



Implications of Investment and Services Facilitation

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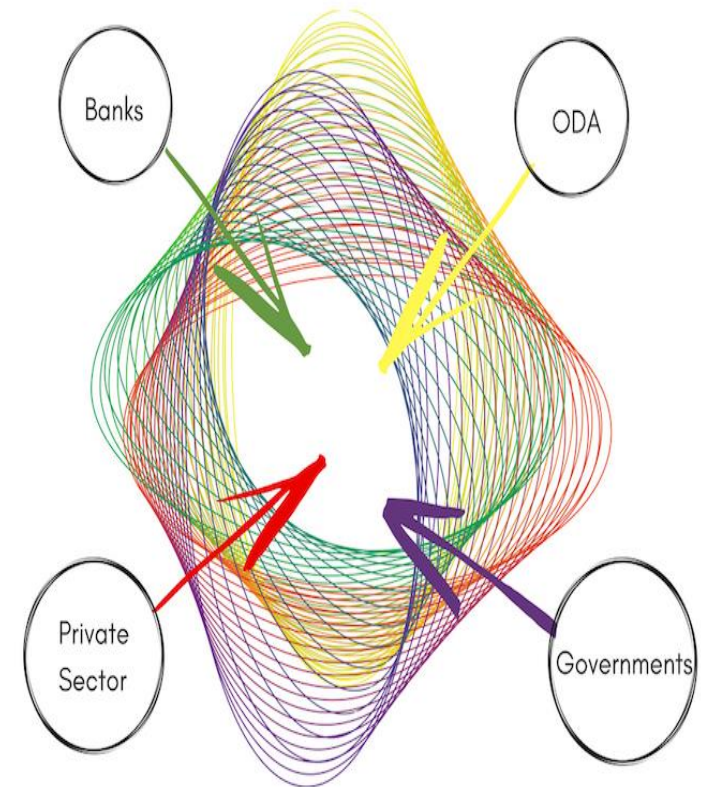
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Investment: Policy concerns

- Investments in a country  Growth and Development
- Attracting and retaining investments: Crucial for achieving **Sustainable Development Goals (SDGs)**
- UNCTAD estimates that developing countries face an annual SDG-investment gap of \$2.5 trillion
- How to address this in a sustainable manner 
 - Do Rules of Trade under the WTO have a role to play in addressing the SDG-Inv-Gap?
 - What could be the role, if any, of “Investment Facilitation” at the WTO?

Investment for SDG

- UNCTAD says achieving the SDGs will take between US\$5 to \$7 trillion,
- Investment gap in developing countries of about \$2.5 trillion.
- Who will fund:
 - Government sources: 50-80% has to come from Governments
 - Private funding & Private capital: Achieving the SDGs could open up \$12 trillion of market opportunities in food and agriculture, cities, energy and materials, health & well-being; Create 380 million new jobs by 2030.
 - Official Dev. Assistance (ODA) can put in seed money to de-risk Investments in developing country economies.



Source: UNDP: <http://www.undp.org/content/undp/en/home/blog/2017/7/13/What-kind-of-blender-do-we-need-to-finance-the-SDGs-.html>

Facilitating and retaining Investments is in the best interest of each country;

Do Trade Agreements, or
Investment Facilitation agreements have a role?



“Facilitation”: What does it Mean?

- Oxford Dictionary: The act of “Facilitating” something
- Cambridge Dictionary: The act of helping other people to deal with a process or reach an agreement or solution without getting directly involved in the process:
 - *Example: Instructors should have appropriate facilitation skills and be able to develop learner autonomy.*
- Facilitation in the Context of Trade Agreement:
 - Fairly new concept; there is no stand-alone or independent agreement or chapter on “Facilitation” at the WTO or any FTA.
 - In essence: trade policy reform within a country to allow for simplified and harmonized norms that can enable greater flow of trade & investment.

