RESEARCH STUDY

Trade and Investment in the Multilateral Trading System: How has it Evolved?

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Abbreviations

ACIA	ASEAN Comprehensive Investment Agreement
AIA	ASEAN Investment Area
ASEAN	Association of Southeast Asian Nations
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
DSU	Dispute Settlement Understanding
EAC	East African Community
EC	European Community
ECCAS	Economic Community of Central African States
EU	European Union
FDI	Foreign Direct Investment
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICS	Investment Court System
IIAs	International Investment Agreements
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
MAI	Multilateral Agreement on Investment
MFI	Multilateral Framework on Investment
MFN	Most Favoured Nation

MNEs	Multinational Enterprises
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organization for Economic Co-operation and Development
RCEP	Regional Comprehensive Economic Partnership
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
TNCs	Transnational Corporations
TPP	Transpacific Partnership
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission of International Trade Laws
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
WGTI	Working group on Trade and Investment
WTO	World Trade Organization

Abstract

This paper aims at building awareness and understanding on possible approaches to trade and investment in the multilateral trading system. This is in consideration of the Nairobi World Trade Organization (WTO) Ministerial Conference Declaration, which *inter alia* provided that despite strong commitment of all WTO Members to advance negotiations on pending Doha issues … some wish to identify and discuss other issues of negotiation, while others do not.[1] Subsequent to the Declaration, trade and investment has been floated amongst such issues for consideration.

Moreover, Regional Trade Agreements (RTAs) and the so called Mega Regionals such as the Trans Pacific Partnership (TPP) Agreement and Transatlantic Trade and Investment Partnership (TTIP) negotiations include substantive trade and investment elements.

Against this backdrop, this paper provides a historical recollection of trade and investment in the multilateral trading system; it also highlights approaches taken under regional trade arrangements so as to reflect on recent trends on the issue. The paper includes contemporary views with regard to investment facilitation, which highlights WTO Members' proposals and differing views in this regard.

[1] WT/MIN (15)/DEC Nairobi Ministerial Declaration 21/12/2015 (paragraph 31 and 34)

Executive Summary

Trade and Investment in the multilateral trading system was first considered in the Havana Charter of 1948 that proposed establishment of an International Trade Organization (ITO) to regulate trade relations amongst Members; however it was adopted, it did not come into force. Subsequently the General Agreement on Trade and Tariffs (GATT) was maintained to regulate trade relations and as a forum for trade negotiations amongst members, its mandate did not extend to trade and investment. As a result, Bilateral Investment Treaties (BITs) were resorted to by most countries, as the means of regulating and protecting foreign investments.

In the multilateral trading system, soon after the establishment of the World Trade Organization (WTO), at the first Ministerial Conference of 1996, Trade and Investment was amongst the issues proposed for the next negotiation round. Although it was not adopted, Members decided to establish a working group on trade and investment (WGTI) whose mandate was to examine the relationship between trade and investment issues, as well as carry out exploratory work in that regard. In its deliberations, the WGTI considered a number of issues such as: Technology transfer; Transparency; Non-Discrimination; and Dispute Settlement among others. A possible multilateral framework on investment was also deliberated upon. Ultimately, in 2004 WTO Members decided that trade and investment issues would not be considered before the conclusion of the Doha Development Agenda (DDA) negotiations, and the WGTI went into limbo.

In the meantime, given the continued impasse in the DDA negotiations, Trade and Investment is increasingly being covered within Regional Trade Agreements (RTAs) and in the so-called mega regionals such as the recently concluded Trans-Pacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership negotiations between the United States and the European Union. The common emphasis in these arrangements is the provision for transparency and non-discrimination with regard to investment. In the TTIP and TPP, investment is broadly defined. The latter agreement also takes consideration of developing country members' concerns, making provision for their situation with regard to investment regulatory obligations.

The 10th Ministerial Conference Declaration at the WTO noted that although strong commitment remains to advance negotiations on the remaining Doha issues, some Members wish to identify and discuss other issues for negotiations, while others do not. Amongst the issues that have been proposed in this context is investment facilitation.

The proposed Investment Facilitation takes a different approach to trade and investment, from what was deliberated under the WGTI and earlier similar initiatives to multilateralism of trade and investment. Proponents of investment facilitation argue that the overarching objective is to facilitate investment as means of enhancing trade, investment and development through the WTO, which would ultimately be leveraged towards achievement of the United Nations Sustainable Development Goals (SDGs). This approach specifically proposes avoidance of known sensitivities such as investment protection, and investment dispute settlement arrangements. The rationale is to enhance transparency on investment policies and regulatory systems so as to ensure predictability as well as promoting efficiency by streamlining administrative procedures amongst the WTO membership. Such a move, it is argued, would minimise investment barriers, while promoting international cooperation, capacity building and technical assistance to the Membership, thereby contributing to their development efforts.

There are however members with differing views on the above approach. They argue that most countries are cognisant of the role of investment and its potential towards development efforts, and have already adopted policies, legislation and institutions towards attracting and promoting investment, including providing an enabling environment for its enhancement. They are therefore of the view that there is no need for multilateral obligations to undertake what is already being done, moreover such a move would unnecessarily impact on their policy space.

Clearly, a lot more deliberations and considerations will have to be undertaken before reaching a common position on the appropriate approach to trade and investment in the multilateral trading system. Such deliberations should also be inspired by the work of other organisations so as to harness investment for sustainable development, notably UNCTAD, which is the United Nations' focal point for all issues related to investment and development.

Introduction

Attempts to address trade and investment in the multilateral trading system date back to the 1948 draft Havana Charter to establish the International Trade Organization, which was meant to be the third of the so called Bretton Woods Institutions i.e. the World Bank and International Monetary Fund created to address post World War II economic cooperation. The Charter provided for foreign direct investment issues.

Proposals in the Charter spelt out extensive rights for investors such as obligations of host countries to extend national treatment (NT) and most-favoured-nation treatment (MFN). The Charter never the less provided for circumstances through which Members (host countries) could, without prejudice to international agreements to which they were members, have the right to:[2]

- Take any appropriate safeguards necessary to ensure that foreign investment is not used as a means for interference in its internal affairs or national policies;
- To determine whether and, to what extent as well as terms it would allow future foreign investment;
- To prescribe and give effect to other reasonable requirements with respect to existing and future investments.[3]

However, some countries were opposed to such measures since they did not wish to extend neither NT nor MFN to certain countries. Another contentious issue was the opposition by US corporations to provisions under the Charter that provided for regulating anti-competitive policies of private business. Charter provisions did not extend to issues such as dispute settlement or performance requirements. Despite the United States having been the main demander of the Charter, their Congress refused to ratify it and the ITO was replaced by the General Agreement on Tariffs and Trade (GATT). The GATT did not take on investment issues in all the negotiation rounds during its existence. It was only at its last round of negotiations (the Uruguay Round) that Trade Related Investment Measures (TRIMs) agreement was introduced within the multilateral trading system.

It is argued that failure to establish the International Trade Organization resulted in proliferation of bilateral investment agreements (BITS) as a means of regulating and protecting foreign investments. This was especially in an era when many developing countries, upon obtaining independence from colonial rule, put in place nationalisation measures. The World Bank also set up the International Centre for Settlement of Investment Disputes (ICSID) in a move to facilitate settlement of disputes between governments or between investors and governments.

In a bid to further investment and related issues, the large foreign investment exporting countries initiated dialogue at the Organization of Economic Cooperation and Development (OECD) whose membership during the 1960-70's was constituted by developed countries. This dialogue never the less, did not extend to rights and obligations of foreign investors. Later attempts to establish investor protection and related issues within the OECD framework were also unsuccessful.

In the 1970's there was an important development related to the role of foreign investment, which was raised by developing countries in the United Nations. This was with regard to meddling of foreign investors in the domestic political affairs of their host countries, which resulted in establishment of the United Nations Commission on Transnational Corporations and the Centre on Transnational Corporations (UNCTC) with the mandate to conduct research on investment issues

[2] United Nations Conference on Trade and Employment – Held at Havana, Cuba – Final Act and Related documents

[3] Ibid

towards a UN Code of Conduct on Transnational Corporations. The aim was to limit corporate power through provision of guidelines controlling their activities in host countries. The eventual 1986 draft of the UN Code provided for extensive regulation of the entry and operations of transnational corporations in the host country, which did not go well with some UN member countries and was not approved, subsequently the UNCTC was dissolved. The United Nations Conference on Trade and Development (UNCTAD) has since taken on work related to Transnational Corporations.

The GATT; TRIMs and General Agreement on Trade in Services (GATS), which are part of the Uruguay Round of negotiations outcome, marked the inclusion of investment related issues in the multilateral trading system. These were proposed by developed countries at a time developing countries were also liberalising investment rules following IMF imposed initiatives in the form of Structural Adjustment Programmes (SAPs).

At the multilateral level, in the 1990's developed countries re-initiated investment negotiations under the OECD, since most developing countries were not supportive of such an agreement (although some were invited as observers in the process). The US led the process for negotiating a Multilateral Agreement on Investment (MAI) that called for investment liberalisation, protection of investors and a dispute resolution mechanism. However, negotiations later broke down despite the general consensus of such an agreement amongst the OECD members. Later developments such as the US Helms-Burton Act that empowered US citizens and Corporations whose property was expropriated by Cuba to claim damages against anybody transacting in their former property; as well as the demand for exemption from national treatment for culture raised by France, led to the collapse of the negotiations.

Efforts to establish a multilateral agreement on investment reverted to the WTO, which had been established following the Uruguay round, to replace the GATT. At the 1996 WTO Ministerial Conference held in Singapore, developing countries resisted introduction of investment as a negotiation issue. The compromise was to set up a Working Group on Trade and Investment (WGTI) with the mandate to examine the relationship between trade and investment issues, as well as carry out exploratory work in that regard. The WGTI studied and discussed issues of trade and investment from 1996 to 2004.

This study analyses the trade and investment work undertaken in the WGTI. The study also evaluates the approach taken by select regional trade agreements (RTAs) and regional economic cooperation arrangements with regard to trade and investment. The overarching objective is to raise awareness among WTO delegates – particularly from developing countries – about relevant aspects of past WTO work and alternative approaches in this regard, which could help them better prepare for possible upcoming debates around new issues at the WTO. The study also captures contemporary views on trade and investment in the WTO as reflected by select developed, developing and least developed country members of the WTO.

