Note

WTO Joint Statement Initiative on Investment Facilitation

Considerations for Developing Countries in the Context of the COVID-19 Pandemic

By Julian Mukiibi

Summary

This note reviews the main issues under deliberation in the Joint Statement Initiative on Investment Facilitation, taking into account developing country perspectives, especially at a time when impacts of the COVID 19 pandemic are expected to negatively affect investment. The rationale is to highlight best practices that could be adopted in order to revamp investment that is critical for development.

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Introduction

WTO Investment Facilitation JSI: Brief history and objectives

Although the WTO Investment facilitation initiative is referred to as a new issue, it is not an entirely new phenomenon and the conversation certainly did not start with the Joint Statement Initiative on Investment Facilitation. Discussions on investment rules at multilateral level started during the drafting of the Havana Charter.[1] The Charter also contained provisions on Foreign Direct Investment (FDI), spelled out extensive rights for investors such as the National Treatment (NT) and Most Favoured Nation principles (MFN) inter alia.[2] Having proved to be an over-ambitious instrument of its time, the Havana Charter never entered into force.[3] Following the failure to either ratify the Havana Charter or establish the International Trade Organisation, countries signed the General Agreement on Tariffs and Trade (GATT) which entered into force in 1948.

The GATT did not contain any provisions that pertained to investment, it was during the Uruguay Round of negotiations that Member states came up with the Agreement on Trade-Related Investment Measures (TRIMS) as well as certain provisions in the General Agreement on Trade in Services (GATS).[4] The negotiation of the TRIMS and GATS could be attributed to the fact that Member states were cognisant of the relationship between trade and investment.

In 1995, 27 Member states of the Organisation for Economic Co-operation and Development (OECD) opened negotiations on a multilateral agreement on investment but later discontinued them in April of 1998 with no intentions of ever resuming them[5]. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes, investment protection and effective dispute settlement procedures, open to non-OECD countries.[6] The negotiations were discontinued for a myriad of reasons which include the fact that the Agreement was targeted at developing countries who were not part of the negotiating forum.[7]

In 1996, some WTO Members proposed introduction of investment along with trade facilitation, competition policy and transparency in government procurement (which collectively became known as the Singapore issues) for negotiation, however this was not agreed, as a compromise it was decided to establish Working Groups. In the case of investment, the group's mandate was to examine the relationship between trade and investment issues, as well as carry out exploratory work in that regard. The working group on Trade and Investment then actively studied and discussed these issues from 1996 to 2004.[8]

In the 2001 WTO Ministerial Declaration, paragraphs 20-22 were dedicated to affirming the relationship between trade and investment.[9] In terms of paragraph 20, Members of the WTO were recognising the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross border investment, particularly FDI that will contribute to the expansion of trade and the need for enhanced

[1] Mehta, P., Mangla, S. (2019) *Investment Facilitation at the World Trade Organisation: Progress and the Road Ahead*. Geneva: CUTS International, Geneva. Pg. 1.
[2] Ibid.
[3] Herdegen M, (2013) *Principles of International Economic Law* 2nd ed Oxford: Oxford University Press pg. 50.
[4] Mehta & Mangla (2019) 2.
[5] Organisation for Economic Co-operation and Development, '*Multilateral Agreement on Investment'* available at, https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (accessed on 25 November 2020)
[6] Ibid; The Multilateral Agreement on Investment Commentary on the Consolidated Text, DAFFE/MAI(98)8/REV1.
[7] Mehta & Mangla (2019) 2.
[8] Sandrey R, 'World Trade Organisation and the Singapore Issues' (2015) Trade Law Centre Working Paper available at https://www.tralac.org/publications/article/6840-wto-and-the-singapore-issues.html (accessed on 27 November 2020). Pg i-ii.
[9] Doha World Trade Organisation Ministerial 2001: Ministerial Declaration WT/MIN/(01)/DEC/1 20 November 2001 available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (accessed on 23 November 2020).

technical assistance and capacity building.[10] Paragraph 21 was a commitment by Member states to recognising the needs of developing and least- developed countries for enhanced support for technical assistance and capacity building.[11] The Working Group on Trade and Investment was directed to focus on the clarification of the scope and definition, transparency, non-discrimination, modalities for pre-establishment commitments based on a GATS-type, positive list approach, development provisions, exceptions and balance-of-payments safeguards, consultation and the settlement of dispute between Members.[12] In addition, Members emphasised on the need for the multilateral framework to reflect in a balanced manner the interests of home and host countries and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.[13] In line with paragraph 21 that recognised the needs of developing and least-developed countries (LDCs), Members further agreed to take into account the special development, trade and financial needs of developing and least developed countries as being an integral part of the framework.[14] This recognition of the needs of developing and least developing countries still finds expression even in the Informal Consolidated Text of the Multilateral Framework on Investment Facilitation.

