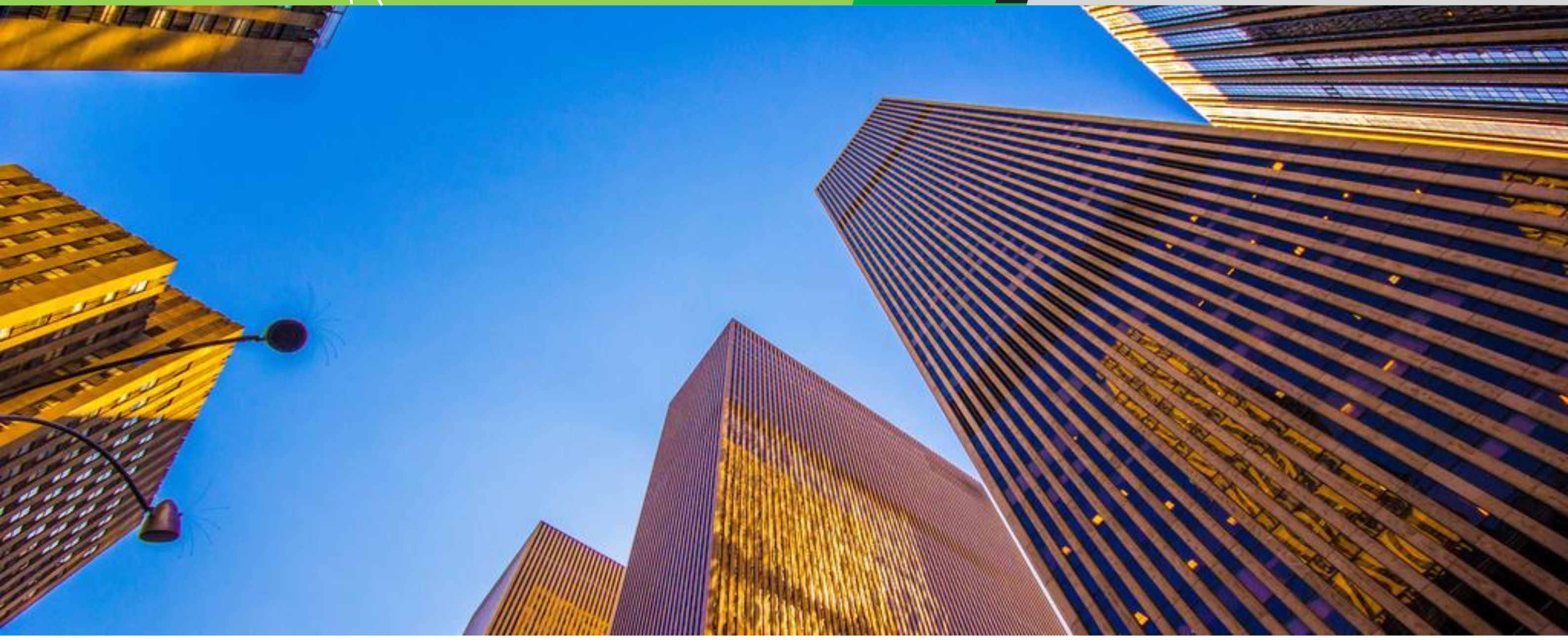
December | 2018

CUTS International GENEVA



Briefing Paper

Investment Facilitation: What are the Issues at Play?

By Pradeep S Mehta and Julian Mukiibi

Summary

This briefing paper summarises findings from a study by CUTS International on "Investment Facilitation at the World Trade Organization: Progress and the Road Ahead", and examines the issue of investment facilitation at the multilateral level in the context of its definition; major developments in WTO discussions so far; and clauses on investment facilitation in select regional trade agreements (RTAs). It aims at analysing the WTO Investment Facilitation initiative, with a view of highlighting the main issues therein.

KEEPING PACE WITH TRADE DEVELOPMENTS

This briefing paper published under the project "Keeping Pace with Trade Developments", undertaken with funding support from the Ministry of Foreign Affairs, Sweden.

SWEDEN

FUNDING SUPPORT

Introduction

It is acknowledged that foreign investments have the potential to spur economic growth by *inter alia* creating employment, developing skills and contributing to requisite infrastructure for optimal utilisation of resources. Through presence of foreign investment enterprises, local firms in the host countries could also learn and build necessary capacity to become more competitive and integrated in the global trading system. It is therefore clear that a link exists between investment, trade and development.