WTO's Trade Facilitation Agreement (TFA)

- WTO's Agreement on Trade Facilitation- in effect since 2017:
 - Not a 'stand-alone' agreement
 - TFA purpose is to "clarify and modernise" 3 specific provisions of the GATT 1994:
 - Art. V- Freedom of Transit
 - Art. VIII- Fees & Formalities
 - Art. X: Publication & Administration of Trade Regulations
- **Facilitation** of internal domestic regulatory measures pertaining to certain core obligations under GATT.
 - **Emergence of TFA: 23 years after GATT 1994**
- There is no 'Facilitation' Agreement for Services under GATS
 - **Proposal for Trade Facilitation in Services in 2017- did not progress**

Coverage of “Investment” under the WTO

- **Agreement on Trade-Related Investment Measures (TRIMs Agreement):**
 - Applicable to trade in Goods
 - Prohibits measures inconsistent with GATT obligations on National Treatment and Quantitative Restrictions. Example: local content requirements which compels an enterprise to procure only locally manufactured material, to the exclusion of exports.
- **General Agreement on Trade in Services (GATS):**
 - Foreign investment in services through commercial presence- Mode 3 out of four modes of services supply
 - Mode 3 obligations apply only if a sector is committed on a sector.
 - Even for committed sectors, carve-outs for National Treatment and Market Access can be specified for specific Modes in Member schedules :
 - E.g.: Domestic banks can be given more favourable treatment than foreign banks.
 - If sector is not committed, only obligation applicable is MFN and Transparency

Investment under the WTO

WTO Singapore Ministerial Decision (1996) established the Working Group on the Relationship between Trade and Investment (WGTI). Deliberations till 2004:

- WGTI submitted 7 reports to the General Council- Diverse views & concerns
- How should host countries minimize possible negative effects and maximize positive effects of FDI through appropriate policies?
- Link implementation of investment related obligations with the need for technical assistance: Any multilateral framework should include clear and detailed provisions for *“linking the implementation of transparency obligations and procedural reform to technical assistance and capacity building.”*
- WTO discussions should draw upon and be without prejudice to work at UNCTAD
- Aug. 1, 2004: “July Package”- Decision to drop the subject of Trade and Investment from the Doha round of negotiations.

What has UNCTAD done so far on Investment Facilitation?

UNCTAD's Work

Basic Premise for UNCTAD's work on Investment & Investment Facilitation:

“Facilitating investment is crucial for sustainable development and inclusive growth.”

“Any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda.”

UNCTAD's Work

- UNCTAD'S Global Action Menu for Investment Facilitation (“UNCTAD Menu”):

a “menu” of options for national and international policy needs.

- Global Action Menu endorsed by countries with the following approach:

- “High quality reference document” for investment facilitation policies.
- User-friendly Menu
- Flexibility to policymakers to choose and adapt facilitation measures best suited for their countries' development needs
- Building capacity for implementation of the Menu is critical.

UNCTAD's Global Action Menu

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

Investment Facilitation elements in IIAs

- In the overwhelming majority of the existing 3,300-plus international investment agreements (IIAs), concrete facilitation actions are either absent or weak’;
- But UNCTAD too has not envisaged “Investment Facilitation” as a stand-alone agreement.

State of Play at the WTO

Investment Facilitation

- “Investment” as a subject- Not part of WTO.
- Fundamentally, any international agreement on ***Investment Facilitation*** would mean harmonized approaches to regulatory mechanisms for entry and establishment of investments.
 - Like TFA, there is a cost attached for implementation.
 - *Is a binding WTO regulatory framework the best way to address this?*
 - *Is it realistic to assume that Investment Facilitation at the WTO will in fact lead to achieving SDGs?*