SECTION 1

Trade and Investment at the WTO: What Has Been Done?

The WGTI's first annual report in 1997 spelt out the issues on which the group would undertake its work. First, the WGTI hoped to explore the links between trade and investment with relation to development and economic growth. Instead of an one-dimensional view of investment and trade, the WGTI planned to examine if certain policies that contributed to the rise of trade and investment also contributed to overall economic growth. Another investment issue enumerated in this first annual report was the economic relationship between trade and investment. This portion of future analysis would mostly look at the data behind flows of Foreign Direct Investment (FDI) and the ensuing change in trade. Finally, the WGTI would look at international regulatory instruments and determine their net effect on trade. These main ideas would vary during the years of operation of the WGTI, but the areas highlighted in 1997 shaped the work of the WGTI for the next seven years.[4] Deliberations of the WGTI also benefited from the substantive backstopping by UNCTAD division on Investment and Enterprises.

1.1 Definition of Investment

The definition of investment has been a major debate within the WTO and specifically within the WGTI. While this will become more evident later in the study, for now it is important to note that developed countries favour a broad definition of FDI while developing countries prefer a narrower definition. The WGTI did not define investment, but it acknowledged the controversy and multiple sides of the issue. One school of thought looks at the IMF definition that considers FDI when a resident entity in one economy obtains a long-term interest in another country's enterprise. This is a broader definition that has been used in some WGTI documents in reference to overseas investment. Another view is that the constantly evolving nature of international economic relations has created several means of investing in foreign-owned assets such that the concept of what constitutes foreign investment is in itself an evolving term that has over the recent past manifested in diverse economic activities beyond the traditional investment in manufacturing and natural resources.[5] New forms of investment in technology-related areas such as intellectual properties (patents, copyrights, trademarks) as well as investment in services and contractual rights are taking hold.[6]

1.2 Economic Relationship between Trade and Investment

The WGTI identified two main types of FDI: horizontal FDI and vertical FDI. Horizontal FDI is the duplication of production units overseas that are identical to the domestic production units. For example, the building

[4] WT/WGTI/W1

[5] CUTS Centre for International Trade, Economics & Environment: Putting Our Fears On the Table: Scope and Definition of Investment, John Gara

[6] Ibid

of a Ford Motor Company factory in Mexico would be considered horizontal FDI because the factory is running the exact same operations as a domestic factory in the United States. The other type of FDI is vertical FDI. Vertical FDI is when a specific part of the production process of a good is moved to another country to lower costs or improve the process. Going back to the same example, vertical FDI would involve Ford Motor Company moving its metalworking operations to Mexico to save money. The WGTI examined both forms of investment and determined which situations call for which type of investment. However, deliberations were concentrated on horizontal FDI, which constitutes the bulk of FDI.

Horizontal FDI is used most often when trade barriers are high and exporting goods overseas is not cost effective. High shipping costs can also cause countries to look towards horizontal FDI. The WGTI found that companies favour countries with large markets that would be accessible so that Multinational Enterprises (MNEs) can produce their goods in the same location they sell them without paying the high shipping costs. The chance of opening a new, large market can be enough of an incentive for a MNE to engage in horizontal FDI. The WGTI explains that horizontal FDI pays off when sales from foreign affiliates are higher than transport costs between the host country and the country where the investment originates. In addition, if a MNE thinks it can open a market, it will sometimes be willing to use horizontal FDI with the prediction that their overseas production units will become more profitable in the future.

The main question regarding the efficacy of horizontal FDI comes from the distribution of intermediate goods and final goods. As foreign affiliates move overseas, exports from the investing country to the rest of the world will decrease. For instance, the United States will export less Ford Explorers to Mexico if a new Ford factory is built in Mexico to supply the local market. This will mostly involve final goods and not intermediate goods. For the purposes of production, the investing MNE will send more intermediate goods to its foreign affiliates to maintain high levels of production. The decrease in exports of final goods by the investing MNE will be offset by increase in exports of intermediate goods.

The WGTI found that horizontal FDI has an unclear effect on total trade, but in general is an excellent way to involve other countries in world trade and open new markets. Profits of MNEs can increase as new markets are opened even if the total effect of trade is unclear. These findings bode well for the opening of markets in developing countries as developed countries will continue to seek out new production centres. However, one drawback to horizontal FDI is the long-term possibility that foreign affiliates could seek out new partners for intermediate goods which would hurt the home country. Furthermore, host countries sometimes pass legislation that is not favourable to FDI. In this case, the entire trading partnership could face a downward spiral and hurt both the home and the host country. In general, though, the WGTI found that horizontal FDI remains a fixture in the world trade system because of its effectiveness in opening markets and increasing profits for MNEs when trade barriers are high.

By acknowledging the two types of FDI, the WGTI successfully identified the economic effects of the relationship between trade and investment. A study by Gary Clyde Hufbauer in 1994 examined total trade and FDI stocks in multiple countries and found that almost everywhere FDI stocks were positively correlated with exports. While Hufbauer mostly looked at developed countries and every country did not have a statistically significant correlation, the WGTI believed his methodology was sound enough to directly link investment and trade. The WGTI used this evidence to set up the goal to raise FDI with the knowledge that this would also cause trade to rise. The WGTI then focused on the nuances of trade with the purpose of providing enough information to WTO members to create economic policies that favour trade.

In relation to both types of FDI, the WGTI explained that sometimes creating local affiliates in host countries can replace exports of final goods, but create exports of intermediate goods. This occurs when a new production centre in a host country needs parts to continue their production. This causes the host country to turn abroad and seek profitable ways to import the parts they need. It is important to note that not all studies reach these conclusions, however the WGTI uses a general consensus to make recommendations.

Another aspect of the relationship between trade and investment is the spill-over effect. The spill-over effect in international trade is when technology and other resources spill over from foreign MNEs to domestic entrepreneurs. For instance, when a British clothing company builds a factory in Myanmar, local Burmese entrepreneurs learn the cost reducing techniques of the British company out of necessity to either compete or supply the MNE with intermediate goods. Investment in host countries forces local firms to rise to the level of the MNE to stay in business. Although, one of the arguments is that on the contrary, when FDI goes from a developed country to a developing country there is not enough technology in place for firms of the host country to compete with the MNE or leverage its presence through say supply on intermediate goods. This can cause local businesses to go out of business. Later in the work of the WGTI, technology transfer is addressed to mitigate these concerns.[7]

FDI stock and trade are positively correlated in general, but certain strategies can apply to certain situations. For instance, export-oriented strategies by countries are more conducive to FDI, however high and low trade barriers attract different types of FDI. Horizontal FDI is more used with high trade barriers because MNEs are trying to bypass export fees by simply creating a new, foreign base of operations. It goes around the resistance of a host country to take in foreign goods through trade because instead the MNE looks at the local market. Lower trade barriers on intermediate goods can also induce horizontal FDI as the host country is more inclined to import these lower cost goods to run production operations. However, lower trade barriers in general can lead to vertical FDI especially in countries with low labour costs and an abundance of natural resources.

The WGTI also found that local capital in the country that hosts FDI can be crowded out by foreign investment, but with proper technology and skills training, the crowding out effect can be negated. Instead, spill-over effects for local firms increase a country's GDP. Finally, FDI can diversify markets for a country's exports and make the economic climate more stable.[8] By opening a new market, a country may become less dependent on specific natural resources and specialised industries. Diversity of markets creates a stable economic climate because investors will not immediately pull investment in the event of a brief economic downturn within one industrial sector. Consistent FDI flows and diversity of markets is therefore important for development in any economy.[9]

1.3 Trade and Investment in WTO Agreements

During the Uruguay Round of trade negotiations in the late 1980s-Early 1990s, it became clear that an agreement on trade-related investment measures was necessary to liberalise trade without distorting investment flows. After years of deliberation, the Agreement on Trade-Related Investment Measures (TRIMs) was signed and came into effect with the WTO. The TRIMs agreement was used by the WGTI as a framework for the protocol surrounding all types of foreign investment. It was one of the first agreements to acknowledge the challenges surrounding investment for countries at varying economic levels. It explained that developing countries and least developed countries may have different needs than the developed world. TRIMs provided developing countries and least developed countries transitional periods to implement its obligations.[10]

TRIMs mostly looked at investment and goods and did not include stipulations relating to the services sector. The services sector had blossomed since the inception of GATT into almost a quarter of world trade with some countries trading services more than material goods. During the Uruguay Round, the questions surrounding the future of the services sector evolved into the GATS which went into effect simultaneously with TRIMs.

Article IV of GATS is focused entirely on increasing the participation of developing countries in the services sector. The agreement is designed to regulate

[7] WT/WGTI/W7

[8] CUTS Services Trade and Investment Liberalisation, and Domestic Regulation: A Summary of Six Country Studies, Jaipur

[9] WT/WGTI/W8

[10] Agreement on Trade Related Investment Measures, 1868 U.N.T.S. 186

investment in the services sector and provides *inter alia* for the treatment of MNEs in host countries. The GATS looks at strengthening efficiency and competitiveness of the services sector in developing countries through the distribution of technology, information networks, and the liberalisation of market access sectors. Furthermore, the agreement is flexible regarding compliance by the least developed countries so as to allow for each country's economic situation to be taken into account before any sweeping agreement is applied. The use of flexible language within the document sets the tone for future exceptions granted to the developing and least developed countries. Both GATS and TRIMs were two trade and investment related agreements that acknowledged the differences in economic compliance capacities between developed and developing countries.[11]

The other WTO instrument relating to investment is The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The purpose of TRIPS was to regulate the protection of intellectual property through the WTO. In general, TRIPS establishes a mechanism to protect against infringement of intellectual property. Exceptions are enumerated within the document for geographical reasons, creative licensing, and other basic fair use.[12] While heavily favoured by developed countries worried about technology being stolen and repurposed, there are concerns that it could limit FDI technology transfers.

1.4 Main Issues discussed by the WGTI

The mandate of the WGTI was to conduct analytical work on the relationship between trade and investment and collaborate with both the working group on competition and the UNCTAD. This analytical work led to the discussion of the issues of technological development, transparency, non-discrimination, and dispute settlement. While other issues were discussed within the working group, these sets of issues were the most discussed in WGTI documents. Developed and developing countries alike perceived the efficient distribution of technology as crucial to grow investment and world trade. During the time of the WGTI, MNEs had 90% of their research & development in developed countries and only 10% in developing countries. However, that 10% comprised of over 50% of developing countries total R&D. While numbers have changed over the years with an influx of R&D going towards developing countries, the necessity of technology transfer to new markets remains the same.

