STUDY

Investment Facilitation at the World Trade Organization

Progress and the Road Ahead

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Investment Facilitation at the World Trade Organization: Progress and the Road Ahead

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Abstract

Investment, especially foreign investment, has been recognised as an important driver of growth and development. Recognising the dynamic link between investment, trade, and development, several member states of the World Trade Organization (WTO) including developing countries from Asia and Latin America, and developed countries like the European Union are raising their voice to develop and adopt an Investment Facilitation Agreement (IFA) at the multilateral level.

The Joint Statement on Investment Facilitation for Development issued by a group of 70 countries during the 11th Ministerial Conference of the WTO, held at Buenos Aires during 10-13 December 2017, paved the way for Structured Discussions on Investment Facilitation for Development at the WTO. The Structured Discussions started on 28 June 2018 and have had four meetings. There has been some progress of these discussions through proposals on possible elements of the proposed IFA. In this backdrop the issue of investment facilitation at the multilateral level is analysed in terms of its progress and way ahead.

SECTION 1

Background

Discussions on multilateral rules on investment date back to the 1948 draft Havana Charter to establish the International Trade Organization (ITO). The Charter addressed foreign direct investment (FDI) issues and spelled out extensive rights for investors such as obligations of host countries to extend national treatment (NT) and most-favoured-nation treatment (MFN). However, it did not extend to issues like dispute settlement and performance requirements. Some countries did not wish to offer NT or MFN to all member states. Whereas the corporates of the United States (US) opposed the Charter's provisions that *inter alia* provided for regulating anti-competitive practices of private businesses. The proposed ITO could not be established due to disagreements on several issues, with the US Congress's opposition to the fact that its sovereignty can be challenged in some areas by foreign bodies. The failure to establish the ITO led to the signing of the General Agreement on Tariffs and Trade (GATT) on 30 October 1947, which came into effect on 1st January 1948. The GATT did not address the issue of investment during the course of its negotiations. However, it was its 8th round of multilateral trade negotiations, the Uruguay Round (during the late 1980s to early 1990s) when it was agreed to formulate and adopt the Agreement on Trade-Related Investment Measures (TRIMs). In fact many countries including the US wanted a high standard investment agreement but to wrap up the Uruguay Round as soon as possible a low ambition TRIMs was agreed upon. The Marrakesh Agreement of the Uruguay Round, signed on 15 April 1994, established the World Trade Organization (WTO) thus bringing to fruition the still born ITO envisaged in 1948., The WTO officially commenced on 1st January 1995. Furthermore, many new agreements were also wrought which included TRIMs in 1994, which came into effect along with the WTO.

The Agreement on TRIMs provides a set of rules on domestic regulations on foreign investment, applied by a country as part of its industrial policy. It is important to note that the Article 9 of the Agreement on TRIMs (Review by the Council for Trade in Goods) states, "the Council shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy". [1] Thus the rich members of the WTO could create a built in agenda to negotiate investment policy coupled with competition policy in future.

Around the time the WTO was born, the WTO member states, about 27 countries, who were members of the Organisation for Economic Co-operation and Development (OECD) launched negotiations on a proposed multilateral agreement on investment (MAI) at its Annual Meeting of the Council at Ministerial Level in May 1995. "The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries". [2] This did take the developing world by surprise because there was a simultaneous move at the WTO to negotiate the

[1] https://www.wto.org/english/docs_e/legal_e/18-trims_e.htm

[2] http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm

same even before the ink had dried on the WTO texts. In June, 1996 both EU and Canada floated the idea of an investment agreement in informal manner at the WTO to build up a storm. However, the OECD negotiations were discontinued in April 1998 due to strong civil society pressure and French intransigence which did not want its audio-visual sector to be covered by the OECD MAI. The biggest flaw of these negotiations was that the MAI was targeted at the developing world but they were not in the negotiating room.