WTO JI on Investment Facilitation

- Joint Ministerial Statement on Investment Facilitation for Development at MC11 (December 2017) issued by 70 WTO members, including 28 members of the EU.
- This group currently includes 9 members of the Commonwealth- Australia, Canada, Cyprus, Malaysia, Malta, New Zealand, Pakistan, Singapore and United Kingdom.
- WTO estimates that the proponents account for around 73 per cent of trade and 66 per cent of inward **FDI**.
- Thrust of JMS is on:
 - “...the need for closer international cooperation at the global level to create a more transparent, efficient, and predictable environment for facilitating cross-border investment.”
 - “beginning structured discussions with the aim of developing a multilateral framework on investment facilitation,”

JMS- IF Elements

The Joint Ministerial Statement on IF Sets out the elements of a framework for facilitating FDI, which it states would:

- Improve the **transparency** and **predictability** of investment measures;
- **Streamline** and **speed up** administrative procedures and requirements; and
- Enhance **international cooperation**, **information sharing**, the **exchange of best practices**, and **relations with relevant stakeholders**, including **dispute prevention**.

JMS emphasizes that the discussions **shall not address:**

- Market access,
- Investment protection, and
- Investor-State Dispute Settlement.

JMS- IF: Key Concerns

Member reservations:

- Investment Facilitation is not part of the current negotiating mandate.
- A binding legal framework under the WTO could hinder the ability of members to regulate investment coming into their home markets.

JMS- IF: Proposals

Pre- MC 11, Proposals from:

- Brazil,
- Russia
- China
- Friends of Investment Facilitation for Development (FIFD)- 11 Members which includes Brazil, China, Argentina, Chile, Colombia, Hong Kong, China, Kazakhstan, Korea, Mexico, Nigeria and Pakistan. (5 subsequent FIFD members: Gambia, Guatemala, Liberia, Mauritania, Qatar, Uruguay)

Post MC 11:

- Brazil proposal with elements for a WTO multilateral framework agreement (JOB/GC/169, 1 February 2018)
- Kazakhstan & FIFD organized Astana high-level forum on Sept. 28, 2018

Brazil's Elements Paper

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 Article 10 on Processing of Applications
Action Line 2: Avoid discriminatory use of bureaucratic discretion; Clear criteria and procedures for administrative decisions	
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 a 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

Difference between UNCTAD & WTO approaches

- Legal approach and outcome.
 - UNCTAD Menu: series of **options** of measures to achieve each action line that policymakers and government agencies can choose from. Overall UNCTAD approach appears to be ‘soft law’.
 - WTO’s approach: Binding covered agreements, enforceable through dispute resolution
- Technical Assistance; Capacity Building:
 - UNCTAD Menu predicated on technical assistance, capacity building, cooperation.
 - WTO Agreements do have provisions on TA and CB; but no direct linkage with compliance obligations.
 - WGTI- 1996-2004: Any multilateral framework should include clear and detailed provisions for *“linking the implementation of transparency obligations and procedural reform to technical assistance and capacity building.”*

Services Facilitation?

TFS and DR Discussions at the WTO

- **Trade Facilitation in Services:** Brief discussions at WTO in 2017. No progress.
- **Domestic Regulations:** Mandate under GATS Article VI:4 for Disciplines on Qualification and Licensing Requirements & Procedures, Technical Standards
“Such disciplines shall aim to ensure that such requirements are, inter alia:
 - *based on objective and transparent criteria, such as the competence and the ability to supply the service;*
 - *not more burdensome than necessary to ensure the quality of the service;*
 - *in the case of licensing procedures not in themselves a restriction on the supply of the service”.*
- **DR Discussions in 2 parallel forums:**
 - Working Party for Domestic Regulations (WPDR)
 - Joint Ministerial Statement leading to Informal Discussions on DR also.
- **Thrust of DR Discussions (so far):** Disciplines for sectors where “commitments” are taken.

Synergies between IF, TFS and DR Elements

Common issues addressed under IF, TFS and DR include the following:

- Single window for making applications and follow-up;
- Option of making electronic applications, where feasible;
- Prompt publication of laws and regulations to enhance transparency;
- Opportunity of prior comment before laws are formulated; and
- Timelines and feedback on processing of applications.