Following the infamous 'train wreck' of Cancun which in part was induced by the acrimonious debate on the Singapore issues, three of the issues were dropped and negotiations continued on trade facilitation.[15] For a moment, it seemed as if the discussion on investment at the multilateral level had ceased. The conversation however continued in other forums such as the OECD, UNCTAD and the G20. The G20 established the Trade and Investment Working Group which advanced the endorsement of the G20 Guiding Principles for Global Investment Policymaking.[16] UNCTAD released the Global Action Menu for Investment Facilitation which provided the most comprehensive guidelines on the range of investment facilitation measures that a country could implement either unilaterally or as a basis for international cooperation.[17]

At the WTO, cognisant of the potential of the potential of FDI in creating employment, enhancing exports and technological transfer, as well as contributing to economic growth necessary in the attainment of the Sustainable Development Goals (SDGs), in early 2017, a group of countries introduced the issue of Investment Facilitation, with a focus on processes aimed at improving transparency and predictability of rules and regulations applicable to FDI. The new approach is differentiated from previous investment discussions in the WTO, in that it categorically does not cover substantive issues such as market access, investment protection and dispute settlement.[18] It started with the MIKTA group comprising of Mexico, Indonesia, Korea, Turkey and Australia who in March 2017 organised the first informal workshop on investment facilitation at the WTO.[19] Thereafter, in the drive towards the 11th WTO Ministerial Conference of 2017, another group comprising of some developing country Members of the WTO known as the Friends of Investment Facilitation for Development (FIFD) organised a number of similar informal workshops aimed at advancing investment facilitation. It is during these informal meetings that Member states discussed the rationale of having a multilateral framework on investment facilitation.

At 11th WTO Ministerial meeting, some Members of the WTO issued a Joint Statement dated 13

[10] Paragraph 20 of the Ministerial Declaration WT/MIN/(01)/DEC/1
[11] Paragraph 21 of the Ministerial Declaration WT/MIN/(01)/DEC/1
[12] Paragraph 21 of the Ministerial Declaration WT/MIN/(01)/DEC/1
[13] Ibid.
[14] Ibid.
[15] Sandrey R (2015) ii.
[16] Balino S, et al (2020) 6.
[17] United Nations Conference on Trade and Development. (2016). UNCTAD global action menu on investment facilitation. Available on https://investmentpolicy.unctad.org/publications/148/unctad-global-action-menu-for-investment-facilitation as cited in Balino S, et.al (2020) 4.
[18] Mehta & Mangla (2019) 6.
[19] Balino S, et al (2020) 6.

December 2017 on Investment Facilitation for Development.[20] The initiative was birthed from the recognition that there is a dynamic link between investment, trade and development and the need for closer international cooperation at global level to create more transparent, efficient and predictable environments for facilitating cross-border investment.[21] In the Joint Statement Initiative (JSI) it was agreed to commence 'structured discussions' aimed at identifying and developing the elements of a framework for facilitating FDI and clarifying the framework's relationship and interaction with existing WTO provisions, investment commitments among Members and with the investment facilitation work of other international organisations.[22] In 2018, the discussions were mainly centred around identifying the basic elements that would form the basis for the Multilateral Framework on Investment Facilitation (MFIF).[23] Submissions for the drafted basic elements were made in 2019 upon which a Working Document was prepared and circulated for comments. The document was meant to help WTO Members identify areas of convergence as well as potential conflicts.[24] Subsequently, a series of meetings have been held and the discussions have recently evolved into negotiation mode as of September 2020[25].

This note reviews the main issues under deliberation in the Joint Statement Initiative on Investment Facilitation, taking into account developing country perspectives, especially at a time when impacts of the COVID 19 pandemic are expected to negatively affect investment. The rationale is to highlight best practices that could be adopted in order to revamp investment that is critical for development.

COVID-19 Impacts on Developing Countries and Least-Developed Countries' Investment Initiatives.

