



DISCUSSIONS IN THE WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT (2001-2003)

This Note reviews Members' submissions in the Working Group on the Relationship between Trade and Investment (WGTI) between 2001 - 2003.

The Singapore Ministerial Declaration established the WGTI to examine the relationship between trade and investment. Subsequently, the Doha Ministerial Declaration tasked the WGTI to focus on the clarification of seven elements of a possible future multilateral investment agreement, as well as some other issues: (i) scope and definition; (ii) transparency; (iii) non-discrimination; (iv) modalities for pre-establishment commitments based on a GATS-type, positive list approach; (v) development provisions; (vi) exceptions and balance-of-payments safeguards; and (vii) consultation and the settlement of disputes between members.

Around 60 submissions to the WGTI were made during 2002 and 2003. Around 10% came from developing countries whereas 60% from OECD or developed countries (and 20% from WTO secretariat). Discussions were mainly driven by OECD countries.

The WGTI discussions show that there were large divergences between WTO members, particularly between developed and developing countries. Even though the discussions took place 15 years ago, the process of reforming Bilateral Investment Treaties (BITs) now underway in some major developing countries suggest that such differences on investment continue. At the same time, the EU and US today appear to take similar positions in their investment treaties as the positions they had taken in the WGTI.

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I. WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT - From Examining The Relation Between Trade And Investment To Clarifying A Select Set Of Issues

a) 1996 Singapore Ministerial Declaration

The Working Group on the Relationship between Trade and Investment (WGTI) was established in 1996 by the Singapore Ministerial Declaration (paragraph 20) with the mandate to ‘examine the relationship between trade and investment’. Work in UNCTAD and other appropriate intergovernmental fora were to be drawn upon. Future negotiations, if any, regarding multilateral disciplines in investment, were to take place only after an explicit consensus decision by WTO Members regarding such negotiations.

Paragraph 20 of the Singapore Ministerial Declaration

Investment and Competition

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

Paragraph 20 also established a working group to study issues relating to interaction between trade and competition policy. In addition, paragraph 21 established a working group to conduct a study on transparency in government procurement practices and directed the Council for Trade in Goods to undertake exploratory and analytical work on the simplification of trade procedures in order to assess the scope for WTO rules in this area (later referred to as ‘trade facilitation’). Together with (trade and) investment, these four areas have come to be known collectively as the ‘Singapore issues’.

The first WGTI meeting was held on 2-3 June 1997. The basis for work was the so-called ‘Checklist of issues suggested for study’, a non-paper by the Chair (See Annex 2 of WT/WGTI/M/1, reproduced in Annex 1 of this Note).

This non-paper notes that: “It was widely recognized that the Working Group's work programme should be open, non- prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements, not only category I, should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In

pursuing the items of its work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.”

In total fifteen (15) meetings took place until the launch of the Doha Round during which time the WGTI received around 100 written submissions from WTO Members, WTO secretariat and international organisations inter alia OECD, UNCTAD, World Bank (once).

b) 2001 Doha Ministerial Declaration

The 2001 Doha Ministerial Declaration mandated the WGTI to further clarify some issues (paragraph 22). Members also agreed “that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations”.(paragraph 22).

Paragraph 22 of the Doha Ministerial Declaration

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members.

Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.

The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances.

Due regard should be paid to other relevant WTO provisions.

Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

Paragraph 22 of the Doha Ministerial Declaration identifies seven areas for clarification in the Working Group on the Relationship between Trade and Investment:

1. scope and definition
2. transparency;
3. non-discrimination;
4. modalities for pre-establishment commitments based on a GATS-type, positive list approach;
5. development provisions;
6. exceptions and balance-of-payments safeguards;
7. consultation and the settlement of disputes between members.