Investment Facilitation is the novel approach proposed to harness the links between investment, trade and development. Arguments have been made that a multilateral framework on investment facilitation would complement trade in global development efforts, including in the mobilisation of the much-needed resources to attain the sustainable development goals (SDGs). It is in light of this that a group of countries in the World Trade Organization (WTO) proposed the initiative on Investment Facilitation, which is the basis of the WTO Ministerial Declaration of Buenos Aires that launched informal discussions on the issue in WTO.

This brief note draws from a recent CUTS Study on "Investment Facilitation at the WTO: Progress and the Road Ahead"[1] to analyse the concept of Investment Facilitation, highlighting contemporary discussions on the matter.

Definition and scope of investment facilitation

Although there is yet to be an agreed definition of investment facilitation, proponents of the initiative in the WTO emphasise that its overarching objective is to provide transparency and predictability of the requirements to invest in a market/country. It is argued that multilateral disciplines on access to the necessary information and measures required to set up and operate an investment would greatly advance and promote foreign investments and thereby increase the benefits therein. The need for measures to enhance investment are underpinned by recent significant decline in FDI flows – highlighted in the table below.

FDI Flows (2015-17) and Projections (2018) by Group of Economies and Regions in US$ billions

Group of Economies	2015	2016	2017	2018
World	**1921 (44)**	**1868 (-3)**	**1430 (-23)**	**1450 to 1570 (1 to 10)**
Developed economies	**1141 (91)**	**1133 (-1)**	**712 (-37)**	**740 to 800 (5 to 10)**
Europe	595 (117)	565 (-5)	334 (-41)	~380 (~15)
North America	511 (96)	494 (-3)	300 (-39)	~320 (~5)
Developing economies	**744 (9)**	**670 (-10)**	**671 (0)**	**640 to 690 (-5 to 5)**
Africa	57 (8)	53 (-6)	42 (-21)	~50 (~20)
Asia	516 (12)	475 (-8)	476 (0)	~470 (~0)
Latin America and the Caribbean	169 (-1)	140 (-17)	151 (8)	~140 (~-5)
Transition economies	**36 (-36)**	**64 (78)**	**47 (-27)**	**50 to 60** (~-20)

Source: World Investment Report 2018, UNCTAD, p. 15. Figures in parentheses indicates annual growth rate (per cent) which are rounded up.

[1] http://www.cuts-geneva.org/pdf/KP2018-Study-Investment_Facilitation_at_the_WTO.pdf

The declining trends of investment become more worrisome as developing countries and least developed countries (LDCs) require a massive investment (approx. US$2.5tn per year) to achieve the SDGs. Thus, at such a time, discussions on investment facilitation at the multilateral level become more eye-catching.

In the Joint Ministerial Statement on Investment Facilitation (JMSIF) during the 11th Ministerial Conference of the WTO, it is provided that a multilateral framework on investment facilitation seeks to identify and develop the elements of a framework for facilitating FDI that would: (i) Improve the transparency and predictability of investment measures; (ii) Streamline and speed up administrative procedures and requirements; and (iii) Enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention.

International organisations have also provided more clarity on definitional aspect of investment facilitation.

The OECD separates investment facilitation from investment promotion.[2] The latter is about marketing a country or a region as an investment destination while the former aims to make it easy for investors to establish, operate and expand their existing investments. Under investment promotion, the key functions of investment promotion agencies (IPAs) include image building and investment generation while for investment facilitation; they are investor servicing, aftercare, and policy advocacy.

According to the OECD, "*investment facilitation aims to encourage new investments and reinvestments by providing investors with a transparent, predictable and efficient regulatory and administrative framework for investment while ensuring the benefits of investment are maximised. It aims to reduce or eliminate potential and existing obstacles faced by companies in the host country when they decide to invest, including the lack of clarity on the legislation and administrative procedures, the cost of doing business (in terms of time and resources), the lack of capacities of the civil service, and the risk of corruption when interacting with government officials*".[3]

The World Bank contemplates investment facilitation as a sub-function of investment promotion and defines it as *"the most basic and cost-effective activity supporting foreign investment promotion through supporting a prospective investor during the investor's location selection and decision-making procedure"*.[4]

According to Global Action Menu for Investment Facilitation, UNCTAD (2018)[5], *"investment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries. It focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and information available to investors, more efficient and effective administrative procedures for investors, or enhanced predictability and stability of the policy environment for investors. Investment facilitation is distinct from investment promotion,*

[2] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf
[3] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pd
[4] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf
[5] http://investmentpolicyhub.unctad.org/Upload/Action%20Menu%2023-05-2017_7pm_print.pdf

which is about promoting a location as an investment destination (e.g. through marketing and incentives) and is therefore often country-specific and competitive in nature".