By the end of September 2020, the World Health Organisation had reported that more than 31 million people globally had been confirmed infected with COVID-19.[26] Over a million death worldwide were also attributed to the coronavirus. Without a doubt, the COVID-19 pandemic has had immediate and negative effect on FDI in 2020.[27] Although the extent of the impact is said to be difficult to assess, UNCTAD's Global Investment Trends Monitor predicts a drastic drop in global FDI flows by up to 40% during the 2020/21 period reaching its lowest level in the past two decades.[28] FDI flows throughout the year were 25% lower in Africa, 25% lower in Latin America and the Caribbean with Asia experiencing a 12% decline due to resilient investments in China.[29] The economic contraction, projected drop in FDI flows and changes in government policies are cumulatively going to affect investment in both developed and developing economies. [30] This is mainly because the projected sharp drop in FDI flows is happening against the background of the stagnant global investment flows over the past decade thus significantly widening the already large gap in investment needed to meet the SDGs.[31]

UNCTAD expects gross domestic product (GDP) to

[20] WTO, 'Structured discussions on investment facilitation for development move into negotiating mode
' World Trade Organisation News, September 2020 available at,
https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm
[21] Ibid.
[22] Osterwalder N.B., Campos, S.L., Van der Ven C, (2020) '*The Proposed Multilateral Framework on Investment Facilitation: An analysis of its relationship to international trade and investment agreements*. Geneva: International Institute for Sustainable Development and CUTS International Geneva, ii.
[23] Ibid.
[24] Ibid.
[25] https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm

[26] UNCTAD, (2020) 'Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal' United Nations Conference on Trade and Development UNCTAD/OSG/2020/1, pg. 13 available at https://unctad.org/system/files/official-document/osg2020d1_en.pdf
[27] Ibid, pg.17.
[28] UNCTAD Investment Policy Monitor No. 23
[29] UNCTAD (2020) 17.
[30] OECD, 'Investment Promotion Agencies in the time of COVID-19' June 2020 available at https://read.oecd-ilibrary.org/view/?ref=132_132715-6ewiabvnx7&title=Investment-promotion-agencies-in-the-time-of-COVID-19 (accessed on 26 November 2020).
[31] G20 Trade and Investment Ministerial Meeting: Communique of 22 September 2020 available at http://www.g20.utoronto.ca/2020/2020-g20-trade-0922.html

fall with developing countries and LDCs expected to be more affected than developed countries at -5.8% as compared to -2.1% recorded in developing countries.[32] Also, developing countries are expected to have a weaker recovery post-COVID-19 with a +3.1 % GDP growth as compared to an estimated 5.7% GDP growth in developed countries.[33] Such an outlook is sombre for most developing countries and LDCs because FDIs play a significant role as sources of finance in these economies.[34] For instance, many LDCs are dependent on FDI in the extractive industries and small islands developing countries are dependent on investment in tourism. In 2017, FDI was one of the largest sources of international finance for LDCs generating inflows of approximately US$39 billion and with the outbreak of COVID-19, developing countries have seen around US$100 billion worth of capital being withdrawn by investors.[35] As such, the brunt of FDI flows decline will cause contractions in these countries' GDP thus exacerbating hunger and other socioeconomic challenges.

The pandemic has delayed the implementation of most investment projects and the shelving of new projects due to a myriad of reasons some of which were motivated by government responses to the pandemic. Countries have been adopting policy measures with the view to supporting investors and economies amidst the pandemic. Governments introduced policy measures that were diverse, some aimed at investment facilitations and others aimed at shielding domestic industries from foreign takeovers. According to the study that was carried out by UNCTAD, some governments introduced new screening requirements and investment restrictions targeted at protecting the healthcare system and other strategic industries[36] Countries like India and South Africa made changes and introduced new guidance to FDI screening.[37] These policy measures inarguably reverse the potential gains from the JSI which essentially seeks to enhance investment facilitation among Member states.

On the other hand, a considerable number of developing and transitioning economies introduced measures that were geared towards investment facilitation. China was the first country to announce a set of measures to promote and facilitate foreign investment amidst the global pandemic.[38] The Chinese government issued the 'Circular on Responding to Novel Coronavirus Pneumonia, Stabilising Foreign Trade and Foreign Investment and Promoting Consumption' which provides for the promotion of paperless management of foreign investment records and issuance –free of charge- of factual proof of force majeure for foreign companies failing to execute contracts on time due to the epidemic.[39] In addition, the government provided for additional measures including simplifying approval procedures for foreign invested projects optimising the tax exemption process for imported equipment and protecting legitimate rights and interests of foreign investors.[40]

With the spread of the virus to other parts of the globe, a number of countries also ended up introducing like measures. Algeria introduced a set of fiscal incentives to attract foreign investment in the oil and gas sector.[41] Azerbaijan expanded tax incentives for industrial and hi-tech parks, Colombia established a preferential corporate tax regime for investment projects which reduces the large amounts of taxable income and create multitude of jobs, Kenya revised its taxation system to provide exemption