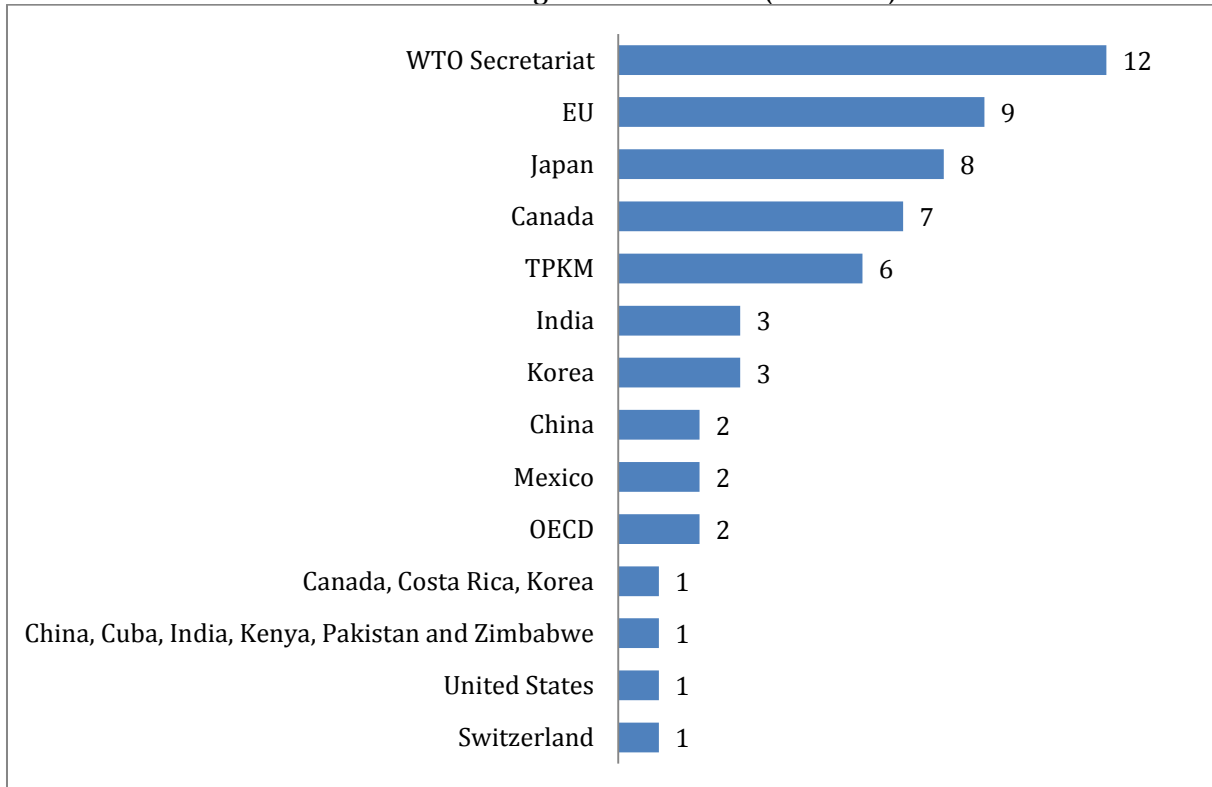
It should be noted that the WGTI would ‘focus’ on the clarification of these seven issues, implying there was room to also discuss other issues mentioned in the Doha mandate, such as how any framework should reflect ‘in a balanced manner the interests of home and host countries’ or Members’ ‘right to regulate in the public interest’ or how ‘account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.’ (paragraph 22 of the Doha Ministerial Declaration).



c) WGTI meetings during the Doha Round

During the Doha Round, seven (7) more WGTI meetings were held, between 18-19 April 2002 and 10-11 June 2003. Around 60 submissions, mostly by OECD countries, were discussed by the WGTI between 2002-2003.