There was an all out pressure on the developing world to frame multilateral rules on international investment and the WTO being a member body of both developed and developing countries was the better forum. Consequently, the issue of investment was raised at the First Ministerial Conference of the WTO, held in Singapore during 9-13 December 1996. Here, Trade Ministers of the Member States agreed to convene a working group to examine the relationship between trade and investment; and explore the scope for negotiating investment at the WTO beyond the ambit of the General Agreement on Trade in Services (GATS) where investment in services comes under Mode 3 of supply (commercial presence), and the Agreement on TRIMs.[3] The working group was established in 1996 and called as the Working Group on Trade and Investment (WGTI) alongwith three other study groups covering competition, transparency in government procurement and trade facilitation (collectively referred to as Singapore Issues). However, the Ministerial Declaration acknowledged, at the insistence of India, that future negotiations would not be a foregone conclusion, but would require an "explicit consensus decision" by the Member States. The issue seemed to linger on the WTO agenda and the unbeatable opposition on the issue became clear at the Fifth WTO Ministerial Conference at Cancun in 2003. There the Africa Group walked out of green room negotiations on the Singapore Issues and the Cancun meetings collapsed with the Mexican chair calling off the Ministeial meeting without any declaration. Moreover, in August 2004, the General Council decided to drop the issue from the Doha Round trade talks.[4] Of the four Singapore issues only trade facilitation was retained for future negotiations.

It is worth mentioning here that there has been a major debate on the definition of investment within the WTO, especially after the formation of the WGTI. Some of the WGTI documents have adopted a broader definition of investment i.e. investment by a resident entity in one economy to obtain a long-term interest in entity resident in another country. However, the constantly evolving nature of international economic relations has created several other means of foreign investment beyond the traditional investment in manufacturing and natural resources such as investment in technology, intellectual properties, services, and contractual rights.[5]

Considering the importance of foreign investments to create employment, enhance exports and economic growth, and achieve Sustainable Development Goals (SDGs); many Member States, including those who were opposing it earlier, have again raised the issue of investment at the multilateral level but with a different focus, named as investment facilitation. Many developing countries including leading

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[3] https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

[4] Luke Eric Peterson, "Investment Officially Jettisoned from WTO's Doha Round", INVEST-SD: Investment Law and Policy News Bulletin, August 14, 2004. Retrieved from https://www.iisd.org/pdf/2004/investment_investsd_aug14_2004.pdf on 19 November 2018.

[5] Gara, J. (2003). Scope and definition of investment. In CUTS Centre for International Trade, Economics & Environment (Eds.), *Putting our fears on the table: Analyses of the proposals on investment and competition agreements at the WTO* (75-78). Jaipur, India: CUTS Centre for International Trade, Economics & Environment

proponents of investment facilitation such as Brazil have remained opposed to the idea of investment rules at the multilateral level, what they aspire is for its facilitation. India has been opposed to this as it feels that once investment facilitation is on the WTO acquis the day will not be far off when there will be a demand for a comprehensive agreement on investment rules.

Granted that investment facilitation is quite different from the investment rules discussions at the WTO under WGTI in the sense that it is limited to processes and does not cover substantive issues such as entry requirements, market access, investor protection, and dispute settlement etc. The major issues pertaining to investment discussed in WGTI meetings include technological development, transparency, non-discrimination, and dispute settlement. While discussions on investment facilitation focus only about guaranteeing a central point of information on investment procedural requirements in a country and do not cover issues such as investment protection, market access, dispute settlement etc.

Brazil, China, and Russia had introduced their vision on elements of investment facilitation through their papers before the 11th Ministerial Conference of the WTO held in Buenos Aires, Argentina during 10-13 December 2017. Additionally, in April 2017, the "Friends of Investment Facilitation for Development" (FIFD) – comprising 14 developing and least-developed country members – proposed an Informal WTO Dialogue on Investment Facilitation for Development. [6] The FIFD point out that investment facilitation at all levels is very much essential to fulfil an annual US$2.5tn investment deficit in developing countries for achieving the 2030 SDGs. A series of WTO Informal Dialogues have taken place on investment facilitation for development since June 2017.

A group of WTO members agreed to initiate continuous discussions on investment facilitation during the 11th Ministerial Conference of the WTO. Consequently, 70 WTO Member States issued a *Joint Statement on Investment Facilitation for Development* (JSIFD), which calls for Structured Discussions on Investment Facilitation for Development (SDIFD) at the WTO.

Subsequent to the 11th Ministerial Conference, Brazil proposed Structured Discussions on Investment Facilitation (SDIF) through its formal communication to the General Council on 1st February 2018 (JOB/GC/169). Recently, Kazakhstan also submitted a similar communication to the General Council on 12 September 2018 (JOB/GC/197).

The JSIFD and formal proposals on SDIF have recognised the importance of dynamic relations among investment, trade and development. The member countries have called for closer global cooperation to create an efficient, transparent, and predictable environment for facilitating FDI and aim at arriving at a plurilateral 'investment facilitation agreement' (IFA).