Each of the above entails:

- Internal Regulatory reform;
- Harmonization of approaches to achieve coherence ➡ Significant impact on reducing costs for Investors and Traders
- But also entails, costs for putting in place streamlined regulatory and institutional mechanisms

Differences between TFA, TFS/DR, IF

Trade in Goods	Trade in Services	Investment Facilitation
<ul style="list-style-type: none"> - Substantive Disciplines on Trade - Trade Facilitation Agreement 	<ul style="list-style-type: none"> - Substantive disciplines on Trade - No Disciplines on Trade Facilitation - <u>Domestic Regulation</u>: Limited impact for Modes 3 and 4 only; and for 'committed sectors'. 	<ul style="list-style-type: none"> - <u>No substantive disciplines on Investment</u> - Proposals for Investment Facilitation addresses Goods and Services components - <u>Impact</u>: Cost for internal regulatory measures - <u>Impact on Services</u>: <ul style="list-style-type: none"> - Only Mode 3 will get addressed; not other Modes - All sectors- whether committed or not

Key Issues to Ponder



Soft OR Hard Law?

- UNCTAD does not envisage Investment Facilitation as ‘stand alone’ and legally binding provisions.
- UNCTAD notes that: Number of elements of UNCTAD’s Global Action Menu for Investment Facilitation can be incorporated in Investment Agreements without establishing legally binding, enforceable obligations.

MAIN FOCUS OF UNCTAD’S GLOBAL ACTION MENU:

- Cooperation: Collaboration on anti-corruption; Regulatory & institutional exchange of expertise; Home country Guarantees.
- Capacity building: UNCTAD’s e-regulations, Business Facilitation services; Administrative & compliance Procedures,
- Technical assistance: Building institutional capacities



Larger overarching issues

- Does WTO have a mandate for Investment Facilitation?
- What are the Implications of Joint Ministerial Informal Groups for decision making at the WTO?

Current State of Play:

- Buenos Aires MC 11: Joint Ministerial Statement on Investment Facilitation for Development
- Brazil's Proposal: Illustrative elements of an Agreement.
- Astana High Level Forum: Calling for deeper discussions
- Momentum towards MC 12 (June 2020), likely to continue building up

Recent developments:

- Discussion on WTO Reform: Including that 'Consensus' decision making is slowing the process; hence new approaches are being debated.
- Can countries remain complacent that only consensus decision making will continue for all time?

How should countries respond?

- Remain out and peep in through the window?
- Or step in to engage?

Inform/enrich the discussions,
Gain better understanding,
Strive for innovative outcomes?



Key Issues

- Investment Facilitation: Good basic common sense to attract and retain investments.

- *But do we need a “Multilateral Trade Agreement” for this?*
 - Trade Agreement means Enforcement through Dispute mechanism and Trade remedies
 - Are developing countries, especially, ready for binding legal obligations?

- UNDP/UNCTAD: Focus on SDG Investment Gaps
 - *Is WTO equipped to address issues relating to Financing*: Govt., ODI, Private sector?