[32] UNCTAD (2020) 16
[33] Ibid.
[34] Saurav A, Kusek P, Kuo R, Viney B, 'The Impact of COVID-19 on foreign investors: Evidence from the second round of a global pulse survey' World Bank Blogs of 06 October 2020, available at, https://blogs.worldbank.org/psd/impact-covid-19-foreign-investors-evidence-second-round-global-pulse-survey (accesed on 26 November 2020).
[35] UNCTAD (2020) 73.
[36] Ibid.
[37] Saurav A (2020).
[38] UNCTAD Investment Policy Monitor (2020) 5.
[39] Zhang Z, 'China's support policies for Businesses under COVID-19: A Comprehensive list.' China Briefings of 03 July 2020 available at https://www.china-briefing.com/news/china-covid-19-policy-tracker-benefiting-business-enterprises-comprehensive-updated-list/ (accessed 27 November 2020); see also UNCTAD Investment Policy Monitor (2020) 4.
[40] UNCTAD Investment Policy Monitor (2020) 4.
[41] Ibid.

for investment in various sectors, Oman established an investment portal designed to enable local companies attract foreign investors worldwide and Uzbekistan created a one stop shop mechanism for investment facilitation.[42] As will be noted, in most countries, priorities changed from trying to attract FDI overseas to deploying crucial domestic efforts to help foreign investors and companies ensure their business continuity in those countries.[43] All these measures were put in place to ensure that governments enhance investment facilitation for development during the pandemic and also in preparation for post-COVID economic recovery.

From the above, it can be argued that the pandemic will have long-lasting effects not only on global economies but also the future of investment facilitation negotiations. The pandemic may solidify the shift towards more restrictive admissions policies for foreign investment in strategic industries, yet it may also trigger increased competition for foreign investment as economies will be seeking to recover.[44]. For developing countries and LDCs, this would be the time to improve investment facilitation so as to spur the much-needed investment for post-COVID-19 economic recovery.

WTO Investment facilitation JSI: Issues, Positions and COVID-19

As already indicated above, the structured discussions spurred by JSI were focused on identifying and developing the scope and coverage for a potential multilateral framework on investment facilitation (MFIF), establishing the relationship between such a framework with existing WTO provisions and prospects of incoherence with existing obligations from IIAs. JSI Members agreed that the framework for facilitating FDIs would improve transparency and predictability of investment measures, streamline and speed-up administrative procedures and requirements, enhance international cooperation, information sharing, exchange of best practices, relations with relevant stakeholders including dispute prevention but would not address issues such as market access, investment protection and investor-state dispute settlement.[45]

The following developments were a result of the structured discussions in the JSI; a compendium of the text-based examples which contains investment facilitation elements that could be included in a potential MFIF; a Working Document which builds on the compendium and focuses on areas of convergence emerging from those decisions; a Streamlined Text which is based on the Working Document and aims 'to help Members further develop the elements and specific provisions of an MFIF' and an Informal Consolidated Text which was circulated to Members in April of 2020 and prepared on the basis of the Streamlined Text and proposals by Members.[46]

The proposed text of the MFIF as reflected in the Informal Consolidated Text comprises of the Preamble and nine sections.[47] The sections are as follows;

I- Scope and General Principles (Art. 1 Scope, Art. 2 MFN);

II- Transparency of Investment Measures (Art.3 Publication and availability of measures and information [including electronic means], Art. 4 Notification to the WTO, Art.5 Enquiry Points, Art. 6 Specific Exceptions Applicable to transparency requirements);

III- Streamlining and Speeding Up Administrative

[42] Ibid.
[43] Chiffelle C.R., Vanham P, (2020) '*Foreign Investment is drying up thanks to COVID-19, but there may be a silver lining.*' World Economic Forum available at https://www.weforum.org/agenda/2020/04/foreign-investment-covid19-economy-winners/ (accessed on 27 November 2020).
[44] UNCTAD (2020) 75.
[45] WTO (2020).
[46] Balino S. (2020) 1.
[47] The Informal Consolidated Text is a restricted document and the sections are as provided for in Balino S et. al (2020) as adapted from the Streamlined Text, WTO. (2020).WTO Structured Discussions on Investment Facilitation for Development. Streamlined text. (INF/IFD/RD/45).