In this backdrop, this paper examines the issue of investment facilitation at the multilateral level in the context of its definition; major developments in WTO discussions, so far, on the issue; and clauses on investment facilitation in select regional trade agreements (RTAs). The paper aims at analysing the WTO Investment Facilitation initiative, with a view of highlighting the main issues therein.

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6 https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm

SECTION 2

Investment Facilitation for Development at the WTO

According to the World Investment Report 2018 by the United National Conference on Trade and Development (UNCTAD), global FDI fell by 23 per cent to US$1.43tn in 2017 from US$1.87tn in 2016, which signals a cause of concern for global flows of FDI.

Table 1: FDI Flows (2015-17) and Projections (2018) by Group of Economies and Regions in US$ Billion

Group of Economies/Regions	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.

The table 1 indicates that there was a significant decline in FDI flows in 2017 in developed economies of Europe and North America, and Africa. These declining trends 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 becomes more eye-catching.

2.1 Definition and scope of investment facilitation

As against the complete clarity on definition of trade facilitation (i.e. promotion and expansion of global trade through simplified and streamlined cross-border trade procedures), investment facilitation is a broader notion which is not clearly defined and confused/mixed with investment promotion. However, with the passage of time and increasing importance of investment for international development, international organisations have provided more clarity on definitional aspect of investment facilitation.

The OECD separates investment facilitation from investment promotion. [7] 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

[7] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf

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"*.[8]

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"*.[9]

According to Global Action Menu for Investment Facilitation, UNCTAD (2018) [10] , *"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, 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:

- Promote accessibility and transparency in investment policies and regulations and procedures relevant to investors.
- Enhance predictability and consistency in the application of investment policies.
- Improve the efficiency of investment administrative procedures.
- Build constructive stakeholder relationships in investment policy practice.
- Designate a lead agency, focal point or investment facilitator.
- Establish monitoring and review mechanisms for investment facilitation.
- Enhance international cooperation on investment facilitation.
- Strengthen investment facilitation efforts in developing country partners, through support and technical assistance.
- Enhance investment policy and proactive investment attraction in developing country partners, through capacity building.

[8] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf
[9] https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf

[10] http://investmentpolicyhub.unctad.org/Upload/Action%20Menu%2023-05-2017_7pm_print.pdf

- 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".[11]

According to the JMSIF during the 11th Ministerial Conference of the WTO, 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.

2.2 Elements of investment facilitation in countries' proposals at the WTO

Until todate, primarily Russia[12], MIKTA (Mexico, Indonesia, Korea, Turkey, and Australia), FIFD, China[13], Argentina & Brazil[14], and Brazil[15] have submitted their proposals on investment facilitation at the WTO. These proponents of investment facilitation underline the importance of foreign investments to achieve SDGs, enhance exports, and create employment among their arguments in favour of multilateral framework on investment facilitation.

The proposal from FIFD on investment facilitation aimed at starting Informal Dialogues and seven such Dialogues took place before the Structured Discussions. The key areas of discussions in these Dialogues are[16]:

- Improving regulatory transparency and predictability
- Streamlining and speeding up administrative procedures
- Enhancing international cooperation and addressing the needs of developing members
- Other investment facilitation-related issues are – government-investor cooperation, resolving investors' grievances/ombudsperson, and corporate social responsibility.

The proposal from MIKTA recognises the dynamic link between investment, trade, and development, and emphasises for a greater coherence between trade and investment policies. The proposal further, urges that discussions at the WTO should add value to the related work at other global forums such as OECD, UNCTAD, and G20 etc. It states, *"FDI is a vital source of funding to close the 2.5 trillion USD development investment gap to achieve SDGs. With the right policy settings, recognising the trade-investment nexus, investment can advance inclusive, broad based growth,*

[11] APEC investment facilitation action plan, available at: http://www.apec.org/Press/Features/2009/~/media/5B7AA1499678495193D806C776DEDBCE.ashx.
[12] Communication from the Russian Federation, Investment Policy Discussion Group, WTO Document JOB/GC/120.
[13] Possible Elements of Investment Facilitation, Communication from China, WTO Document JOB/GC/123.
[14] Possible Elements of a WTO Instrument on Investment Facilitation, Communication from Argentina and Brazil, WTO Document JOB/GC/124.
[15] Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Document JOB/GC/169.
[16] https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm

promote and enable sustainable development and responsible business conduct".[17]

It is important to note that both FIFD and MIKTA proposals suggest to avoid sensitive issues such as market access, investment protection, and dispute settlement especially investor-state dispute settlement, etc. from the framework of investment facilitation.