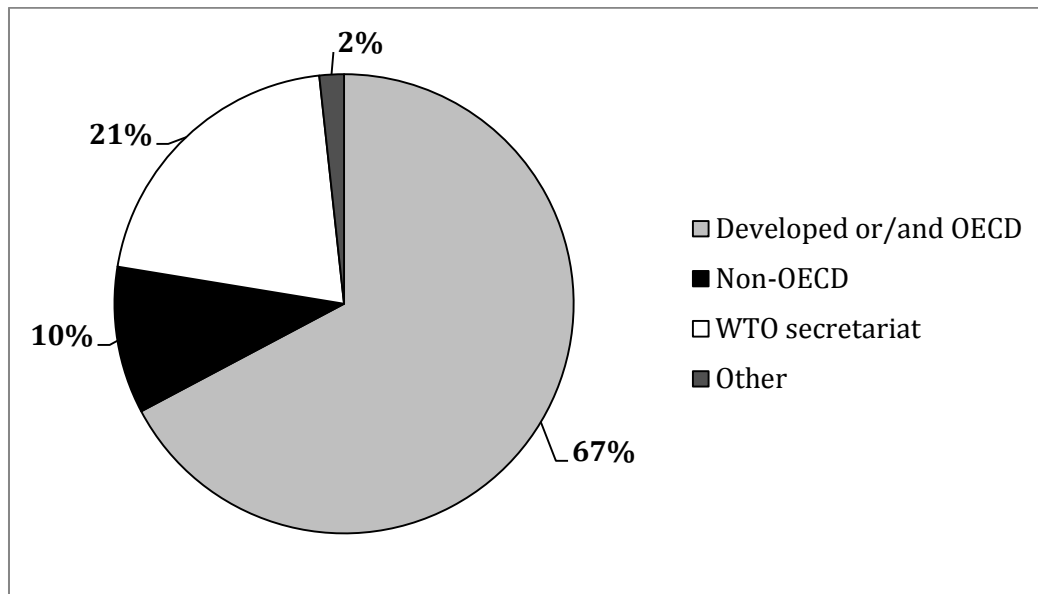
Number of submissions to the WGTI during the Doha Round (2002-2003)



Notes: TPKM = Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. The European Union (EU) was officially known as 'The European Community and its Member States' until 30 November 2009.

In fact, 67% of submissions were submitted by developed or OECD Members (39 submissions), 21% by the WTO secretariat (12 submissions) and only 10% by non-OECD countries (10 submissions). One submission was supported by a group of developing country proponents, the submission on Investors' and Home Governments' Obligations (WT/WGTI/W/152).

This clearly indicates that the discussions in the WGTI were driven by developed countries and were actively supported by technical analysis and background documents provided by the WTO Secretariat (12 submissions, more than any WTO Member).

Distribution of WGTI submissions during the Doha Round**II. DEVELOPING COUNTRY VIEWS ON DESIRABILITY OF LAUNCHING
MULTILATERAL NEGOTIATIONS ON INVESTMENT****a) Cancun Ministerial Conference**

Prior to the 5th Ministerial Conference (Cancun) in 2003, the general view among developing countries was that the preparatory work of the WGTI was not completed, as evidenced by the minutes of the last meeting of the WGTI:¹

- The preparatory work is not complete and that the WGTI should therefore not move to a different level of discussion - or rather to start negotiations (e.g Kenya).²
- As far as China was concerned the Group's work was far from complete. He reiterated the overwhelming importance of coming to terms with basic concepts, such as definition and scope, and their implications, before Members could reach a consensus as to whether the negotiations should proceed or not. China did not believe that the decision as to whether or not negotiations should start was long overdue, as suggested in the paper. It was important to get basic concepts and ideas clear first before Members could make a firm commitment to launch negotiations (China).³
- Investment is a new area for the WTO, and therefore Members needed to understand fully the development implications of the issue before plunging into negotiations. (Kenya, Indonesia).⁴ The core competence of the WTO lay in trade in goods and services, and this should remain so (India).⁵

¹ Report of the meeting held on 10 and 11 June 2003, Working Group on the Relationship between Trade and Investment, WTO document WT/WGTI/M/22 of 17 July 2003