Technology Transfer

Technology can spread through joint ventures, licensing, international trade, patents and capital connected to FDI. When the term technology transfer is mentioned, these are the forms of transfer implied. Technology transfer is considered important because it directly contributes to spill-over effects in host countries. Spill-over effects of technology can occur when local firms innovate to keep up with the technology of a MNE in the same industry. The technology of a MNE can be replicated which makes the local firm more advanced and efficient. This is not a difficult process as local firms compete with MNEs which creates familiarisation with advanced technology. Sometimes though, local firms cannot compete with MNEs and are forced out of business. As a whole, FDI technology spill-overs contribute to efficiency and improve other basic aspects of international businesses.

Technology transfers bolster human capital, reduce supply bottlenecks, and assist in management techniques. The WGTI found that part of technology transfer involved the transfer of knowledge in terms of employee training and strategies for using advanced technology. For example, a local telecommunications firm could use the information they observe when a MNE uses horizontal FDI to invest nearby. The local firm can see how the MNE's technology works and pass this along their employees. In addition, supply bottlenecks are reduced because more competition means more firms can provide a good or service for cheaper. Marketing and management techniques can also be observed and copied by local firms. In

[11] General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183

[12] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299

summation, local firms can copy certain technology and advanced knowledge from MNEs and this will cause increased efficiency and an ensuing increase in trade.

The WGTI found that for technology transfers to be effective there must be enough human capital to understand how to use the new items of technology. Sometimes if a country directly transfers technology, the technology gap or human capital gap can be too great for firms in the host country to benefit. Intellectual property laws can also force MNEs and countries to strike a balance as often time advanced technology is protected which can serve the interest of the business but hurt overall economic growth. Finally, the WGTI distinguished between internalised transfers between a MNE and a foreign affiliate of the same MNE versus externalised transfers between a MNE to a different firm. For example, internalised transfers would involve a McDonalds in the United States sending fryers to a McDonalds in Nigeria, while externalised transfers could involve McDonalds giving cattle prods to cattle farmers in Argentina. Both are important to world trade as they are instrumental in the production process and eventually in total economic growth.[13] [14]

The discussions on technological development centred on the balances needed to be struck between the developed world and the developing world. The European Community (EC), an economic community which consisted of most of the states in the EU today, represented the desires of the developed world. The EC explained their main goal was to protect intellectual property. In addition, the EC explained that regulatory control and performance requirements put the wrong kind of pressure on countries. All countries cannot meet the same performance requirements with the same technology because too many factors go into production. Instead the EC recommended improvement of infrastructure in countries that were receiving technology transfer. By combining infrastructure with the training of management and workers, the EC believed technology transfer could help all parties involved. These sentiments were backed up by developing countries like China, Cuba, India, Kenya, Pakistan, Zimbabwe, and Colombia who believed human capital was necessary to facilitate technology transfers. Colombia's emphasis on the importance of human capital demonstrated the need to look into the people using technology, not just the technology itself [15] The methodology behind the technology transfers provoked more disagreements.

The biggest discrepancy in the WGTI was between India and Japan over the effectiveness of spill-overs. Both countries agreed that a rise in technology does not necessarily mean the technology is transferred locally, but each country's reasoning for this phenomenon differed. India believed developing countries sometimes do not understand why technology is transferred and therefore cannot increase production on market forces alone. Instead India recommended licensing agreements and regulation of FDI inflows that involve technology. From India's experience, direct transfer of technology could reduce competition between MNEs and local firms. Licensing agreements will present a trial period for local firms without the MNE giving up control of the item of technology. [16] Japan disagreed and said the liberalisation of trade should be a top priority and licensing agreements are another type of non-tariff trade barrier. From Japan's experience with technology transfers to South Korea, transfer requirements are not effective and limit production. This disagreement was never resolved because these statements are considered matters of opinion expressed in the WGTI, but on the whole the WGTI did not favour licensing agreements.[17]

Many developing countries looked at investing environment as a key for proper technology absorption. Indonesia observed that MNEs could take advantage of local firms' lack of advanced technology and distort the market in a developing country. Most of the developing countries explained in the WGTI that mandatory requirements do not work. Hungary, a country still undergoing some of the signs of development at the time, clarified that screening measures discourage investors. In general, countries focused on their individual needs in these working

[13] WT/WGTI/W65
[14] WT/WGTI/W136
[15] WT/WGTI/W152
[16] WT/WGTI/M15
[17] WT/WGTI/M15

group meetings. Mexico as a manufacturing giant gave its expertise on the diffusion of technology in the manufacturing sector and confirmed the lack of success of performance requirements on the manufacturing sector. Argentina summarised the viewpoints of developing countries the best when their delegation emphasised the key to effective technology transfer is balance between the rights of host countries and investors' expectations.[18]

There was a consensus that technology transfers can aid transparency requirements but there were questions surrounding spill-over effects of technology. For example, a country with updated computer software will be able follow the Hong Kong model of transparency and comply with a hypothetical measure that could call for all trade laws to be updated on a database. A country with outdated technology may not have the software capabilities to accomplish this task. On the other side of the spectrum, MNEs emphasised protection of their intellectual property. The TRIPS does handle most of these concerns but firms continue to look to enforce their intellectual property. For technology transfers, it is important to strike a balance to ensure intellectual property is protected and technology is distributed without harming smaller firms.

Transparency

The WGTI further examined what conditions lead to investor confidence. The working group established that transparency is the key to investor confidence because investors hope to become familiar with all relevant trade laws and regulations. To make an international treaty transparent, the WGTI outlines three guidelines. 1. There must be information on relevant laws and policies in the treaty publicly available for investors and corporation. 2. There must be a notification system so all parties are aware of changes in the treaty. 3. There must be uniform enforcement of the treaty without favours granted to investors or host countries. All of these steps give treaties integrity. Ancillary to these obligations, a transparent legal system establishes trust between investors and host countries. It was found by the WGTI that since governments act, they will be transparent about their laws because transparency is a prerequisite for FDI.[19]

An example of the commitment to transparency that helped an autonomous territory become a world trade power is the case of Hong Kong. Hong Kong created The Code on Access to Information which allows for public access to all documents upon request. A database of all statutory laws and bilateral agreements was created for a reference. All information needed to ensure transparency for investment was provided, but as an additional bonus, brochures and pamphlets with updates to regulations are regularly distributed by the government along with guidebooks such as the Hong Kong Investment Guidebook, HK Works Newsletter, and the Small and Medium Enterprise Centre. All of these steps have led to Hong Kong's reputation as one of the most transparent places to do business in the world.[20]

There is consensus that transparency is beneficial to all parties in investment, but all countries do not always have the capacities to provide transparent information with the same gusto as Hong Kong. Generally, countries recommended the transfer of resources to improve transparency. Developing countries do not always have the database technology or information technology to distribute details online. The WGTI suggested for developed countries to provide this technology because it is mutually beneficial for developed and developing countries. Developed countries gain a secure market while developing countries improve their integration in global trade. It is important to note that confidential business information still should get exceptions from transparency obligations. As a whole, the WGTI found that transparency requirements are universally considered positive and recommended providing the technology necessary to make every country more transparent as to encourage investment and enhance development.

Transparency was agreed upon as a universal good for world trade as investors can feel more secure in investing money when they understand the laws of a

[18] WT/WGTI/M19

[19] WT/WGTI/W7

[20] WT/WGTI/W90

country regarding FDI. There were few disagreements regarding the benefits of transparency. China recognised that developed countries should commit to technical assistance to developing countries so they can meet technical standards. Switzerland spoke for many developed countries when its delegation reminded all countries that MNEs will not always be apt to share information they consider proprietary so transparency may sometimes only apply to laws and court systems. The EC, Canada, Switzerland and other countries that more often invest in developing countries pushed heavily for the transfer of technology that assists with transparency.

The degree of implementation of transparency requirements was still debated within the WGTI. Many countries considered the framework in GATS regarding transparency adequate enough to continue to accept. The framework called for countries to inform the Council for Trade in Services about any new laws, regulations, and guidelines regarding the trade of services or any changes to existing measures. Countries like Japan believed the language in GATS referring to transparency covers the topic sufficiently and no changes to GATS are necessary. India on the other hand felt GATS only applied transparency measures to publications without calling for transparent administration of laws. Publication was irrelevant for transparency if the laws were not shown to be transparent during the implementation process because countries could use the language of the law or regulation to harm investors after the publication process. Japan felt that GATS adequately covered the transparency provisions of FDI and asking more of countries could present an issue if a country was not institutionalised enough to comply. The disagreement over the degree of transparency was framed well by developing countries' concerns.

The comments of Thailand, Malaysia, and Costa Rica in the WGTI detailed some of the other issues the WGTI would face as they attempted to create a more transparent world trade system. All developing countries' delegations in the WGTI felt that transfer of technology was imperative to assist with transparency guidelines. Thailand explained that transparency framework must take into account countries with different levels of institutionalisation or compliance to transparency measures will be a challenge. Furthermore, Thailand was concerned with India's comments about possibly changing GATS because if changes were made, all commitments under GATS would have to be changed. Thailand believed GATS has been effective, but it also took time for their country to fully comply with the regulations. Any changes would cause Thailand to wipe away a good portion of its transparency progress. Malaysia agreed with Thailand and went as far to add that flexible language in current and new agreements will be one of the most crucial aspects to ensuring compliance. If GATS was changed at all, developing countries would need a long grace period to improve their technological infrastructure to comply with new language. Finally, Costa Rica added that transparency helps small and medium enterprises the most. These comments demonstrate that negotiations on investment disciplines will likely face resistance to any framework changes from countries who are worried they will not be able to meet compliance standards in a timely manner. In addition, developing countries will be seeking flexible language in all agreements in the future to assist all sizes of domestic businesses.[21]

Transparency was accepted as a universal positive because promoting investor confidence and cooperation between investors and countries was regarded as a step towards improving world trade and national economic growth.[22] While technology transfers and some flexibility were deemed necessary to accomplish transparency objectives, there were no protests to the concept itself. An equal role in information sharing between MNEs and countries was considered a step in the right direction. The WGTI's main goals seemed to involve building trust between investors and countries. With the endorsement of ideas such as transparency designed to build investor confidence, the WGTI showed its mission to increase trade by improving the relationships between MNEs, developed countries and developing countries.