The proposals from Russia, China, and Argentina & Brazil provided the key elements of the proposed IFA in more details. The Argentina-Brazil proposal states, "*The proposed IFA would encompass the set of policy measures and activities aimed at making it easier for investors to establish, maintain, and expand their investment in host countries as well as to conduct their day to day business*". [18] The main elements of investment facilitation from these three proposals include scope (investment in production of goods and supply of services); transparency; processing of applications; single electronic window; national focal points; fees and charges; investors' principles and standards; special and differential treatment; technical assistance; and regulatory space.[19]

The main elements of IFA coming out from the proposal by Brazil are scope (investment in services and non-services sectors); most-favoured nation treatment; right to regulate; electronic documents; transparency; national focal point; cooperation among national focal points; notification; single electronic window; processing of applications; appeals and review; prior commitment; publication; corporate social responsibility; and WTO Committee on investment facilitation.[20]

Table 2: Summary of the major elements covered in various investment facilitation proposals at the WTO

Elements of investment facilitation	Russia (2017)	MIKTA (2017)	FIFD (2017)	China (2017)	Argentina & Brazil (2017)	Brazil (2018)
Definition of investment facilitation					X	X
Regulatory, transparency, and predictability	X	X	X	X	X	X
Streamlining & simplifying administrative procedures	X	X	X	X	X	X
Non-discriminatory		X				X
Single window process	X			X	X	X
Electronic applications	X					X
Protection of confidential information	X					
Facilitation of outward investment				X		
Appeals and review of admin decisions						X
National institutional arrangements	X			X	X	X

[17] MIKITA Investment Workshop Reflections, WTO Document JOB/GC/121
[18] Possible Elements of a WTO Instrument on Investment Facilitation, Communication from Argentina and Brazil, WTO Document JOB/GC/124.
[19] Joseph, Reji K., Investment Facilitation Agreement in WTO: What It Contains and Why India Should Be Cautious? (December 7, 2017). Available at SSRN: https://ssrn.com/abstract=3083945
[20] Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Document JOB/GC/169.

Multilateral institution arrangement						X
Institutional cooperation		X	X	X	X	X
Special and Differential Treatment (SDT)	X		X	X	X	X
Technical assistance	X	X		X	X	X
Corporate Social Responsibility				X	X	X
Dispute prevention and/or dispute settlement	Domestic remedies					Refer to DSU

Source: Zhang (2018)

Table 2 shows that five elements of investment facilitation viz. regulatory, transparency, and predictability; streamlining and simplifying administrative procedures; institutional cooperation; special and differential treatment; and technical assistance have been covered in investment facilitation proposals of all the countries/groups. While elements like definition of investment facilitation; non-discriminatory; electronic applications; protection of confidential information; facilitation of outward investment; appeals and review of admintrative decisions; multilateral institutional arrangements; and dispute prevention have been featured in proposals of limited countries/groups.

The comparison among the above-mentioned proposals on investment facilitation shows that countries/groups do not maintain the same position on issues of dispute settlement and protection of outward investment. Proposals from FIFD, MIKTA, and Argentina and Brazil, and Brazil opine to keep the sensitive issue of dispute settlement out of the purview of proposed IFA while proposal from Russia proposes to establish domestic mechanisms to prevent and settle investment related grievances. While the proposal from China seems silent on this issue, however, it demands for protection of outward investment (compensation for losses of foreign investors in the territory of the host country owing to war or other armed conflict, revolution, a state of emergency, revolt, and insurrection or riots in the host country) of foreign investors to developing countries and LDCs.