² *Ibid*, paragraph 80

³ *Ibid*, paragraph 65

⁴ *Ibid*, paragraph 45 (Indonesia) and paragraph 80 (Kenya)

⁵ *Ibid*, paragraph 73

- Conditions for starting negotiations on a multilateral framework for investment had not been achieved despite intense discussions in the Working Group (Cuba).⁶ The many questions that so far remained unanswered should not be resolved in a negotiating mode (Malaysia, Kenya).⁷

Furthermore, questions were raised whether divergence could be achieved with respect to the issues subject to clarification:

- Clarification of the elements contained in paragraph 22 of Doha Declaration should lead to a convergence in understanding of the issues. This convergence had not been achieved (Kenya).⁸ Discussions in the Working Group meetings had been useful in the sense that they had revealed the complexities of issues involved and the divergence of Members' views (India).⁹

The need for a multilateral framework on investment was questioned, and whether such framework could be applied to all countries and take into account development concerns:

- No convincing argument had been presented to indicate that lack of predictability or certainty was the main constraint to investment flows (India).
- No convincing argument had been advanced that a single international standard could be applied across the board to all countries in the form of any possible multilateral investment framework (India)¹⁰.

As Thailand noted, if a multilateral framework on investment did not guarantee greater investment flow, as highlighted in paragraph 10 of the paper, why was it needed? ¹¹

Furthermore, there was ambiguity on what proponents of the multilateral framework on investment exactly wanted. Beyond some clarification on the issues mentioned in the 2001 Doha Ministerial Declaration, proponents did not come forward with comprehensive substantive proposals:

- For example, Thailand stated that "Today, many years later, her delegation was still waiting for the proponents of an investment negotiation to put forward a proposal with which all developing countries could live comfortably. Unfortunately, her delegation felt that the level of ambition that had been reflected in the debate so far made Thailand wonder whether it could accept negotiations"¹²

b) WGTI after the 2003 Cancun Ministerial Conference - the July 2004 Framework

The WGTI has been inactive since the 2003 Cancun Ministerial Conference.

Subsequent to the 2003 Cancun Ministerial Conference, WTO Members agreed to continue negotiations on trade facilitation and to have "no work towards negotiations .. within the WTO during the Doha Round" on the remaining Singapore issues (i.e. trade and investment, trade and competition policy and transparency in government procurement):

⁶ *Ibid*, paragraph 50

⁷ *Ibid*, paragraph 80 (Kenya) and paragraph 82 (Malaysia)

⁸ *Ibid*, paragraph 80

⁹ *Ibid*, paragraph 73

¹⁰ *Ibid*, paragraph 73

¹¹ *Ibid*, paragraph 81

¹² *Ibid*, paragraph 51



Paragraph 1(g) of the 2004 July framework¹³

g) Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

III. ISSUES FOR CLARIFICATION IN THE WGTI DURING THE DOHA ROUND

Paragraph 22 of the Doha Ministerial Declaration identifies seven areas for clarification in the Working Group on the Relationship between Trade and Investment:

1. scope and definition
2. transparency;
3. non-discrimination;
4. modalities for pre-establishment commitments based on a GATS-type, positive list approach;
5. development provisions;
6. exceptions and balance-of-payments safeguards;
7. consultation and the settlement of disputes between members.

It should be noted that the WGTI would 'focus' on the clarification of these seven issues, implying there was room to also discuss other issues mentioned in the Doha mandate, such as how any framework should reflect 'in a balanced manner the interests of home and host countries' or Members' 'right to regulate in the public interest' or how 'account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.' (paragraph 22 of the Doha Ministerial Declaration).

This Section reviews the seven issues for the clarification in the WGTI as well as investors' and home governments' obligations, as a group of developing countries made a proposal on this issue.

a) Issue 1 - Scope and definition

The definition of 'investment' (and 'investor') is an important element for the coverage/breadth of a possible multilateral investment agreement. To a large extent, the definition would determine the extent of investment liberalisation and investment protection to be undertaken by WTO Members.