[21] WT/WGTI/M20

[22] CUTS Centre for International Trade, Economics &Environment: Identifying a Comprehensive IBSA Strategy for the Post-Hong Kong Phase of the Doha Round Agriculture Negotiations.

Non-Discrimination

The WGTI also found out that non-discrimination which is a fundamental principle of international trade, and also applied in trade and investment agreements, should be considered in an investment negotiation. Non-discrimination is premised on the idea that a country should not differentiate between its trading partners or between its own and foreign products, services or nationals, the rationale is to ensure equal competitive opportunities. [23] It was considered necessary to continue with this principle with regard to investment as long as exceptions could be made in certain agreed circumstances.

Non-discrimination lowers costs as a pillar of trade liberalisation. By allocating resources appropriately without granting favours to specific countries, the cheapest and best products are traded. For example, if the international community granted a customs discount for Nigerian oil and did not apply it to the rest of the world, countries would purchase Nigerian oil regardless of whether it is higher quality or cheaper at its base cost. More markets open up because any measure applied across the board can assist in lowering the barriers to entry in a specific industry for a country trying to diversify its industries. The consistent application of non-discrimination is important for legal security. By having favours granted to all members, investors do not have to worry about suddenly competing with other countries because of a surprising change to a trade agreement or domestic law.

The WGTI split non-discrimination along the principles of mostfavoured-nation (MFN) and national treatment (NT). MFN is when foreign products flowing into a country are treated the same as other foreign products flowing into the same countries. For instance, the United Statesshould treat Norwegian fish the same way as Danish fish. This equal treatment only applies to like products under the same tariff schedule as provided by the WTO. Sometimes countries can discriminate towards foreign investment and hurt domestic businesses, so the WTO also recognises the importance of NT which states that domestic like goods must be treated the same as foreign goods. This creates competition that is quality-based instead of origin-based causing NT to directly influence domestic business practices. Non-discrimination is about consistency for investors and host countries, but for effectiveness in developing countries there must be exceptions.

The WGTI identified four major classifications of exceptions to non-discrimination as a way for mostly developing countries to remain economically integrated without hurting their main industries. Systematic exceptions involve the exemption of specific sectors mostly so that firms can meet domestic guidelines and comply with the parameters of NT in a realistic time frame. General exceptions are designed for the government to take measures to maintain public interest and uphold laws. Country specific exceptions are mostly what the WGTI focused on because they are the imperative for developing countries. Country specific exceptions assist with development because countries can focus on acquiring the infrastructure and capacities instead of international compliance. For instance, developing countries and least developed countries were given extra time to comply with the provisions of the TRIMs agreement. The WGTI recommended that developing countries either create a negative list of the provisions they disagreed with or a positive list of all the provisions they agreed with. All other exceptions that do not fall under the realm of the first three types are considered ad-hoc exceptions if they are legitimate grievances. These four types of exceptions enable countries to comply with non-discrimination taking into account their policy and strategic needs.[24]

With regards to non-discrimination, the WGTI looked at the principles of MFN and NT separately to distinguish between ideas. While transparency was considered more automatic by the WGTI, non-discrimination was not because of disagreements over NT. For instance, the EC looked at a balance between legal obligations and domestic agendas while acknowledging that (?) there must be a schedule of commitments for certain countries to comply with NT. Norway agreed and wanted strictness regarding non-

[23] CUTS Centre for International Trade, Economics &Environment: Putting Our Fears on the Table, Deborah Akoth Osiro, Core Principles in Investment Agreement.

[24] WT/WGTI/W118 ; WT/WGTI/W122

discriminatory measures. The pushback to strict non-discrimination came from numerous countries who had issues with this approach.

Many countries called for a positive list of provisions that could be fulfilled instead of a list of exceptions to documents known more commonly as a negative list. These sentiments were expressed by Malaysia and South Korea who felt a positive list could give countries more control in determining the provisions of non-discrimination. South Korea called for unconditional MFN except in the case of multilateral agreements because exporting countries should be able to freely compete. However, for NT South Korea wanted exceptions based on varying levels of commitment. For the pre-establishment phase when investment contracts are first created, NT should apply based on level of commitment and during the post-establishment phase when the investment goes into practice, NT should have general exceptions.[25] Mexico and Malaysia believed that exceptions during the pre-establishment phase would likely eliminate the current free rider problem where MFN gives an advantage to all countries regardless of need.[26] Malaysia went further than most countries and called for flexibility in the post-establishment phase of NT so implementation of an investment is secure. This idea did not gain much influence as countries hoped flexibility in the pre-establishment phase would be sufficient. Brazil summarised the concerns of developing countries best when their delegation explained that most international agreements make it difficult for countries to limit FDI when it flows freely during free trade agreements.[27]

In general, all countries wanted to strike a balance between legal security for investors and individual development methods. One of the main reasons developing countries seek exceptions is that each country grows differently which makes a cookie-cutter framework without exceptions difficult to fulfil. Costa Rica, Hungary, South Korea, Chile, and Norway all explained this idea in a joint statement.[28] India goes on to add that developing countries need to screen FDI before it enters—a practice that would be considered contrary to the principles of non-discrimination. The majority opinion of the WGTI is that while non-discrimination is a positive force for breaking down trade barriers, every country develops differently so it may be important to have screenings of FDI to make sure MNEs are working for national interest. For example, Thailand might want to screen a new piece of database technology to make sure it is not designed by the MNE to undercut local fledgling technology firms. Most countries looked towards exceptions and screening to prevent the exploitation of smaller domestic firms.

Flexible language in trade agreements is also crucial for developing countries. As previously mentioned, developed countries often have economic parity in capabilities and industries. Developing countries are not as similar. They have differing capabilities and industries of varying strength. Every time a new framework was discussed, multiple developing countries requested more time to comply with its provisions or special exceptions to its rules so non-discrimination in its entirety cannot be realised. Because of a lack of economic homogeneity, developing countries hope that investment related language can be flexible enough for the WTO and arbitration courts to grant them the freedom to grow their investments and industries in ways they find appropriate. Often times, trade language can attempt to be all-encompassing without considering the plights of individual countries. These countries generally seek flexible language to comply with non-discriminatory measures.

Dispute Settlement

Finally, in reference to dispute settlement, the WGTI produced a secretariat note that outlined the practice. The note was mainly in response to the Doha Ministerial Declaration which called for dispute settlement to be a key issue of exploration by the WTO. The note describes the sequence for basic dispute settlements through the WTO. First, the Dispute Settlement Understanding (DSU) specifies that the Dispute Settlement Body (DSB) gives a consultation of how to resolve the dispute in hopes of avoiding arbitration entirely. These consultations are merely recommendations and do not have any binding effects.

[25] WT/WGTI/W123
[26] WT/WGTI/M15
[27] WT/WGTI/M19
[28] WT/WGTI/M15

If the consultation does not resolve the dispute, the two parties establish a panel of arbiters that will make a decision. The decision can be upheld, modified or reversed by the Appellate Body as a check to the power of these panels. Finally, the DSU calls for WTO oversight for the implementation of the decision. The WGTI also acknowledged the two types of disputes: state-state and investor-state.

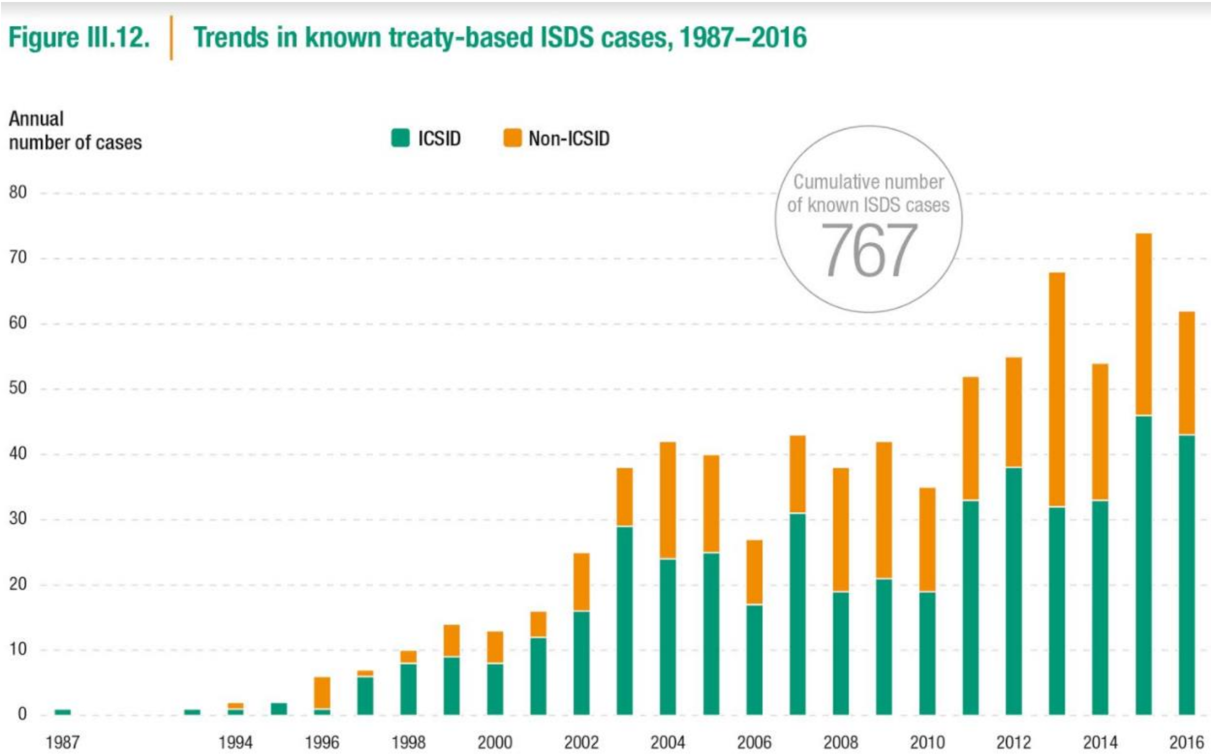
Most International Investment Agreements (IIAs) have a dispute mechanism that operates as more of an ad-hoc system with arbitration awards. The problem with these ad-hoc systems is unlike the WTO they do not have an implementation system for settlements. Without follow up on decisions made by tribunals, there is no guarantee a fair decision leads to a fair result. While WTO dispute settlement is reserved for member states, towards the end of the time of the WGTI the debates considered allowing for foreign investors to directly to the WTO for dispute settlements. There are still obstacles in the settlement of investor-state relations considering the WTO is the only organisation with the power to declare a provision of an agreement incongruent with trade ideals. In the case of investor-state tribunals, the panel must make its decision in the framework of the text. The WGTI looked into more protection for foreign investors who cannot seek adequate protections through local courts as long as developing countries' interests are protected. In general, it was observed that any dispute settlement mechanism must be unbiased, established and utilised in good faith, and contain reasonable exceptions on a case by case basis when necessary.[29]