On the other hand, countries like India are not against the investment facilitation *per se* but they are opposed to the multilateral framework of IFA at the WTO as an agreement with binding commitments on market access and investor-state-dispute settlement would amount to surrendering of policy space to decide on FDI norms and arbitration clauses.[21]

2.3 Major elements of investment facilitation emerging at the WTO

After the JMSIF during the 11th Ministerial Conference, SDIFD started on 28 June 2018 coordinated by Mr Juan Carlos González (Colombia). Since then four such Structured Discussions have taken place. Following are the major issues of discussions in these Structured Discussions: (i) 28 June 2018- Improving the transparency and predictability of investment measures; (ii) 23 July 2018 - Streamline and speed up administrative procedures and requirements (APRs); (iii) 21 September 2018 - Enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention; (iv) 26 October 2018 -

[21] Joseph, Reji K., Investment Facilitation Agreement in WTO: What It Contains and Why India Should Be Cautious? (December 7, 2017). Available at SSRN: https://ssrn.com/abstract=3083945

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

2.4 Summary of the Structured Discussions

Improving the transparency and predictability of investment measures

Majority of the participants considered regulatory transparency and predictability a key element of investment facilitation. It states 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: (i) timely publication of relevant legislation; (ii) notification obligations; (iii) enquiry points/single windows; (iv) 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; and (v) administrative procedures to ensure the consistent and impartial application of investment-related laws and regulations to domestic and foreign investments alike.

Following are the detailed provisions of transparency and predictability measures.

Making information on investment measures publicly available in a clear and timely manner

Types of measures and information to be made publically

Types of measures and information to be made publically available include: (i) Publication of measures such as laws, regulations, procedures, administrative, judicial rulings of general application; (ii) Publication of international agreements pertaining to FDI; (iii) Information to be published where an authorization is required to invest in a country (e.g. relevant requirements and procedures, information on fees and charges, competent authorities including contact details, applications processing times, and appeal and review procedures); and (iv) Making other relevant pieces of information easily accessible (e.g., application forms and support provided to investors).

Modalities of making measures and other information publicly available

These include: (i) Official gazette/electronic means for making measures and other information publically available, including easily accessible and user-friendly electronic portals or official websites; and (ii) Language of publication.

Time-period between publication of measures and their entry into force

Such a time period is needed to allow investors and other interested parties enough time to bring their activities in line with the new or amended measures.

Publication of proposed measures and opportunity for comments

This includes: (i) Publication of proposed measures and allowing a time-period for investors

and other interested parties to comment on those proposed measures; (ii) Explanation of the purpose and rationale of measures when publishing in advance; (iii) Time-period for comments: specific time-frame, or reasonable/ appropriate/ sufficient time-period or time frame to be determined by each Member depending on the measure or order; (iv) Exceptions to time-period for prior comment in emergency situations; (v) Use of electronic means; (vi) Consideration of comments received on proposed measures; and (vii) Explanation of why comments were not considered.

Notification to the WTO

- Type of measures and information to be notified: (i) Notification of laws, regulations, and administrative procedures of general application; (ii) Notification of places and URL of websites where relevant information concerning investment is made publicly available; (iii) Notification of enquiry/ focal/ contact points; (iv) Notification of other relevant information (e.g. competent authorities); and (v) Notification of inventory of investment measures.

- Modalities of notification through electronic means

- Mechanism to allow timely access and search of notified information through user friendly information systems allowing governments and other users to search and receive notifications of investment measures including SPS/TBT notification alert system

- Notification of proposed measures and opportunities for Members to make comments on those proposed measures, except in certain cases (e.g. emergency situations)

Contact points

The role of enquiry/ focal/ contact points would entail: (i) Responses to requests for information on published measures; (ii) Response to enquiries of governments, investors, and other interested parties; here TFA can serve as a good model; (iii) Making measures and other relevant information publicly available (e.g. regarding procedures applicable to investors and competent authorities), including through electronic portals; (iv) Providing assistance to investors including after-care services/ one-stop services.

One-stop shop/single window

These may serve the followingpurposes: (i) Making relevant information easily available in a centralised manner, including through electronic portals; (ii) Single entry point for the submission of documentation necessary for investment application procedures, including through electronic means.

Exceptions to transparency requirements

These may be considered in certain situations, e.g. confidential information, emergency situations.

Other transparency related issues

These include information to be made available by the home country of the investor and role of WTO Trade Policy Review Mechanism.

Capacity building

Improving the transparency of investment-related measures seems to be a challenging task for a number of governments due to their lack of resources, weak institutional capacity, and limited access to technology and expertise. Therefore, they need technical assistance and capacity

building to strengthen their investment authorities, respectively.

Streamlining and speeding up administrative procedures and requirements (APRs)

APRs exist in all countries and can take 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.