Procedures and Requirements (Art. 7 Consistent, reasonable, objective and impartial administration of measures, Art. 8 Reduction and simplification of administrative procedures and documentation requirements, Art. 9 Clear criteria for administrative procedures, Art. 10 Authorisation procedures, Art. 11 Treatment of incomplete and rejection of applications, Art.12 Fees and charges, Art.13 Periodic review of administrative procedures and requirements, Art. 14 Use of ICT/e-government including electronic applications, Art. 15 One-stop shop/single window-types of mechanisms, Art. 16 Independence of competent authorities, Art. 17 Appeal and review)

III BIS- Temporary Entry for Investment Persons/Facilitating of Movement of Business Persons for Investment Purposes;

III TER- Transfers and Subrogation;

IV – Contact Points/Focal Point/Ombudsperson Types of Mechanism, Arrangements to Enhance Domestic Coordination and Cross-Border Cooperation on Investment Facilitation (Art. 18 Contact/focal point/ombudsperson types of mechanism, Art.19 Domestic regulatory coherence, Art. 20 Cross-border cooperation on investment facilitation)

V- Special and Differential Treatment for Developing and Least Developing Country Members (Art. 21 General principles, Art. 22 Implementation, Art. 23 Notification of dates for implementation of Categories B and C, Art. 24 Grace period for the application of the dispute settlement understanding, Art. 25 Technical assistance and capacity building)

VI- Cross-Cutting Issues (Art. 26 Corporate social responsibility, Art. 27 Measures against corruption)

VII- Institutional Arrangements and Final Provisions (Art. 28 WTO Committee on Investment Facilitation, Art. 29 General exceptions, Art. 30 Security exceptions, Art. 31 Dispute settlement, Art. 32 Final provisions)

Main Issues under the JSI

- *Scope*

The Informal Consolidated text spells out that the MFIF would apply only to investment facilitation but does not go on to define what the phrase, 'investment facilitation' means for the purposes of the framework.[48] For a better understanding of the phrase, one would then have to borrow the definitions that were put forward in other forums. UNCTAD defines investment facilitation as, '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.[49] Investment facilitation 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.[50] Upon paying regard to the provisions that are contained in the Informal Consolidated Text, it is clear that the definition proffered by UNCTAD best defines what investment facilitation is for the purposes of the framework. It has been argued that the Members deliberately did not define investment facilitation as the MFIF is modelled from the Trade Facilitation Agreement which also does not define what 'trade facilitation' is.[51]

- *Non-discrimination*

Article 2 of the Consolidated Informal Text contains the MFN provision. It provides that 'each Member shall accord immediately and unconditionally to investments and investors of

[48] Bernasconi-Osterwalder N et. al (2020) 20
[49] United Nations Conference on Trade and Development. (2016). UNCTAD global action menu on investment facilitation Available at https://investmentpolicy.unctad.org/publications/148/unctad-global-action-menu-for-investment-facilitation
[50] Ibid.
[51] Bernasconi-Osterwalder N et al (2020) 20.

any other Member treatment no less favourable that it accords to like investments and investors of any other country.' the MFN provision is however subject to exceptions that relate to the context of free trade areas, customs unions, common markets or economic unions. It is imperative to note that the MFN provision is not escorted with a National Treatment provision as is the norm with most investment agreements. The absence of a National Treatment provision in a way can be interpreted to suggest that Member countries are at liberty to treat domestic investors in a more favourable way as compared to their foreign counterparts. However, that could be undermined by the fact that once governments put in place investment facilitation regimes under the MFIF, then the processes and procedures put in place would also apply to foreign investors.[52]

- *Special and Differential Treatment*

Concerns were raised during the earlier discussions relating to developing and LDC Members' capacities to address issues of investment facilitation and the risk of diverting their limited resources away from negotiating the remaining Doha issues.[53] Developing country representatives were interested in knowing the extent to which the proposed MFIF would address their priorities and interests and contribute to their sustainable development objectives.[54] In response to the concerns that had been raised. Members then emphasised that the framework should be in a way that helps developing countries, particularly LDCs put in place appropriate institutional and regulatory frameworks for attracting and expanding investments.[55] This was reinforced by Section V which provides for special and differential treatment for developing and least developed country Members to the MFIF.

Article 21 states that, "(a)ssistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of this framework, in accordance with their nature and scope." It further states that "(t)he extent and the timing of implementation of the provisions of this framework shall be related to the implementation capacities of developing and least-developed country Members." Again, Article 24 encompasses best-efforts obligations on technical assistance and capacity building for developing country and LDC Members to implement the framework, including through possible cooperation with other international organizations and the possible establishment of an Investment Facilitation Facility to manage voluntary contributions.[56]The provisions were drafted being mindful of the fact that technical assistance is vital for developing countries and LDCs to build their capacity towards strengthening their institutional mechanisms which in turn will position them well to also reap from the benefits of the framework on investment facilitation.