The WGTI also extensively examined dispute settlement as a key issue in the trade-investment relationship. Without a proper dispute settlement mechanism, it is impossible for investors and states to have confidence in investment. During the time of the WGTI, the Dispute Settlement Understanding (DSU) was the main settlement organ. The delegation from Japan outlined the DSU by explaining that the current goal is to remove measures inconsistent with WTO principles. Any matter effecting operations can be covered through DSU, but matters should only be brought for mediation if non-binding consultations do not work. Japan wanted any future investment agreement to include DSU, but also compensation for investors.[30] The DSU only deals with state-state disputes and did not grant compensation to investors in dispute settlement, so developed countries felt this was unfair to investors. In a proposal by Taiwan that was backed up by the EC and the United States, it was stated that investors should be compensated in disputes.[31] While this would be a change to the current framework, it was suggested that the change could be added to an overall multilateral investment agreement. However, there were some reservations to these ideas.

First, Australia believed that any change that would be made in a later agreement should be after the other provisions of the multilateral agreement were decided. Some developing countries showed even more opposition to the idea of changing the DSU. Indonesia was worried a new mechanism would only benefit developed countries who know the nuances of dispute settlement. Furthermore, Argentina, Colombia and the majority of other countries liked the current DSU and did not want to make any changes. Colombia added however that complaints about non-violation disputes could complicate the process considering these were designed to specifically ensure tariff advantages were not eliminated.[32] Pakistan was also vocal as its delegation claimed that because of a lack of investment definition and asymmetry between developed and developing countries, a multilateral framework with a new dispute settlement should not be discussed at all.[33] In general, some countries hoped for a new investor-state dispute settlement mechanism as part of a larger multilateral framework for investment, but were repudiated by the majority opinion that the current DSU was suitable for (dispute?) settlements.

[29] WT/WGTI/W134
[30] WT/WGTI/W139
[31] WT/WGTI/W141; WT/WGTI/W145
[32] WT/WGTI/M19
[33] WT/WGTI/M19

FIGURE 1: EVOLUTION OF INVESTOR-STATE DISPUTE SETTLEMENT CASES



Source: UNCTAD

Multilateral Framework on Investment

In addition to the four main issues of technological development, transparency, non-discrimination, and dispute settlement there were a few notable discussions within the WGTI ancillary to those topics. Many countries brought up the idea of a Multilateral Framework on Investment (MFI) and the provisions that would have to be included for their delegation to support it. While no MFI was created, there were some notable stances by countries within the WGTI. Numerous developing countries wanted exceptions and more time to comply to measures if the MFI was implemented. Despite debate earlier in the WGTI, countries agreed that GATS should not be changed and the EC committed to not reopening GATS.[34] Poland emphasised with much agreement from other countries any multilateral framework should not include services because GATS is in effect.[35] The WGTI did not want to market a redundant framework. Another original idea mentioned by Egypt and Djibouti was the lack of knowledge by developing countries to negotiate any possible MFI or most items within the WTO.[36] Often times, developing countries have less of a role in the creation of negotiating framework which can hinder their negotiating abilities. Numerous developing countries pointed out that unstable, speculative investment can cause crises. A prime example of this would be the Asian Financial Crisis where a downturn in speculative FDI caused state economies to spiral towards a catastrophic banking crisis. By establishing trust and consistent flows of FDI that do not impede national interests, economic growth through liberalised trade can be realised.

Ultimately, following a General Council decision of 2004 that negotiations on investment would not be considered until the DDA was concluded, the WGTI went into hibernation.

[34] WT/WGTI/M19
[35] WT/WGTI/M21
[36] WT/WGTI/M19

SECTION 2

Trade and Investment in Regional and Free Trade Agreements

In this study, North American Free Trade Agreement (NAFTA), Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), and the ASEAN Comprehensive Investment Agreement (ACIA) were compared to find investment provisions amongst the agreements. By sorting through each respective investment chapter, it is clear why specific ideas were added to these Regional Trade Agreements (RTAs) and Free Trade Agreements (FTAs). To clarify, many RTAs and FTAs look similar on a surface level with the same basic ideas, but the nuances in each document can provide clues on the perspectives of countries. NAFTA was chosen to show the interactions between the highly-developed countries of the United States and Canada with Mexico—a country in the flux of becoming a developed country. CAFTA-DR, which includes the United States, Dominican Republic, El Salvador, Costa Rica, Guatemala, Honduras, and Nicaragua, was chosen to demonstrate the methodology behind forming an agreement between the United States and the small developing countries of Central America. Finally, ACIA, which includes all ASEAN nations, will be examined to provide more perspectives on the trade agreements between mostly developing countries. The ACIA borrowed the investment framework from the TRIMs agreement and was signed almost a decade after the Asian Financial Crisis when there was emphasis on consistent FDI instead of the sporadic flows of investment that caused the crisis 11 years ago. These three trade agreements should assist in forming a deeper understanding of countries' trade aspirations.

The other form of trade agreements that must be looked at are Regional Economic Communities (RECs) which are designed to grow a specific region through similar trade principles and policies. The Economic Community of Central African States (ECCAS) and the East African Community (EAC) will be examined to provide the perspectives of developing countries within Africa. The Economic Community of Central African States (ECCAS) was set up in 1983 to promote regional economic cooperation. Consisting of the 11 states of Gabon, Cameroon, Central African Republic, Chad, Republic of the Congo, Equatorial Guinea, Burundi, Rwanda, the Democratic Republic of Congo, and San Tome and Principe; the ECCAS focused on regionalising the Central African economy and operating as one bloc instead of 11 different states. The EAC consists of Tanzania, Kenya, Uganda, Rwanda, Burundi, and South Sudan which participates at a lesser degree than the other countries. Like the ECCAS, the EAC looks to promote regional integration. The RECs studied will explain the ideas relating to trade and investment in a regional context. Both agreements are still young and weak so their implementation is sporadic so the best method for analysis is to look at how each agreement handles non-discrimination and exceptions to promote regional economic strength. The three FTAs and these two RECs provide a detailed outlook on the investment provisions currently in use.

For a regular update on international investment rulemaking, including recent developments to reform international investment agreements (IIAs) see UNCTAD's annual World Investment Reports (WIRs) and regular policy updates on its Investment Policy

Hub.[37] Of great relevance are also UNCTAD's policy tools aimed to assist in the formulation of sustainable development-oriented treaty making, notably UNCTAD's Investment Policy Framework for Sustainable Development (2012, updated 2015), UNCTAD's Roadmap for IIA Reform (2015) and UNCTAD's 10 Options for Phase 2 of IIA Reform (2017).

2.1 Technology Transfer

NAFTA attempted to induce technology transfers and overall FDI flows. The agreement shows comprehension of the importance of technology transfer between nations, but emphasised intellectual property heavily. The intellectual property protections in NAFTA are some of the strongest of any FTA/RTA. Provisions called for the elimination of non-tariff trade barriers to stem Mexican imports of United States goods that were previously limited by licensing agreements, local production requirements, and export performance requirements. For CAFTA-DR, there are few direct mentions of technology transfers. ACIA on the other hand mentions technology transfers and explains the necessity of technology for complying with transparency measures. Differing levels of investment led to exceptions for free transfers for countries including bankruptcy and insolvency of MNEs. In relation to technology performance requirements, there is a two-year grace period allowed for all countries to remove their performance requirements.[38] ECCAS does not have any mentions of technology transfers, but the EAC emphasises technology more than the typical young REC. The EAC looks to technology linkages as a key for improved regional integration, but does not elaborate on the procedures to form these linkages.

2.2 Transparency

NAFTA does not contain a transparency section, but instead upholds the generally accepted idea that transparency is beneficial to promote investment. CAFTA-DR was formed similarly with an understanding that on principle states would be transparent about their laws and regulations. However, CAFTA-DR also calls for transparent financial reporting by investors in conjunction with state reporting. Keeping with the similar prioritisation of transparency, the ACIA elaborates further and calls for technical assistance to assist developing countries in complying with transparency measures. The ACIA wants countries to inform ASEAN Investment Area Council (AIA) annually about changes to a law or regulation and make laws and documents publicly accessible upon request. ACIA repeatedly shows the need for technical assistance to comply with these requests. Neither the ECCAS nor the EAC mention transparency directly.

2.3 Non-Discrimination

The principle of non-discrimination is taken seriously with the agreement giving MNEs the right to participate in setting trade standards in the other two countries. Exceptions and protections to all sized MNEs also enforced the idea of expanding North American trade. The assistance did not end with large MNEs, but rather included uniform customs rules designed to help small and medium MNEs. To assist Mexico because it had and still has the weakest economy of the three countries, exceptions were added. The investment chapter of the agreement includes exceptions to maritime industries, telecommunications, government policies, national security measures and certain sectors within Mexico specifically like the notary sector. The United States and Canada used the investment chapter in NAFTA to prop up the Mexican economy, encourage investor confidence, and demonstrate the appropriate way for developed countries to interact with countries in economic transition.[39]

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[37] http://investmentpolicyhub.unctad.org/

[38] ASEAN COMPREHENSIVE INVESTMENT AGREEMENT Accessed April 24, 2017. http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf

[39] Villarreal, M. Angeles. The North American Free Trade Agreement (NAFTA). Congressional Research Service. February 22, 2017. Accessed April 24, 2017. https://fas.org/sgp/crs/row/R42965.pdf.

CAFTA-DR includes exceptions designed for the smaller Central American countries including details regarding to grounds for stopping FDI. There are exceptions involving national security, bankruptcy of local firms, speculation, national security and environmental protection. While CAFTA-DR looked at non-discrimination as important, the agreement still called these exceptions to ensure FDI properly was integrated into markets. For ACIA there were similar exceptions for public interest, human and plant life, safety, protection of the environment, and national security.