Following are the detailed provisions of APRs:

- Administrative procedures, formalities, and documentation requirements to be removed and simplified: It includes reduction in the number of administrative procedures, formalities or approval requirements; simplifying documentation and procedural requirements as much as possible; review of application forms to make them simple and clear; and publication online of a checklist and a set of guidelines on application requirements to assist applications.
- Use of electronic platforms for administrative procedures, e-forms, online payment of fees and charges and status of their applications to investors.
- Shorten the time frame for administrative procedures and inform applicants
- Inform the applicants about rejection of their application, give them an opportunity to correct deficiency, and re-submit.
- Establish focal/contact point/ombudsperson to facilitate access to information/procedures, receive complaints, solve difficulties, and carry out policy advocacy.
- Provide criterion for review of fee and charges with the aim of reducing them
- Provide independence to competent authorities.
- Provide for non-discriminatory access to public infrastructure.

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. Following are its detailed provisions:

Cooperation in International Investment Agreements (IIAs)

Cooperation in International Investment Agreements (IIAs) through institutional strengthening of local investment promotion agencies, exchange of information on regulation and investment incentives and the promotion of various state activities; the exchange of experiences with regard to encouraging foreign investment, including the option to organize visits, and the exchange of information on the economic situation of each country, as well as information on investment-related standards and regulations.

Further, it includes ensured transparency and access to information, simplifying the procedures to obtain necessary permits and licenses for investors, facilitate entry and stay of personnel relating to an investment, and facilitate the hiring of executives and foreign directors by allowing investors to hire executives and directors regardless of their nationality.

Stakeholder relations

Establish good relations with various stakeholders since investment policies, laws and regulations affect many citizens including interested persons and investors beyond the border. Each of these stakeholders hold a different interest, purpose or concern and to consult with them allows a government to take a decision in a better-informed way.

Exchange of best practices

Contact or focal points could help facilitate the exchange of best practices among governments and improve relations between governments and relevant stakeholders.

Dispute prevention

Dispute prevention can be termed as a centre point of investment facilitation. It is important to establish a high level Ombudsperson to provide support to investors in dealing with administrative procedures, including assistance in resolving difficulties faced by investors, and engage in policy advocacy.

Other issues

Some of the other issues involved are appeal and review for administrative action relating to investment matters, promote corporate social responsibility, and consider points of views of private sector concerning the bottlenecks and challenges faced by them when facilitating investment.

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.

Some of the important provisions to increase participation of developing and LDCs in global investment flows are:

- Consideration of challenges faced by developing and least-developed members in implementing the multilateral framework's provisions (e.g. lack of institutional capacity, infrastructure, human resource); and provide them technical assistance and build their capacity.
- Strengthen the institutional mechanism, non-discrimination, address challenges faced by micro, small and medium-size enterprises (MSMEs), institutional issues (e.g. creation of a WTO Investment Facilitation Committee), and relationship between proposed investment facilitation framework and governance issues.
- Inter-agency consultations and coordination among domestic authorities (e.g. taxation authorities, international finance experts) on government measures
- Sharing and promoting best practices
- Special and differential treatment

It is to be noted that the Structured Discussions do not cover issues like investment protection, market access etc.

SECTION 3

Investment Facilitation in Regional Trade Agreements and Similar Arrangements

One of the prominent features of international trade is growing number of RTAs, and preferential trade agreements (PTAs). All these trade agreements become a basis or driving force for multilateral trade agreements. "*RTAs in the WTO are taken to mean any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region while (PTAs) refer to unilateral trade privileges such as General System of Preferences (GSP) schemes and non-reciprocal preferential programmes some WTO members implement for products from developing and least-developed countries*".[22] Currently, there are 308 RTAs in force with or without clauses on investment.[23]

The RTAs include rules on trade in goods and services along with clauses on investment, technology transfer etc. among the participating countries. Nowadays, investment agreements are also negotiated as part of the trade agreements, in many cases. Here, we briefly describe certain important provisions of investment facilitation in select RTAs.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP): The CPTPP, also known as TPP11, is an RTA among 11 countries[24] and contains most of the provisions of the Trans-Pacific Partnership (TPP) but deferred 22 provisions supported by the United States, but opposed by other countries. Investment facilitation measures are covered in its Chapter 9.

ASEAN-China Free Trade Area (ACFTA): The ACFTA is free trade area among all 10-member states of ASEAN and the People's Republic of China. The ACFTA was signed on 4th November 2002. It is also termed as the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China. It includes agreements on trade in goods, dispute settlement mechanism, trade in services, investment.

The Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China was implemented on 15 February 2010. Its main objective is "*to promote investment flows and to create a liberal, facilitative, transparent, and competitive investment regime in ASEAN and China through liberalisation of investment regimes, creating favourable investment climate, promoting cooperation, improving transparency of investment rules, and providing protection of investments*". The objective of the Agreement on Investment of ACFTA seems to be more in sync with investment facilitation measures as evident from table 3 also.

[22] https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm
[23] http://rtais.wto.org/UI/PublicAllRTAList.aspx

[24] Countries include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

Table 3: Mapping of investment facilitation elements in select RTAs

Elements of investment facilitation	CPTPP		ACFTA	
		Article		Article
Definition of investment facilitation			X	21
Regulatory, transparency, and predictability			X	19
Streamlining & simplifying administrative procedures			X	21
Non-discriminatory	X	9.6(1)	X	7(1)
Single window process			X	21
Electronic applications				
Protection of confidential information			X	17
Facilitation of outward investment			X	9
Appeals and review of admin decisions				
National institutional arrangements				
Multilateral institution arrangement				
Institutional cooperation				
Special and Differential Treatment (SDT)				
National Treatment	X	9.4(2)	X	4
Technical assistance				
Corporate Social Responsibility	X	9.17		
Dispute prevention and/or dispute settlement	X	9.18	X	13 & 14(1)
Notification to WTO				
Enquiry/focal/contact point				
Sharing and promoting best practices				

Source: Author's compilation

The investment chapters of the CPTPP and ACFTA cover some of the elements of investment facilitation as coming out from proposals on investment facilitation at the WTO and Structured Discussions. Table 3 shows that as compared with CPTPP, ACFTA covers more number of investment facilitation elements. The other side is that these RTAs contains some possible clauses of investment facilitation, which have not come in the SDIF so far; such as transfer and repatriation of profits.

Some of the major elements of investment facilitation, emerging from Structured Discussions and countries/groups proposal on investment facilitation at the WTO, but missing in CPTPP and ACFTA are application of electronic platforms/portals to submit applications and other documents/fee etc.; national/bilateral/plurilateral institutional arrangements; institutional cooperation; single focal/contact point; and sharing/promoting of best practices. Notably, the Agreement on Investment in ACFTA has a clause on protection of outward investment, which has been proposed by China in its proposal on investment facilitation at the WTO. This is probably because the country makes a lot of investment in developing and LDC states and some of which are more prone to losses of investment due to unforeseen happenings like war and armed conflict etc.

SECTION 4

Investment Facilitation in the Multilateral Trading System: The Way Forward

It is the proposal of Informal Dialogues on investment facilitation by FIFD in April 2017 that marked the stage for formal discussions on this issue. Finally, the JSIFD during the 11th Ministerial Conference set the stage for SDIFD at the multilateral level, which started on 28 June 2018.

The Informal Dialogues aimed at bringing likeminded countries together who are willing to make a multilateral framework for investment facilitation. However, "facilitation' has so far not been addressed as an independent concept in any WTO agreement, or, for that matter, any multilateral agreement so far. 'Facilitation' has so far been linked to a substratum that needs facilitation. Even the TFA does not define the term 'trade facilitation', rather it provides various provisions to facilitate international trade", Anuradha (2018). Similarly, the SDIFD do not define this term but identify the possible elements/provisions to facilitate cross-border investment. Similarly, the UNCTAD Global Action Menu for Investment Facilitation also provides 10 lines of actions to facilitate international investment.

The important provisions of investment facilitation identified, so far, during the Structured Discussions and Investment Facilitation Proposals by individual or group of countries can be clustered in these broad groups: transparency and predictability of investment measures; streamline and speeding up administrative procedures and requirements; enhance international cooperation; and facilitating greater participation of developing and least developed countries in global investment flows. Further, there are several sub-lines of actions under all of these groups.

Majority of these provisions on investment facilitation, have more or less been driven from their investment agreements like the ACFTA. However, some of them are different such as single window clearance, use of electronic platforms for publication and dissemination of information, and technical assistance etc.

Still, many developing countries including 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 multilateral framework for a variety of reasons such as massive capital requirement for development of their economies and achieving the SDGs etc. These countries view the multilateral framework on investment facilitation 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. IFA's

publication and use of electronic platforms provisions can be helpful to overcome this delay.