UNCTAD Global Action Menu for Investment Facilitation has provided the following 10 lines of actions with several other sub-lines of actions:

1. Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors.
2. Enhance predictability and consistency in the application of investment policies.
3. Improve the efficiency of investment administrative procedures.
4. Build constructive stakeholder relationships in investment policy practice.
5. Designate a lead agency, focal point or investment facilitator.
6. Establish monitoring and review mechanisms for investment facilitation.
7. Enhance international cooperation on investment facilitation.
8. Strengthen investment facilitation efforts in developing country partners, through support and technical assistance.
9. Enhance investment policy and proactive investment attraction in developing country partners, through capacity building.
10. Complement investment facilitation by enhancing international cooperation for investment promotion for development, including through provisions in IIAs.

According to the Asia-Pacific Economic Cooperation (APEC), "*investment facilitation refers to actions taken by governments designed to attract foreign investment and maximize the effectiveness and efficiency of its administration through all stages of the investment cycle… Transparency, simplicity and predictability are among its most important principles*".[6]

Major elements of investment facilitation emerging at the WTO

After the JMSIF during the 11th Ministerial Conference, four Structured Discussions have so far taken place. Following are the major issues of discussions in these Structured Discussions:

- Structured Discussions (28 June 2018): improving the transparency and predictability of investment measures
- Structured Discussions (23 July 2018): streamline and speed up administrative procedures and requirements (APRs)
- Structured Discussions (21 September 2018): enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention
- Structured Discussions (26 October 2018): facilitating greater developing and least-developed Member participation in global investment flows

[6] APEC investment facilitation action plan, available at: http://www.apec.org/Press/Features/2009/~/media/5B7AA1499678495193D806C776DEDBCE.ashx

The major issues arising from the above discussions include the following:

Improving the transparency and predictability of investment measures

Majority of the participants considered regulatory transparency and predictability a key element of investment facilitation. It is argued that adoption of investment facilitation policies could foster transparent and stable/predictable investment regimes for both foreign and domestic investors. The general investment facilitation aspects of transparency and predictability are:

- timely publication of relevant legislation;
- notification obligations;
- enquiry points/single windows;
- advance publication of draft laws and regulations, opportunity to comment (and consideration of comments), and explanation of their purpose and rationale; as well as reasonable timeframes between their publication and entry into force;
- administrative procedures to ensure the consistent and impartial application of investment-related laws and regulations to domestic and foreign investments alike.

Streamlining and speeding up administrative procedures and requirements (APRs)

APRs exist in all countries and can take a variety of forms. They are related to the submission and processing of applications and cover matters such as the documentation required (e.g. certificates), the nature of the documents to be submitted (e.g. original or copy), the number and succession of steps required, the authorities to be approached, and the timeframe for processing applications, etc. APRs may have restrictive effects on investments due to various factors, including ill-conceived or outmoded regulations, inefficient regulatory frameworks, lack of institutional capacity, or the persistence of ineffective and inefficient regulatory habits. Little exchange of information and coordination among the various agencies add another layer of complexity. To be effective, reforms of APRs are needed to be underpinned by transparent investment regulatory frameworks, which will make all information on investment-related APRs publicly available such as competent authorities, documentation/information requirements, formalities, fees, and allows operators to provide feedback on them.

Enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention

International cooperation is considered an important element to facilitate cross-border investments. It is a multifaceted process on international engagements at bilateral, plurilateral/regional, and multilateral level. The major activities of international cooperation include information exchange and dissemination, monitoring and surveillance, knowledge repository, inter-governmental consultation and negotiation, inter-organization coordination, dispute prevention, and technical assistance and capacity building.

Facilitating greater developing and least-developed Member participation in global investment flows

According to the JMSIF, participation of developing and LDC Members in global investment flows should constitute a core objective of the framework on investment facilitation for development.

Assisting developing country Members, especially LDCs, to enhance their ability to facilitate investment is one of the key enablers to revitalize cross-border investment. These economies face a variety of challenges when designing and implementing investment facilitation measures. Some of these challenges are absence or insufficiency of institutional capacity, financial resources, policy coherence, inter-agency coordination and good governance.