In the ECCAS and the EAC, non-discrimination with exceptions was considered important. The ECCAS eliminated non-tariff barriers between member states such as customs duties and quotas. The elimination of customs duties extended to goods from third party countries as long as the goods were already in an ECCAS state. The framework speaks generally of trade because the agreement is more focused on regional cooperation relating to all economic aspects.[40] The agreement has the typical exceptions to investment of national security, items related to protection of human and plant life, and nuclear security, but also has some intriguing exceptions that involve investment related to precious stones and art.[41] These exceptions are rank in file for an agreement like this so investment does not hurt the community. The EAC agreement creates a customs union to eliminate internal tariffs and non-tariff barriers. The EAC is also non-discriminatory to other states within the region, but has more exceptions for MNEs. There are general goals to promote the whole community instead of just local materials while growing small and medium enterprises.[42]

2.4 Dispute Settlement

It is important to acknowledge that the investment chapter of NAFTA outlines a very clear dispute settlement system that grants investors and states the ability to bring each other to arbitration in an unbiased court. In CAFTA-DR the investor-state dispute settlement section is more detailed relative to NAFTA and favours states more.[43] It details protections to state sovereignty that other agreements do not have. In the ACIA, the dispute settlement mechanisms seek an equal balance between investors and states. Neither ECCAS nor EAC have dispute settlement mechanisms.

2.5 Trends in recent and ongoing FTA negotiations

Trade agreements and economic communities that are currently signed and enforced demonstrate the perceptions of countries in the time before the agreements come into effect. For instance, a trade agreement signed in 2010 is a compilation of all the research, ideas, and thoughts of countries leading up to 2010. Because most trade agreements do not change after they are ratified, to understand current beliefs on the relationship between trade and investment ongoing negotiations must be examined. The three biggest agreements in this context are:

- Transatlantic Trade and Investment Partnership (TTIP) being negotiated between the United States and the EU, although these seem to have stalled given the current US stance on foreign trade policy;
- The Transpacific Partnership (TPP) consisting of a dozen countries that was finalised in 2016, however the US withdrawal from the agreement in January 2017 has so far delayed its ratification;
- The Regional Comprehensive Economic Partnership (RCEP) consisting of the Association of South-East Asian Nations (ASEAN) and six

[40] Economic Community of Central African States Accessed April 24, 2017. http://www.wipo.int/edocs/trtdocs/en/eccas/trt_eccas.pdf

[41] Economic Community of Central African States Accessed April 24, 2017. http://www.wipo.int/edocs/trtdocs/en/eccas/trt_eccas.pdf

[42] Treaty for the Establishment of the East African Community Signed November 30, 1999. Entered into Force July 7, 2000. Accessed April 24, 2017. http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf

[43] CAFTA-DR Accessed April 24, 2017. https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

states with which they have existing free trade agreements.

TTIP is an agreement designed to form one of the largest free trade areas in the world. First, the agreement clearly favours the broad definition that includes portfolio investment. This is not surprising given that the EU and United States prefer the broad definition so they can employ diverse investment tactics without scrutiny, even though developing countries were pushing for a narrow definition, while. Each economy can handle a degree of speculation. While the agreement was supposed to be concluded in 2016, talks have stalled because of differing regulatory standards relating to non-discrimination. Aside from nuanced regulations relating to everything from meat products to environmental protections, the investment chapter does not differ much from earlier trade agreements. TTIP's twofold strategy for growing investment is to make it easier for EU companies to invest in the United States (and vice versa), while simultaneously increasing investor confidence. TTIP hopes to fulfil this strategy with guarantees that include non-discrimination of goods and services; repatriation of profits; and protection of foreign investors by allowing them to make claims in court.[44] While none of these provisions are original, the enumeration of these ideas as the most instrumental towards the investment framework shows a clear outline of expectations for this agreement.[45]

TABLE 1: COMPARISON OF THE DEFINITION OF INVESTMENT FOR TPP AND TTIP

TTIP	TPP
Investment means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:	The TPP defines investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
an enterprise;	an enterprise;
shares, stocks and other forms of equity participation in an enterprise;	shares, stock and other forms of equity participation in an enterprise;
bonds, debentures and other debt instruments of an enterprise;	bonds, debentures, other debt instruments and loans;
an interest arising from: a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources, a turnkey, construction, production, or revenue-sharing contract, or other similar contracts;	turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
intellectual property rights;	intellectual property rights;

[44] "Creating more investment opportunities in the EU and the US." Trade-European Commission. January 2015. Accessed April 24, 2017. http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf.

[45] Transatlantic Trade and Investment Partnership Published September 2015. Accessed April 24, 2017. http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

any other moveable property, tangible or intangible, or immovable property and related rights;	other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges;
Differences Between the Two Definitions	
a loan to an enterprise;	futures, options and other derivatives;
claims to money or claims to performance under a contract;	licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and
any other kinds of interest in an enterprise;	?

TTIP will also use the United Nations Commission of International Trade Law's (UNCITRAL) transparency requirements for the agreement. The transparency laws are a refined version of the NAFTA transparency rules with slightly more emphasis on protection of intellectual property.[46] These rules were likely favoured because historically the EU and the United Statesfavour strict protections to intellectual property. Finally, in the TTIP negotiations the EU proposed to replace the current Investor-State Dispute Settlement (ISDS) system for investor-state disputes with the Investment Court System (ICS) that hopes to provide a more equal platform for countries and investors.[47] Until the system is put into practice, it is difficult to see if there will be a difference between ISDS and ICS. Other than the UNCITRAL's transparency rules and the broad definition indicative of the aspirations of developed countries, the agreement is reminiscent of the trade agreements of the late 1990s and early 2000s.

Despite its inclusion of developing countries, TPP's framework looks like NAFTA and TTIP. TPP favours the broad definition of investment used in TTIP in hopes that it will encourage further investment.[48] This is interesting because typically developing countries would protest a definition of investment that is this broad. In terms of non-discrimination, the language surrounding MFN, NT, and the exceptions to both are nearly identical to NAFTA. TPP calls for free movement of capital and the prohibition of performance requirements. TPP also contains the same exceptions to transfers as NAFTA relating to national security, financial stability, and protection of investments. Transparency is discussed almost identically to the way it is discussed in TTIP so this is not a point of contention.

The investor-state dispute provisions and the other exceptions offered by the investment chapter are currently being tested in negotiations. The ISDS allows for international courts to fully surpass domestic laws and even domestic rulings. This can give corporations power over government laws. In the case of Canada vs. Bilcon (a company that ran a quarry), the latter had its environmental responsibility waived in a higher court that overruled the domestic verdict that favoured environmental protection. TPP's ISDS seems to be trending in this direction which many critics consider a transgression on sovereignty. TPP also includes exceptions from non-discrimination for highly developed industries such as the Australian tobacco sector.[49] There is general concern of investors getting more favourable treatment than states in the agreement which is making TPP the most controversial of these three trade agreements.[50]

RCEP is seemingly becoming the alternative to TPP despite some delays in progress. The agreement was supposed to be signed in 2015 but is now expected to be concluded by the end of 2017. As an agreement between all 10 states of ASEAN, Australia, China, India, Japan, New Zealand, and South Korea, it must accommodate interests of countries in various differing stages of development.[51] As of now, no definition of investment has been released. The guiding principles emphasise that there will be exceptions to non-discrimination for developing countries. The uniqueness of RCEP is that the agreement consolidates of multiple successful agreements. The consolidation of these agreements has made RCEP popular as developing countries' concerns are mitigated with the inclusion of agreements they already support and non-discriminatory measures already in place. RCEP builds upon popular trade agreements to make the framework less controversial.[52] ASEAN nations, especially

[46] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Accessed April 24, 2017. http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

[47] This approach has already been taken in the EU-Canada Comprehensive Economic and trade Agreement (CETA)

[48] Transpacific Partnership Accessed April 24, 2017. https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf

[49] Johnson, Lise, Lisa Sachs, and Jeffrey Sachs. "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law." May 2015. Accessed April 24, 2017. http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf.

[50] CUTS Centre for International Trade, Economics &Environment: Domestic Regulation and Service Trade Liberalisation A South Asian Perspective, Archana Jakta.

[51] Fukunga, Yoshifumi, and Ikumo Isono. "Taking ASEAN 1 FTAs towards the RCEP: A Mapping Study." Economic Research Institute for ASEAN. January 2013. Accessed April 24, 2017. http://www.eria.org/ERIA-DP-2013-02.pdf.

[52] "Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership." Department of Foreign Affairs and Trade. Accessed April 24, 2017. http://dfat.gov.au/pages/default.aspx.

developing countries, were fearful that their negotiated FTAs would be ignored by a larger FTA that would not maintain their measures of non-discrimination. For transparency, other than a basic pledging of transparency in investor state relations, it is unclear what RCEP intends to do to accomplish this. Similarly, RCEP calls for a dispute settlement mechanism but does not provide details as to what it will look like. RCEP does not seek to replace bilateral agreements or current provisions within other agreements, but rather looks to compromise even if at this time it is unclear how. Discussions are centring around the key ideas of the WGTI in the form of non-discrimination, transparency, and dispute settlement.

In the ongoing negotiations of TTIP, TPP, and RCEP, there were trends towards more of the same provisions in regard to the definition of investment, non-discrimination, transparency, and dispute settlement. First, the definition of investment was very broad in TTIP and TPP, likely reflecting the influence of developed countries and their preference for riskier investments. For non-discrimination and transparency, much of the language looked very similar to trade agreements from the late 1990s and the early work of the WGTI. Countries seem to be in favour of incorporating popular bilateral agreements and newer provisions into the overall framework. By demonstrating that a large trade agreement will not infringe upon current localised agreements, it can become more popular. Now, countries are willing to sacrifice the strength of non-discriminatory practices in favour of compromise. Developed countries are eager to open markets even if it means dealing with certain trade restrictions. Transparency and non-discrimination are considered important in all of these agreements, but negotiations are trending towards the allowance of exceptions to mitigate developing countries' concerns.