The Doha Ministerial Declaration focuses particularly on Foreign Direct Investment (FDI). In paragraph 20, Members recognized 'the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment.

FDI should be distinguished from portfolio investment. The fifth Edition of the IMF's Balance of Payment Manual defines the owner of 10% or more of a company's capital as a direct investor. This guideline is not a strict rule, as it acknowledges that a smaller percentage may entail a controlling interest in the company (and, conversely, that a share of more than 10% may not signify control). But

¹³ Doha Work Programme - Decision Adopted by the General Council on 1 August 2004, WTO document WT/L/579 of 2 August 2004

the IMF recommends using this percentage as the basic dividing line between direct investment and portfolio investment in the form of shareholdings.¹⁴

The most common approaches to the definition of investments are the asset-based definition and the enterprise-based definition:

- The **asset-based definition** covers both Foreign Direct Investment (FDI) and portfolio investment, and the whole range of assets that can be associated with a foreign investment. It might include movable and immovable property (e.g. inventories, factories, land, and legal interests in property such as mortgages and liens), participation in companies, contractual rights, Intellectual Property Rights, good will, business contracts and concessions.
- The **enterprise-based definition** encompasses enterprises incorporated according to domestic laws where the foreign investor has a lasting or long-term controlling interest in the enterprise. The definition of ‘commercial presence’ in the GATS (mode 3) is very similar to the enterprise-based definition.¹⁵

In the WGTI, there was a clear differentiation in positions in the WGTI between developed and developing countries. Developed countries opted for a broad asset-based definition whereas developing countries (China and India) considered that a multilateral investment agreement should focus on Foreign Direct Investment (FDI).

The **United States** stated that “long-standing US practice is to have the broadest definition of investment, covering both direct and portfolio investment.” “A direct investment in one in which the investor obtains a lasting influence in, and a degree of influence over the management of, a business enterprise. Portfolio investment is all other investment, including investments in financial assets without the expectation of significant management control of the real assets on which the financial asset are based. Other examples of portfolio investment include, interests in concession agreements, contractual rights including rights embodied in IPRs, debt interests in business enterprise, and ownership interests in tangible and intangible property, such as leases, mortgages, and liens.”¹⁶

Positions of Members in WGTI on definition of investment

| Definition of investment in possible multilateral agreement on investment | | |
|---|--|----------------|
| Broad | Less broad | Narrow |
| United States Canada TPKM | EU (broad for post-establishment) Korea Japan | China India |

Canada preferred a broad asset-based (but closed) definition of investment. This would include equity investments, reinvested earnings, and intercompany debt flows, plus what is increasingly understood as other assets invested abroad for the purposes of economic benefit or other business purposes.¹⁷ Canada also argued that definition of investment “should also be flexible enough to encompass new forms of investment apart from tradition ownership and control.” Canada refers here to the so-called non-equity modes of investment. Multinational companies can coordinate the activities of host country firms through contractual relationships, without owning a stake in those firms. Examples of

¹⁴ Definitions of Foreign Direct Investment (FDI): a methodological note, Maitena Duce, Banco de España, <https://www.bis.org/publ/cgfs22bde3.pdf>

¹⁵ See also WTO secretariat note ‘Scope and definitions: “Investment” and “Investor”, WTO document WT/WGTI/W/18 of 21 March 2002, paragraphs 17 and 39 to 49.