- *Other Core Issues under Deliberation*

According to proponents of the MFIF, deliberations seek to develop a framework for facilitating FDI that would:[57]

- Improve the transparency and predictability of governmental measures affecting the admission and establishment of FDI in host states. This would be accomplished by, for example, requiring participating members to publish and notify all relevant regulations and procedures in a timely manner and provide investors with an opportunity to comment. Such requirements could include the obligation to publish all investment admission requirements, time limits for government decisions on the admission of proposed investments and the obligation to

[52] Ibid pg. 31.
[53] Balino S et al (2020) 7.
[54] Bernasconi-Osterwalder N et al (2020) ii
[55] Ibid.
[56] Balino S,et. al (2020) 13.

[57] An Inventory of concrete measures to facilitate the flow of sustainable FDI, What, Why, How http://www.intracen.org/itc/Investment-Facilitation-for-Development/ .

provide independent review of admission determinations.

- Streamline and speed up all administrative procedures and requirements affecting the establishment and expansion of investments in participating WTO members. This would be achieved by, for example, requiring participating WTO members to reduce and simplify procedures and documentation for establishing companies, including through the use of electronic platforms for submitting forms and applications, and for electronic payments. Some participating members are also proposing obligations to facilitate the temporary entry and stay of foreign investors and to ensure foreign investors' right to freely transfer investment-related funds into and out of a participating country, including any initial capital, profits, and proceeds from the eventual sale of the investment.
- Enhance domestic coordination within the territories of participating members to facilitate investment flows. This would be achieved by, for example, requiring participating members to set up specific institutions that would be tasked with responding to enquiries from investors, assisting investors in obtaining information from government agencies and addressing complaints and grievances of investors. The objective here is for each participating member to have a "one stop" shop dedicated to assisting investors and facilitating investments.

Developing Countries' propositions and positions

During the numerous discussions, both formal and informal, a number of developing countries seemed to be sceptical about having a multilateral framework on investment facilitation. Countries like Brazil remained opposed to the idea of investment rules at multilateral level but were willing to support a framework on facilitation. [58] Other developing countries though, still had reservations with regards to a framework on investment facilitation. These are of the view that once 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.[59] Further that although investment facilitation may affect trade, it remains an investment policy issue in its own right and putting it on the WTO acquis would potentially lead to the fragmentation of the international investment governance regime.[60] In contrast, they strategically demand prioritising critical issues such as agriculture over investment as they remain pending as part of the Doha Development Agenda.[61]

Within the JSI, Members were urged to submit text-based examples of provisions and elements that they were proposing should be part of the investment facilitation framework. Most of the proposals that were submitted were almost similar, from both developed and developing countries. Notable differences were in the Brazil Communication.[62] The Communication included a potential provision for corporate social responsibility that would be applied voluntarily along with provisions on transparency, single electronic windows and documentation requirements.[63] Corporate Social Responsibility was then reflected in Art. 26 of the Informal Consolidated text for the MFIF. The Communication also introduced the setting up of focal points which was modelled from the TFA and provisions for special and differential treatment including a reference to the TFA category approach for LDCs on applying future investment facilitation agreement's commitments.

[58] Mehta & Mangla (2019) 7.
[59] Ibid.
[60] Balino S, et al (2020) 5.
[61] Kulkarni A, (2017) '*Investment Facilitation*, Veiwpoint Paper, CUTS International available at https://www.cuts-citee.otg.
[62] Argentina/Brazil Communication, JOB/GC/124.
[63] Ibid, see also Balino S, et al (2020) 8.

China's proposals introduced the idea of considering efficiencies from the perspective of the home-country.[64] For instance, paragraph 1.5. proposed that stakeholders were to be given the opportunity to comment on the drafts or amendments of any investment-related laws and regulations to the extent it is practicable. This would make more sense in the case of China given that it has a lot of investments in a number of countries. The Communication also emphasised the need to safeguard developing and LDCs Members' special and differential treatment and also to give priorities to the special economic situation and development needs of LDCs.