Finally, another trend in the negotiations of these agreements has been the stalling of discussions because of investor-state disagreements over the dispute mechanisms. The WGTI previously explored an investor-state dispute mechanism, but developing countries had many reservations to this idea. These fears of MNEs having power over developing countries in dispute settlements are becoming realised in TPP. It seems investor-state relations are slightly worse than expected when negotiations started. While TTIP shows a more balanced perspective, some countries feel this mechanism has tipped in favour of corporations over time. In the case of TPP, any advantage given to investors jeopardises state approval of the overall agreement because the dispute mechanism already favours MNEs. The policy space for all sides is contested right now as countries are uncertain of what lies in the future of trade. All of these agreements still have not been implemented yet so there are no results to base off. However, as countries look towards holistic growth and see a lack of comprehensive growth under previous trade agreements, they are scared to sign a newer, bigger agreement with a dispute mechanism they disagree with.

SECTION 3

Contemporary Views on Trade and Investment in the WTO

At the WTO, in line with the 10th Nairobi Ministerial Conference Declaration, wherein it was recognised that some members wished to identify and discuss other issues for negotiations, a number of such issues have been floated, amongst which is trade and investment. In preparing this study, various delegations were approached to share their current perspectives with regard to the proposed discussions on trade and investment in the WTO, these are summarised here below.

Given that the previous work on trade and investment undertaken by the WGTI did not gain traction due to a number of areas where members' positions remained divergent, a completely new approach is being proposed. A number of countries are of the view that there is need for greater coherence in trade and investment policy, especially given the dynamic links between trade, investment and development.

Proponents of discussions on trade and investment argue that the objective is to consider investment facilitation which is the link between trade, investment and development.[53] This would also enable leveraging the WTO in contributing towards attainment of the Sustainable Development Goals (SDGs). The rationale is to identify means through which investment can enhance and or complement trade in development efforts.

Investment facilitation proponents highlight the fact that investment is already covered in piecemeal across WTO Agreements such as the GATS that provides for FDI in services, which accounts for two-thirds global inward FDI stock and 55-60 percent of all services trade;[54] the TRIMs Agreement and the Agreement on Subsidies and Countervailing measures that seek to ensure investment measures are not inconsistent with trade; TRIPS provisions relevant to legal environment affecting foreign investment; as well as investments-related measures considered in WTO accession negotiations.[55] The proposed discussions on investment facilitation are therefore to extend coverage to the areas not already covered by aforementioned agreements, and which forms about only one-third.

It is further pointed out that developing countries now account for an increasing share of inward and outward FDI; moreover, FDI funding is a vital source of funding in light of the close to USD 2.5 trillion development investment gap to achieve the SDGs.[56] It is along these lines that UNCTAD, in its 2016 World Investment Report (WIR), launched its Global Action Menu for Investment Facilitation, which, solidly rooted in international mandates and endorsed by UNCTAD's

[53] CUTS Centre for International Trade, Economics & Environment: Beyond Rhetoric: Ensuring the Economic Partnership Agreements a Guidebook to EPA Development Benchmarks, Victor Ogalo.

[54] As outlined in a recent UNCTAD Trends Monitor, statistics for mode 3 services trade and services FDI that are commonly used in policy discussions tend to provide an inflated impression of the real importance of the tertiary sector in cross-border trade and investment. See UNCTAD, Investment and Trade in Services: The Outsized Role of Holdings and Intra-Firm Services, Investment Trends Monitor, June 2017 (UNCTAD 2017), http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_ITM_June2017.pdf

[55] JOB/GC/121 MIKITA Investment Workshop Reflections

[56] Ibid, based on UNCTAD, World Investment Report (WIR) 2014: Investing in the SDGs: An Action Plan (New and Geneva, United Nations 2014) Chapter IV

intergovernmental machinery, offers 10 Action Lines, covering a wide range of policies and flexibilities for countries to adapt and adopt in line with their national and international policy needs.[57][58]

The new approach specifically points out that known sensitivities from past deliberations on trade and investment should be avoided. Issues such as investor dispute settlement and investment protections will not be included in the discussions. Rather the discussions on investment facilitation should be considered as complementary to the recently concluded Trade Facilitation Agreement. The core issues to be considered in this regard revolve around transparency, predictability and non-discrimination in investment policies; as well as efficiency and streamlining of administrative procedures to minimise investment barriers; while promoting international cooperation, capacity-building and technical assistance to members.[59]

It is also pointed out that pursuing investment facilitation is in line with the 2016 G20 guiding principles for global investment policy.[60] The emphasis on such discussions is to focus on development while avoiding contentious issues of market access, investment protections, dispute settlement and establishment. It is in this context that the "Friends of Investment Facilitation for Development" group has been established within the WTO to take forward this issue. The objective of the group and investment facilitation proponents is to initiate informal dialogue amongst members given that there is no mandate to formally discuss the issue.

The trade and investment facilitation initiative has given rise to a number of questions amongst WTO members, these include the legality or mandate upon which such a discussion can be conducted, what would be the implications of such a discussion, especially in light of forthcoming 11th Ministerial Conference and others; proponents of the initiative argue that it is through dialogue that clarity and answers to the questions could be arrived at. Through deliberations members will collectively decide whether or not to pursue the initiative. It is worth noting that investment is no longer a developed countries' issue only, in light of recent South to South trade and investment flows, for instance China is currently one of the leading investors in the world.

It is also averred by proponents of the investment facilitation initiative that the WTO is the appropriate forum to address these issues given the close inter-linkage between trade and investment, as well as WTO's proven ability in implementing fair rules. Disciplines on investment facilitation in the WTO would ensure predictability and reduction of investment costs, which would likely result in development benefits. Further, such disciplines would entail a development dimension that would provide for special and differential treatment for developing countries and least developed countries.

It is also argued that discussions on investment facilitation do not infer that pending DDA issues should be side-lined, however taking into account the divergent positions on those issues, it would be prudent to commence engagement on other important issues or areas where consensus could be garnered.

Further, proponents of investment facilitation opine that some countries have had a considerably successful implementation of investment cooperation, facilitation and mitigation arrangements, and that extending such an arrangement to the WTO would be more beneficial to the wider membership. This is the motivation for some countries to support the investment facilitation initiative, which could be, in their consideration a means for improving and enhancing investment amongst WTO members. It is never the less emphasised that investment facilitation

[57] UNCTAD, World Investment Report 2016: Investor Nationality: Policy Challenges (New York and Geneva, United Nations 2016), and UNCTAD, Global Action Menu for Investment Facilitation (2016)

[58] http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf.

[59] For a review of investment facilitation policies, at the national and international levels, see (2016), http://investmentpolicyhub.unctad.org/Upload/Documents/Investment-Facilitation_Review%20Note%203%20feb.pdf

[60] CUTS Centre for International Trade, Economics & Environment: Reforming the World Trade Organization Developing Countries in the Doha Round

must be distinguished from "investment the Singapore issue (?)" to the extent that areas such as market access, investment protections, dispute settlements etc. remain sensitive even to proponents of investment facilitation as well. The purpose and objective is to address investment only within the realm of facilitation, more specifically to facilitate investment procedures within WTO members.

To underscore the above objective, one delegation explained that their country has neither negotiated Bilateral Investment Agreements (BITs) nor become a party to the International Investor State Dispute Settlement Mechanism, all due to the fact that policy space and capacity to regulate investments is critical to all stakeholders within their country. Never the less from their experience, investment facilitation would be a means for catalysing development by leveraging links between trade and investment.

Simply put, investment facilitation would put in place a single window system through which investment would be facilitated, which would also promote transparency. The essence is to harmonise means through which investment is facilitated amongst WTO members, so as to avoid costs related to duplication of procedures. Disciplines in this regard would also put in place timelines within which investment procedures would be completed, all of which would provide a firm basis for investors to make decisions.

Again, the rationale is that despite a stalemate in negotiations of DDA issues, members could consider discussing areas of probable consensus with the ultimate view to resolving those that are still on the table. There is need for prudence to ensure that all members, be it developing countries, or the least developed countries perspectives are included in considering other issues beyond those in the DDA.

On the other hand, some WTO members are of the view that trade and investment or for that matter investment facilitation remains ultra vires the WTO. This view is premised on the 2004 General Council Decision (WT/L/579) wherein members agreed that such issues would not form part of the Work Programme within the WTO during the Doha Round. In their view, it is difficult to envisage an investment facilitation agreement that does not take into account issues such as investment protections, dispute settlement and market access.

Moreover, the dissenting member countries argue that de facto investment promotion initiatives and policies are already in place for most WTO members, especially the developing and least developed countries, all keen on attracting and facilitating investment towards development. Indeed, single window processes are being institutionalised as well as putting in place best practices such as electronic publication of processes to improve transparency. They therefore do not appreciate the need for multilateral disciplines and obligations to do what is already being done.

It is also argued that taking on issues beyond what was already agreed to be considered would create a negative precedent in the multilateral trade negotiations, in that future negotiations may easily disregard the modus agreed. In the current scenario, the agreed mandate is to first conclude the DDA as a single undertaking and thereafter consider subsequent issues of interest to the membership. Amongst the WTO's fundamental roles is to promote and protect rules agreed within the membership and therefore any deviance should not be considered within the realm of the organisation.

Any consideration for discussions on investment facilitation should be premised on the “problem/gaps” that such disciplines would be addressing. At the moment, these are not clear at all. There is therefore still need to identify the issues that such an agreement will be addressing, how the multilateral trading system relates their resolution.

All in all, contemporary views on trade and investment are still at variance, however there is clearly a very different approach to the investment question within the WTO. Previous work undertaken within the realm of the WGTI is currently not considered relevant especially to the extent that the various issues remain contentious within the membership. However as established from views of members, even the contemporary proposals to consider investment facilitation remain contentious.

Conclusion

At the 1st WTO Ministerial Conference of 1996, trade and investment was floated amongst the issues for the negotiation agenda, however it was resisted and instead subjected to the WGTI whose work did not gain political traction amongst the membership and was eventually disbanded by the 2004 WTO General Council decision to be only considered upon conclusion of the DDA.