¹⁶ WTO document WT/WGTI/W/142 of 16 September 2002

¹⁷ WTO documents WT/WGTI/W/146 of and WT/WGTI/W/113 of 12 April 2002

such contractual relationships include contract manufacturing, services outsourcing, contract farming, franchising, licensing and management contracts.¹⁸

The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (**TPKM**) preferred an asset-based definition with scheduled exceptions. Movement of capital that are mere financial transactions in nature for speculative purposes and which might have adverse impact on the financial system of a jurisdiction would have to be excluded from the scope of a possible multilateral investment agreement.¹⁹

Korea proposed to focus primarily on foreign direct investment but portfolio investment would not be excluded from disciplines. Short-term financial transactions of a speculative nature should definitively be excluded. A broad definition of investment should apply for ensuring transparency, stability and predictability.²⁰

The European Community and its Member States (now the **European Union**, EU) suggested a basic definition for the admission of foreign investment and a wider definition as regards the protection of established investment.²¹

Japan considered the use of the enterprise-based approach limited to direct investment (as defined by the IMF) as the most appropriate starting point of the discussion on the definition of investment in a multilateral investment framework. The ownership of an equity interest at a low rate (<10%) but which is aimed at long-term economic relations in the host country should be included. If portfolio investment were to be added, a clear delineation would be needed.²²

According to Japan, a possible multilateral agreement on investment should not cover short-term capital movements, as disciplines on short-term capital movements are outside the WTO's mandate.²³ The apprehension to allow more liberalisation and/or protection of short-term or speculative capital, common among Asian WTO Members (as evidenced by the WGTI submissions of Japan, Korea, TPKM and China), can be explained by the causes and developments of the 1997-1998 Asian financial crisis.

In one of its submissions, **India** highlighted that 'greenfield investment' is of more significance than merger and acquisitions (M&A), meaning that a possible investment agreement should cover investments that create tangible development benefits on the ground. A greenfield investment is a form of foreign direct investment where a parent company starts a new venture in a foreign country by constructing new operational facilities from the ground up. In addition to building new facilities, most parent companies also create new long-term jobs in the foreign country by hiring new employees.²⁴

In the view of **China**, 'FDI should be provided with rational and effective protection. Scope and definition in the context of a possible multilateral framework on investment should facilitate developing Members to attract FDI effectively and avoid financial risks'.²⁵ Foreign portfolio investment including capital flows of a speculative nature, and debt as well as loans should be excluded.²⁶

¹⁸ See also UNCTAD's World Investment Report 2011 on 'non-equity modes of international production and development', http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf

¹⁹ WTO document WT/WGT/W/128 of 1 July 2002

²⁰ WTO document WT/WGT/W/114 of 15 April 2002

²¹ WTO document WT/WGT/W/115 of 16 April 2002

²² WTO document WT/WGTI/W/111 of 12 April 2002

²³ *Ibid.*

²⁴ WTO document WT/WGTI/W/148

²⁵ WTO document WT/WGTI/W/159 of 15 April 2003, paragraph 4

²⁶ WTO document WT/WGTI/W/159 of 15 April 2003

The rationale for exclusion of loans and debt instruments seems to be based on empirical evidence. For instance, the WTO secretariat notes that in general equity investments (including portfolio) pose less of a potential problem for a host country's balance-of-payments than bond (debt) instruments.(..).²⁷

The current model bilateral investment treaties of India and Brazil opt for a narrower enterprise-definition rather than a broad asset-based definition.²⁸ Thus, these model BITs are on the same side of the spectrum as the developing country positions in the WGTI almost 15 years ago.

The WTO Secretariat paper on the definition of 'investment' and 'investor' identifies a (long) list of outstanding issues that remain to be clarified.²⁹

b) Issue 2 - Transparency

On the topic of transparency, only four Members made a submission: Canada, TPKM, Japan and China.

Canada stated that its reference with respect to transparency in a multilateral investment agreement would be Article X of the GATT (together with subsequent understandings). The Trade Facilitation Agreement (TFA) could be regarded as such a 'subsequent understanding', as the TFA, according to its preamble, aims to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994.³⁰

Japan and **TPKM** made similar proposals, and suggested that transparency could include the following:³¹

- Publication of the related domestic laws, regulations and systems;
- Notification and provision of information;
- Responses to requests for the supply of information;
- Establishment of enquiry points;
- Domestic judicial and complaints procedures / Administrative procedures.