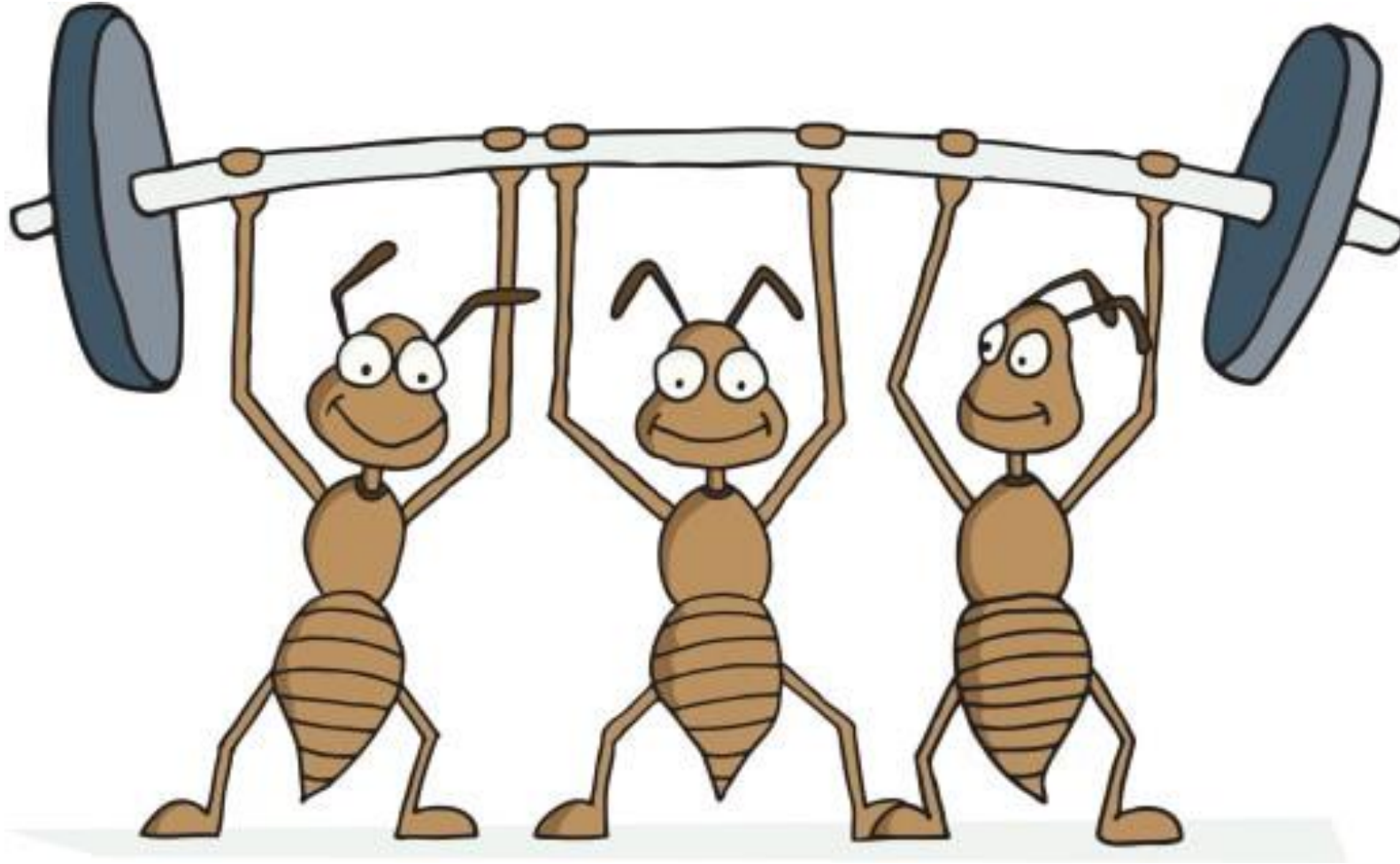
Key Issues

- *Can there be an innovative WTO-UNCTAD joint mechanism that is premised on an outcome-based approach of technical assistance and capacity building initiatives for achieving investment facilitation?*
 - Not a binding covered agreement subject to DSU?
- *How can investment facilitation disciplines address the SDG-investment gap for developing countries, which the UNCTAD estimates to be \$2.5 trillion?*

Key Issues

- *Mere token referencing of SDGs will not achieve the objective.*
- *Can concrete steps be taken?*
 - For e.g.: TRIPS Agreement under Article 66.2 mandates developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to LDC Members in order to enable them to create a sound and viable technological base.
 - Can this be implemented in a meaningful manner to achieve the goal of investment facilitation that can fulfil SDGs?

“Facilitation” ➡ Cooperation



“Facilitation”: Not suitable for adversarial dispute resolution



Thank you!

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