Nature of the Structured Discussions

It is to be noted that the Structured Discussions do not cover issues like investment protection, market access etc. Proponents of investment facilitation like Brazil are of the opinion that trade and investment are two different issues, and the WTO should not intervene in their autonomy to frame investment rules. However, they are willing to facilitate international investment through a multilateral framework, which they argue would advance and promote foreign investments that would in turn contribute to the massive capital required for development of their economies and achieving the SDGs.

Proponents of investment facilitation view the multilateral framework as a significant way of eliminating/reducing many challenges in fulfilling basic requirements in attracting foreign investments. For example, unavailability of complete information regarding documents/fees and other requirements unnecessarily delays the final inflow of foreign investment. Measures such as publication and use of electronic platforms can be helpful in addressing such challenges.

The discussions on investment facilitation at the WTO are at nascent stage; however, other multilateral agencies like UNCTAD are supporting facilitation of international investments by providing research backup and important guidelines. Investment facilitation proposals of many countries like Brazil are more or less in sync with these guidelines.

While, the proponents of investment facilitation are working towards multilateral framework, challenges remain. "*The approach so far under the WTO has been binding legal agreements that are premised on trade remedies for enforcement. Such an approach is perhaps ill equipped for a cooperative and solution-oriented approach that investment facilitation really needs. Therefore, an important consideration for countries is the nature of the legal approach and the consequences of the obligations undertaken*", Anuradha (2018).

Further, investment measures are very broad in nature, and their design and implementation are guided by the development stage of an economy, which significantly differ among the WTO Members. The commitments for various provisions of investment facilitation will require coherence and linkages among objectives of investment, industrialisation, and development strategies. Never the less, the provisions of international cooperation in terms of sharing and promoting best practices can be of substantial help.

A major issue to be taken into consideration is the development aspects of any outcome of a multilateral framework on investment facilitation. Although presently some proposals on the table, such as by China, Argentina & Brazil and Brazil provide for corporate social responsibility (CSR), some countries have called for further and specific discussions on development aspects of the investment facilitation initiative. Importantly, the nature of the framework to be agreed - a binding legal agreement, a plurilateral agreement, or a system of cooperation as suggested by the UNCTAD Menu – is likely to determine progress of the initiative on investment facilitation in the WTO.

Recommendations and Conclusion

All in all, gauging from the deliberations so far, and from the perspective of many developing countries and Least Developed Countries, any outcome in the structured discussions on an investment facilitation framework would need to consider the following important issues:

- Acknowledge upfront that the multilateral agreement on investment facilitation is to ensure that investors are able to make investments in host countries with least handicaps to benefit both the investors and host countries and achieve Goal (no)– of the SDG, 2030.
- Acknowledge the economic differences among countries such as stage of development, administrative capacity, technical and financial resources; when determining a multilateral framework for investment facilitation.
- Clearly identify and make provision of the elements that will be necessary to spur/increase resources linked directly to attainment of SDGs, these could be in the form of obligations within the multilateral investment facilitation framework that direct foreign investment towards contribution to employment, technological transfer, capacity building and enhancement of economic welfare in the host country.
- Make provision for technical assistance and capacity building which should be linked to implementation obligations of the multilateral framework on investment facilitation.
- Study and take into account the likely impacts of an investment facilitation multilateral framework on other domestic policies such as industrialisation, fiscal policies and other related measures.
- Define and incorporate a negative list of elements such as investor state dispute settlement systems; market access, pre-establishment rights of investors; expropriation etc which will not be covered under the multilateral agreement on investment facilitation.

The increasing importance of international investments, especially when it is highly required to achieve SDGs but at the same having a declining trend, makes deliberations on investment facilitation quite important. Never the less, a balanced outcome for a multilateral framework that will ultimately attain such development objectives, would need to take into account issues of importance to developing countries and LDCs – the category of countries to whom SDGs are targeted.

CUTS International, Geneva

CUTS International, Geneva is a non-profit NGO that catalyses the pro-trade, pro-equity voices of the Global South in international trade and development debates in Geneva. We and our sister CUTS organizations in India, Kenya, Zambia, Vietnam, Ghana and Washington DC have made our footprints in the realm of economic governance across the developing world.

This briefing paper is authored by Pradeep S Mehta, Secretary General of CUTS International, and Julian Mukiibi, Assistant Director, CUTS International Geneva. It is based on CUTS' study MEHTA, P., MANGLA, S. (2018). "Investment Facilitation at the World Trade Organization: Progress and the Road Ahead" available at https://goo.gl/qHDZ6x. CUTS briefing papers are to inform, educate and provoke debate on specific issues.

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