China identified three types of stakeholders in the area of transparency: (i) the host country government; (ii) the home country government and (iii) the investor. Transparency disciplines should apply to all these groups:

- The host country government would be bound to publish its laws, make notifications to the WTO and establish enquiry points with regards to laws concerning the establishment and operations of enterprises, taxation and competition in the field of FDI.
- Similarly, the home country government would be bound to publish, notify and establish establishment of inquiry points on its policies, laws and regulations with regard to areas such as outward investment sectors, scales, destinations and transfer of technologies.
- On the part of the investor, transparency should include "the raising of resources, sale and purchase of products and services, transfer of payments as well as the business relations and

²⁷ Exceptions and Balance-of-Payments safeguard, WTO secretariat note, WTO document WT/WGTI/W/137 of 26 August 2002, paragraph 56

²⁸ See also 'Approaches to international investment protection; Divergent approaches between the Trans-Pacific Partnership And developing countries' model investment treaties', forthcoming research paper by the South Centre

²⁹ WTO document WT/WGTI/W/108 of 21 March 2002

³⁰ WTO document WT/WGTI/W/155 of 8 April 2003

³¹ WTO document WT/WGTI/W/112 of 12 April 2002 (Japan) and WT/WGTI/W/129 of 1 July 2002 (TPKM)



allocation of resources and profits, particularly between the parent company and subsidiaries and among the subsidiaries.”

China considered that transparency should not include procedures relating to domestic legislation, judicature, arbitration and administration of the host countries.³²

In the WGTI, the issue of ‘transparency’ was far from clarified - it could entail expansive obligations if crafted upon the transparency disciplines of the TFA

In the WGTI, the issue of ‘transparency’ was far from clarified. The Trade Facilitation Agreement can provide some insight into the meaning of ‘transparency’ in the WTO and its possible application to the area of investment. Transparency measures in the Trade Facilitation Agreement include the following:

- Publication of existing import-export regulations on the Internet
- Enquiry Points
- Prior comment - Stakeholder consultation on new draft regulations (prior to their finalization)
- Advance publication/notification of new regulation before their implementation
- Advance ruling (on tariff classification)
- Independent appeal mechanism (for traders to appeal Customs and other relevant trade control agencies’ rulings)

The scope of possible measures that could be subject to publication and other transparency disciplines could be potentially very large – labour law, tax law, competition law, and so on. Binding requirements for stakeholder consultations, advance notification of new draft regulation or advance rulings³³ would put limits on government budgets and have important implications for domestic policy processes.

Transparency measures can have a sizeable impact on the flexibility of governments to formulate policies, as they might provide foreigners more influence on the development of laws which could eventually lead to further liberalisation of investments, beyond what a Member had initially been prepared to do. For instance, many countries regulate the extent to which foreign investors can own businesses. If a country wishes to change foreign equity shares applicable in certain sectors, in the case of high transparency obligations (e.g. prior comments by stakeholders), this might lead to considerable pressure to raise such foreign equity shares. As such, transparency measures can be used as a tool (by investors) to obtain more market access and protections for their investments.

³² WTO document WT/WGII/W/160 of 15 April 2003

³³ For instance, whether a foreign investor would be eligible for a capital gains tax exemption

c) Issue 3 - Non-discrimination

'Non-discrimination' in the WTO and other trade agreements is constituted by Most Favoured Nation (MFN) treatment and National Treatment (NT). Applied to the context of investment:

- Most Favoured Nation treatment implies that States treat foreign investors no less favourable than the treatment it accords to other foreign investors and their investments.
- National Treatment means that States treat foreign investors at least as favourably as domestic investors.