The WGTI's mandate was to assess the relationship between trade and investment for possible future consideration by WTO members. GATT's mission was to lower tariffs and while it was successful in accomplishing this task, non-tariff barriers were still limiting world trade. The WGTI looked to eliminate these non-tariff barriers in respect of investment. In addition, at the time the main issues surrounding trade and investment involved technology transfer, transparency, and non-discrimination. The WGTI looked at these issues and made recommendations that they felt would assist in the liberalisation of trade. The WGTI recommended technology transfer that could spill over to local firms to improve host countries' economies. Furthermore, the WGTI stated the importance of transparency to increase investor confidence provided that developed countries assist in the installation of transparency infrastructure in the form of advanced technology. Finally, the importance of non-discrimination was acknowledged but the necessity of exceptions was explained as crucial for developing and least developed countries. Without these exceptions, developing and least developed countries are likely to become wary of trade and investment issues.

To build on the perceptions of trade and investment issues, the texts from FTAs, RTAs, and RECs showed the interactions between developed and developing countries. For most trade agreements, the same base framework relates to trade and investment. All such agreements have transparency and non-discriminatory measures built into their framework and similar definitions of investment.

In the ongoing TTIP negotiations, as well as the concluded TPP, investment was defined broadly, perhaps reflecting developed countries perceptions in this respect. A common emphasis highlighted through most of the FTAs, RTAs and RECs that cover trade and investment, is the provision for transparency and non-discrimination, although exceptions to mitigate developing countries' concerns are taken into consideration.

With regard to contemporary views on trade and investment in the WTO, it is generally agreed that the previous approach proposed at the 1st WTO Ministerial Conference and subsequent work of the WGTI should not be reconsidered given the controversy it enshrines. Issues such as investor protection, dispute settlement, pre and post entry requirements all remain unresolved. In light of that, investment facilitation has been suggested as a means of complementing the recently agreed Trade Facilitation Agreement. The approach emphasises transparency as a means of promoting investment, including towards the achievement of the United Nations Sustainable Development Goals. Never the less, there is still scepticism amongst a number of WTO members who are of the view that national policies, laws and regulations geared towards investment promotion would suffice, without the additional burden of multilateral obligations.

All in all, the issue of addressing Trade and Investment at the multilateral level, including within the WTO has had a long history but remains unresolved. Currently, as some WTO members argue for investment facilitation as a win-win given its potential in enhancing development efforts, others remain of the view that such a move would harm the multilateral trading system's core obligations of implementing and promoting members agreed positions, which is that it was already agreed to tackle investment and related issues after resolution of the DDA. According to the latter, bringing investment on board before conclusion of the DDA would create a bad precedent for the multilateral trading system.

References

Agreement on Trade Related Investment Measures, 1868 U.N.T.S. 186

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299

ASEAN COMPREHENSIVE INVESTMENT AGREEMENT Accessed April 24, 2017. http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Fe%202009.pdf

CAFTA-DR Accessed April 24, 2017. https://ustr.gov/trade-agreements/free-trade agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

“Creating more investment opportunities in the EU and the US." Trade-European Commission. January 2015. Accessed April 24, 2017. http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf.

CUTS Centre for International Trade, Economics and Environment: Putting Our Fears on the Table

CUTS Centre for International Trade, Economics and Environment: Services Trade and investment Liberalisation, and Domestic Regulation: A Summary of Six Country Studies

CUTS Centre for International Trade, Economics and Environment: Domestic Regulation and Service Trade Liberalisation A South Asian Perspective

CUTS Centre for International Trade, Economics &Environment: Identifying A Comprehensive IBSA Strategy for the Post-Hong Kong Phase of the Doha Round Agriculture Negotiations

CUTS Centre for International Trade, Economics &Environment: Reforming the World Trade Organization Developing Countries in the Doha Round

CUTS Centre for International Trade, Economics &Environment: Beyond Rhetoric: Ensuring the Economic Partnership Agreements A Guidebook to EPA Development Benchmarks

Economic Community of Central African States Accessed April 24, 2017. http://www.wipo.int/edocs/trtdocs/en/eccas/trt_eccas.pdf

Economic Community of Central African States Accessed April 24, 2017. http://www.wipo.int/edocs/trtdocs/en/eccas/trt_eccas.pdf

Emmerji, Louis , and Richard Jolly. United Nations Intellectual History Project. The CUNY Graduate Center. UN History. July 2009. Accessed April 4, 2017. http://www.unhistory.org/briefing/17TNCs.pdf.

Fukunga, Yoshifumi, and Ikumo Isono. "Taking ASEAN 1 FTAs towards the RCEP: A Mapping Study." Economic Research Institute for ASEAN. January 2013. Accessed April 24, 2017. http://www.eria.org/ERIA-DP-201302.pdf.

General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183

Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership." Department of Foreign Affairs and Trade. Accessed April 24, 2017. http://dfat.gov.au/pages/default.aspx.

“International investment agreements." OECD. Accessed April 24, 2017. http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreeme toninvestment.htm.

Johnson, Lise, Lisa Sachs, and Jeffrey Sachs. "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law." May 2015. Accessed April 24, 2017. http://ccsi.columbia.edu/files/2015/05/InvestorState-Dispute-Settlement-Public-Interest and-U.S.-Domestic-Law-FINAL-May-19-8.pdf

“Singapore Ministerial Declaration." World Trade Organization. Accessed April 24, 2017. https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

Transatlantic Trade and Investment Partnership Published September 2015. Accessed April 24, 2017.http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

Transpacific Partnership Accessed April 24, 2017. https://ustr.gov/sites/default/files/TPP-Final -Text Investment.pdf

Treaty for the Establishment of the East African Community Signed November 30, 1999. Entered into Force July 7, 2000. Accessed April 24, 2017. http://www.eac.int/sites/default/files/docs/treaty_eac_amended2006_1999.pdf

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Accessed April 24, 2017.http://www.uncitral.org/pdf/english/texts/arbitration/rules-on transparency/Rules-on-Transparency E.pdf

UNCTAD, Investment Policy Framework for Sustainable Development (United Nations 2012, updated 2015), http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

UNCTAD, World Investment Report 2014 - Investing in the SDGs: An Action Plan (United Nations 2014), http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf

UNCTAD, World Investment Report 2015 - Reforming International Investment Governance (United Nations 2015) Chapter IV (Roadmap for IIA Reform), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

UNCTAD, World Investment Report 2016 - Investor Nationality: Policy Challenges (United Nations 2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

UNCTAD, Global Action Menu for Investment Facilitation (United Nations 2016), http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf

UNCTAD, Global Action Menu for Investment Facilitation (2016), A Review of Policy Practices http://investmentpolicyhub.unctad.org/Upload/Documents/Investment-Facilitation_Review%20Note%203%20feb.pdf

UNCTAD, World Investment report 2017 - Investment and the Digital Economy (United Nations 2017), http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf

UNCTAD, Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties, IIA Issues Note, Issue 2 (June 2017),

http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf

UNCTAD, Investment and Trade in Services: The Outsized Role of Holdings and Intra-Firm Services, Investment Trends Monitor, June 2017 (UNCTAD 2017), http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_ITM_June2017.pdf

UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/

UNCTAD, Division on Investment and Enterprise, http://unctad.org/en/pages/DIAE/DIAE.aspx

United Nations Conference on Trade and Development, Ninth Session (Midrand, 27 April 1996), available from http://repository.un.org/bitstream/handle/11176/216086/TD_377 EN.pdf?sequence=3&isAllowed=y

United Nations Conference on Trade and Employment. 1948. Havana charter for an International Trade Organization, March 24, 1948, including a guide to the study of the charter. [Washington]: [U.S. Govt.Print. Off.].

Villarreal, M. Angeles. The North American Free Trade Agreement (NAFTA). Congressional Research Service.February 22, 2017. Accessed April 24, 2017. https://fas.org/sgp/crs/row/R42965.pdf.

“WTO dispute settlement." LinkedIn SlideShare. October 06, 2012. Accessed April 24, 2017. https://www.slideshare.net/studsplanet/wto-dispute-settlement.

WT/WGTI/M15 Working Group on the Relationship between Trade and Investment - Report on the Meeting Held on 13 and 14 June 2001 - Note by the Secretariat

WT/WGTI/M19 Working Group on the Relationship between Trade and Investment - Report on the Meeting held on 16 - 18 September 2002 - Note by the Secretariat

WT/WGTI/M20 Working Group on the Relationship between Trade and Investment - Report on the Meeting Held on 3 - 4 December 2002 - Note by the Secretariat

WT/WGTI/M21 Working Group on the Relationship between Trade and Investment - Report on the Meeting Held on 14 and 15 April 2003 - Note by the Secretariat

WT/WGTI/W1 Working Group on the Relationship between Trade and Investment – Submission by the European Community and its Member States

WT/WGTI/W7 Working Group on the Relationship between Trade and Investment – The Relationship between Trade and Foreign Direct Investment - Note by the Secretariat

WT/WGTI/W8 Working Group on the Relationship between Trade and Investment - Implications of the Relationship between Trade and Investment for Development and Economic G[...]Intergovernmental Organizations

WT/WGTI/W65 Working Group on the Relationship between Trade and Investment – The Effects of Foreign Direct Investment on Development: Technology and Other Know How Trans[...]overs - Note by the Secretariat

WT/WGTI/W90 Working Group on the Relationship between Trade and Investment   Communication from Hong Kong, China - Transparency of Investment Environment

WT/WGTI/W118 Working Group on the Relationship between Trade and Investment – Non Discrimination – Most Favoured-Nation Treatment and National Treatment - Note by the Secretariat

WT/WGTI/W121 Working Group on the Relationship between Trade and Investment -   Communication from the European Community and its Member States - Concept Paper on Modalities of Pre-establishment

WT/WGTI/W123 Working Group on the Relationship between Trade and Investment   Communication from the Republic of Korea - Non-Discrimination and GATS-type approach for investment

WT/WGTI/W134 Working Group on the Relationship between Trade and Investment Consultation and the Settlement of Disputes between Members - Note by the Secretariat

WT/WGTI/W136 Working Group on the Relationship between Trade and Investment – Key Issues Concerning Foreign Direct Investment and the Transfer and Diffusion of Technology [...]tries - Note by the Secretariat

WT/WGTI/W139 Working Group on the Relationship between Trade and Investment Communication from Japan Consultation and the Settlement of Disputes between Members

WT/WGTI/W141 Working Group on the Relationship between Trade and Investment Communication from the European Community and its Member States - Concept Paper on Consultation of Disputes between Members

WT/WGTI/W145 Working Group on the Relationship between Trade and Investment Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu - Dispute Settlement Mechanism

WT/WGTI/W152 Working Group on the Relationship between Trade and Investment Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe – Investors and Home Governments' Obligations