Many developing countries, particularly from Asia and Latin America, are supporting the multilateral framework on investment facilitation, as they require greater funds to create livelihoods for their growing population and achieve SDGs. There are several examples where countries have achieved higher growth through massive public expenditure, like Ethiopia, which has raised their debt to gross domestic product (GDP) ratio. They opine that foreign investment can be very helpful in bringing new technology, developing basic infrastructure, generating more jobs, and ultimately leading to socio-economic development.

The interesting part is that much of these foreign investment inflows in developing countries and LDCs have to come primarily from developed countries and China etc. who are supporters of multilateral rules of investment facilitation. Additionally, the engagement of countries in RTAs having investment chapters, for example participation of India in Regional Comprehensive Economic Partnership (RCEP), will encourage more countries to join the multilateral discussions on investment facilitation.

The discussions on investment facilitation at the WTO are at nascent stage; however, other multilateral agencies like UNCTAD are also supporting to facilitate 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.

Table 4: Mapping of UNCTAD Global Action Menu and Brazils proposal for investment facilitation

UNCTAD Global Action Menu	Brazil's Elements Paper on Investment Facilitation
Action Line 1: Single window or special enquiry points	Article 6 on National Focal Point Article 9 on Single Electronic Window
Action Line 1: Timely and relevant notice of changes in procedures	Article 6 on National Focal Point Article 12 on Prior Comment
Action Line 1: Make available screening guidelines and clear definitions of criteria for assessing investment proposals	Articles 13 on Publication Article 6 on National Focal Point Article 9 on Single Electronic Window
Action Line 2: Avoid discriminatory use of bureaucratic discretion; clear criteria and procedures for administrative decisions	Article 10 on Processing of Applications
Action Line 2: Amicable dispute settlement mechanisms	Article 11 on Appeals and Review
Action Line 3: Shorten the processing time, time bound approval processes, keep applicants informed about the status of their applications, keep costs to the investor to a minimum	Article 10 on Processing of Applications
Action Line 4: Establish a mechanism to provide interested parties with the opportunity to comment on proposed new laws, regulations and policies or changes to existing laws, regulations and policies	Article 12 on Prior Comment
Action Line 4: Improved standards of corporate governance and responsible business conduct	Article 18 on Corporate Social Responsibility

Action Line 5: Address suggestions or complaints by investors and their home states	Article 6 on National Focal Point
Action Line 5: Provide information on relevant legislative and regulatory issues	Article 9 on Single Electronic Window
Action Line 5: Inform relevant government institutions about recurrent problems faced by investors	Article 6 on National Focus Point
Action Line 8: Strengthen investment facilitation efforts in developing country partners through support and technical assistance	Article 17 on Technical Assistance

Source: Anuradha (2018)

While, the proponents of investment facilitation are making their wholehearted efforts towards an IFA at the multilateral level, it does not seem to be a cakewalk. "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. However, the provisions of international cooperation in terms of sharing and promoting best practices can be of substantial help.

Majority of the present cases of investment proposals focus on facilitating investment and lack in development aspects as argued. For example, proposals by China, Argentina & Brazil and Brazil provide for CSR while others do not. Further, the proposals on IFA lack in clarity on definition on investment, as it is a very broad term, and involves flow of money from one country to other countries in many forms.

No one can deny that for negotiating any issue at the multilateral level, countries prefer to first have their domestic rules on that issue in place. Although, many countries have their domestic policies on investment in place and those who do not, are preparing them. However, even if all this is assumed to be in place, the question for IFA at the multilateral level is, will it be a binding legal agreement like other WTO Agreements or a system of cooperation as suggested by the UNCTAD Menu?

Irrespective of the fact that what will be the outcomes of the Structured Discussions, countries should start engaging in discussions to raise questions and clarifications. However, some of the important issues to be addressed, especially from the perspective of developing countries and LDCs are:

- Proper definition of international investments,
- Proper care needs to be taken to address domestic economy difference among countries such as development stage, administrative capacity, technical and financial resources etc.,
- Identification of areas for capacity building and technical assistance along with responsible agencies and funding,
- Identification of relevant areas/elements of investment facilitation that would help countries to achieve SDGs, and

- Study the need of adjustment in existing domestic industrial and other fiscal policies, arising from various provisions of 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, will force opponents of IFA at the multilateral level to be prepared with a back-up plan when they may not have much of an option but to discuss investment facilitation issues within the multilateral trading system. This would entail providing informal support for preparation and dissemination of detailed counters to specific provisions of investment related proposals being tabled at different fora.

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