COVID-19 Impacts and Key JSI Issues

Towards the end of 2019, 28 countries took 38 investment policy measures which were geared at creating more favourable conditions, investment liberalisation, production and facilitation measures that were adopted in numerous sectors such as energy, mining, financial services and Information Technology.[65] According to UNCTAD, developing and transitioning economies were the most active in putting in place policy measures for investment facilitation and promotion. However, with the outbreak of the pandemic and the chaos that followed, a lot of countries had to put in place emergency COVID-19 response measures. Some of the measures ended up reversing the strides that countries had taken towards investment facilitation. As alluded to earlier, countries like South Africa revised their FDI screening measures. Such policy measures which were put in place to protect domestic businesses directly conflict with some of the key issues being pushed for in the JSI particularly in section III of the Informal Consolidated Text which deals with streamlining and speeding up administrative procedures and requirements.

It should however be noted that not all COVID-19 responses were inimical to JSI considerations. A number of countries saw the pandemic as an opportunity for coming up with policies aiming at investment facilitation that are in line with the provisions of the proposed MFIF. Investment promoting agencies reacted rapidly to the pandemic and came up with innovative ways to ensure that businesses are not disrupted. InvestIndia created a comprehensive business immunity platform that informs investors and businesses on CVODI-19 related developments with daily updates and APEXBrazil created a platform for COVID-19 market intelligence that gives updates sector by sector as well as tools and checklists for exporters.[66]

Countries in Africa received assistance from the Partnership for Investment and Growth in Africa project meant to help strengthen their resilience to the pandemic. APIEX an entity that operates under the Ministry of Industry and Commerce in Mozambique received IT support including hardware and connectivity resources so as to help the country strengthen its investment facilitation services.[67] Kenya also received IT equipment to help the government identify and fast track investment projects that are critical for managing COVID-19 such as investments for the production of PPE.[68] These efforts are being done through a One Stop Centre which aims to streamline and simplify investing in Kenya by providing unique access to all relevant bodies involved in the investment process such as Business Registration Services, Revenue Authority and the Department of Immigration.[69] Such measures may have a positive impact on the realisation of the JSI issues.

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[64] Balino S, (2020) 8, Communication from China JOB/GC/123.
[65] UNCTAD Investment Monitor (2020) 5.
[66] UNCTAD 'Countries launch investment policies to counter COVID-19' 3 April 2020 available at https://unctad.org/system/files/official-document/osg2020d1_en.pdf
[67] ICT, 'Contributing to business continuity and national COVID-19 Responses in the African Continent', ICT News 15 June 2020, available at https://www.intracen.org/covid19/story/Contributing-to-business-continuity-and-national-COVID-19-responses-in-the-African-continent/
[68] Ibid.
[69] Ibid.

Strategies for Revamping Investment through Investment Facilitation

Although there are differing views on whether a multilateral framework for investment facilitation with binding obligations would be necessary in facilitating and enhancing FDI flows for development, what is generally agreed is that FDI has the potential of spurring development and yet international investment policies do not sufficiently provide for its facilitation.[70] This situation is made more urgent by the fact that developing countries and LDCs are faced with an annual investment gap of about US dollars 2.5 trillion, towards meeting the Sustainable Development Goals target of 2030[71]. Premised on this, a host of measures have been suggested as part of the best practices in facilitating investment, which would in turn lead to increased FDI that contributes to development. These set of strategies include those earlier suggested by UNCTAD in the "UNCTAD Global Action Menu for Investment Facilitation" and others subsequently suggested as part of the discussions and debates in the context of the WTO JSI on investment facilitation, these are highlighted here below:

There is need to promote accessibility and transparency in investment policies, regulations and procedures relevant to investors. This involves providing clear and up-to-date information on the investment regime; establishing a single window or special enquiry point for all enquiries concerning investment policies and applications to invest; maintaining a mechanism for providing timely and relevant notice of changes in procedures, applicable standards, technical regulations and conformance requirements; as well as making available guidelines and clear definitions of criteria for assessing investment proposals.[72]

Countries should also enhance predictability and consistency in the application of investment policies, which entails consistent application of investment regulations across relevant institutions; avoiding discriminatory use of bureaucratic discretion in the application of laws and regulations on investment; establishing clear criteria and procedures for administrative decisions with respect to investment screening, appraisal and approval mechanisms; and establishing amicable dispute settlement mechanisms, including mediation, to facilitate investment dispute prevention and resolution.[73]

Further, there is need to improve efficiency of investment administrative procedures, which involves: shortening the processing time and, where appropriate, simplify procedures for investment and license applications, investor registration and tax-related procedures; promoting the use of time-bound approval processes or a "no objections within time limits" approach so as to speed up processing times; provide timely and relevant administrative advise while keeping applicants informed about the status of their applications; foster institutional cooperation and coordination, where appropriate, establish an online one-stop approval authority; clarify roles and accountabilities between national and local government or where more than one agency screens or authorizes investment proposals; create "Client Charters" in investment agencies that define services delivery standards and good practices; keep costs for the investment approval to the minimum; facilitate, within the framework of relevant legislation, entry and sojourn of investment project personnel; simplify the process for connecting to essential public services infrastructure; conduct periodic reviews of investment procedures, so as to ensure that they are simple, transparent and low-cost; and establish mechanisms within which to

[70] Global Action Menu for Investment Facilitation https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf

[71] Ibid

[72] Ibid

[73] Ibid

expand good administrative practices applied or piloted in special economic zones, to the wider economy.[74]

Another recommended measure is to build constructive stakeholder relationships in investment policy practice, which entails: maintaining mechanisms for regular consultation and effective dialogue with investment stakeholders to identify and address issues encountered by investors and affected communities; establishing a mechanism to provide interested parties with a right of comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation; and promoting improved standards of corporate governance and responsible business conduct.

Other possible measures may include : i) designating a lead agency, focal point or investment facilitator with a mandate to *inter alia:* address suggestions or complaints by investors and their home states; track and take timely action to prevent, manage and resolve disputes; provide information on relevant legislative and regulatory issues; promote greater awareness and transparency of investment legislation and procedures; and inform relevant government institutions about recurrent problems faced by investors which may require changes in investment legislation or procedures. Ii) establishing monitoring and review mechanisms for investment facilitation, which would entail: adopting diagnostic tools and indicators on the efficiency of administrative procedures to identify priority areas for investment facilitation measures; and benchmarking performance of institutions involved in facilitating investment or in providing administrative services. And, iii) establishing international cooperation on investment facilitation, which would entail regular consultations between authorities, or partnerships to: monitor implementation of specific facilitation measures; address specific concerns; design, implement and monitor progress on investment facilitation work plans; collaborate on anti-corruption in the investment process; and arrange for regulatory and institutional exchanges of expertise.

For developing countries and especially LDCs, there is need to support thier investment efforts through technical assistance which involves: bolstering transparency, effective and efficient administrative processes for business and investors; increasing capacity in Investment Promotion Agencies and relevant authorities on business and investor facilitation services; maintaining mechanisms for consultations and dialogue with investment stakeholders; and enhancing the role of policy advocacy within IPAs or investment authorities.[75]

Developing countries and LDCs should also be supported to enhance investment policy and proactive investment attraction through: Building expertise in IPAs for investment project proposal development and appraisal; build expertise for promotion of sustainable development focused investment such as green investments and social impact investments; build capacity for provision of post-investment or aftercare services, including for the expansion of existing operations; and strengthen capacities to optimise positive impacts of investment.[76]

Importantly, there is need to enhance investment facilitation through all available means, including international cooperation arrangements such as FTAs or IIAs which should provide for *inter alia:* high standards of corporate governance and responsible business conduct by outward investors; and establish regular consultations between relevant authorities, or formal collaboration between outward investment agencies and IPAs for promotion and facilitation of investment projects.[77]

[74] Ibid
[75] Ibid
[76] Ibid
[77] Ibid

All in all, the foregoing measures as originally suggested by UNCTAD provide a basis for fundamental "Best Practices" towards investment facilitation. These can be adopted unliterary, regionally or even at a bilateral level for instance between developing countries and developed countries, wherein the later could also assist in supporting the technical assistance and capacity building needs of the former.

Conclusion

The WTO Investment Facilitation JSI brings to the fore an important issue, which without doubt has potential to enhance development through better facilitation of FDI. However, with regard to investment, there are varied arguments, some of which insist that the issues under deliberation in the JSI fall squally within a country's mandate to manage and promote investments. It is never the less noteworthy that FDI has potential to contribute to development, and that investment facilitation is among the avenues to harness such potential.

In light of the COVID 19 pandemic, the proposed MFIF need not be the only vehicle through which investment facilitation is promoted. Countries can already adopt the discussed best practices, so as to attract and facilitate investment, not only towards efforts to achieve the SDG target of 2030, but also to address the immediate slump in investment resulting from the pandemic.

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37-39, Rue de Vermont, 1202 Geneva, Switzerland
geneva@cuts.org ● www.cuts-geneva.org
Ph: +41 (0) 22 734 60 80 | Fax:+41 (0) 22 734 39 14 | Skype: cuts.grc

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