With respect to non-discrimination, the WGTI focused discussions around two main questions:

- (1) Scope of application – should non-discrimination be applied to the 'pre-establishment' stage of investment, or 'post-establishment' stage, after an investment has been admitted into the country, or to all stages of investment?
- (2) Method of making commitments. In essence also a question about scope – should non-discrimination requirements apply to all sectors and to all possible measures with possible exceptions/reservations to be negotiated and scheduled (negative list basis) or can commitments be made on a sector by sector basis ('bottom-up' approach?). This question is closely linked to the 4th item for clarification in the WGTI.

The table below summarizes the positions of various Members on non-discrimination, as reflected in their submissions to the WGTI:

**Positions on non-discrimination
(Most Favoured Nation treatment and National Treatment)**

| Positions | WTO Member |
|--|--|
| MFN applies to all stages of investment, NT not preferred | India ³⁴ |
| MFN applies to all stages of investment, NT does not apply to pre-establishment phase but fully to post-establishment | TPKM |
| MFN applies to all stages of investment, NT applies to post-establishment stage. NT in pre-establishment phase to be scheduled on a 'positive list basis' (GATS model) | Mexico, EU |
| MFN and NT applies to all stages of investment (pre and post establishment) – negative list | Korea, Canada, Japan, Costa Rica ³⁵ |

MFN treatment

With respect to MFN, the general view emanating from Member submissions was that a general MFN principle applying to all stages of investment and sectors plus listing of possible MFN exemptions could be a possibility. This would be an approach similar to the GATS. Article II:1 GATS states that "With respect to any measure covered by this Agreement, each Member shall accord immediately and

³⁴ The question of including the MFN and NT standard in any international investment agreements tends to raise more complex issues than including them in trade agreements. Developing countries need to retain the ability to screen and channel foreign direct investment consistent with their domestic interests and priorities.

³⁵ Costa Rica indicated that applicability of DSU could differ for 'potential investors' (pre-establishment commitments)

unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. In addition, Members had the option to schedule a list of MFN exemptions (Article II:2 of GATS and Annex on Article II Exemptions).

Not much discussion took place regarding the possible development implications of a broad, unconditional MFN obligation in the area of investment. According to EU, an MFN obligation in investment “does not affect the internal economic policy of the host country, for instance, whether it liberalises or not certain economic sectors.”³⁶ Nonetheless, it can be imagined that application of broad MFN treatment can increase competition between domestic investors and foreign investors, as all foreign investors would receive the best available treatment extended to any foreign investor.

National Treatment

With respect to National Treatment, there were diverging positions on whether it should apply to the pre-establishment or post-establishment stage, or to both. Generally speaking, the pre-establishment stage encompasses the entry (admission) and establishment of investment³⁷, whereas post-establishment stage refers to expansion, management, conduct, operation, and sale/liquidation of existing investments. Commitments with respect to the pre-establishment stage are commonly referred to as ‘investment liberalisation’ commitments.

Several pre-establishment measures discriminate foreign investors/investment in favour of domestic investors/investment, such as banning or restricting FDI in certain sectors and maintaining screening procedures for large FDI proposals. Another example provided by United States in one of its WGII submissions are limits on foreign equity holdings and equity divestiture requirements which “are barriers to establishment and clear violations of national treatment with respect to investment, since domestic investors do not have to take on a foreign partner or sell equity to foreign investors.”³⁸ Thus, conceptually, applying national treatment to the pre-establishment stage for such measures is akin to prohibiting such pre-establishment measures.

Nonetheless, it should be noted that not all measures relating to establishment and admission of investment are by definition discriminatory. Quota-type limits on the number or size of investments without introducing nationality criteria, similar to those enumerated in Article XVI:2(a) to (d) of GATS, are not necessarily discriminatory (e.g. a requirement that only five banks can operate in the country).

The GATS applies also to pre-establishment measures. Article XVIII of the GATS (National Treatment) applies to any measure that modifies the conditions of competition in favour of domestic services or services suppliers, covering *de facto* and *de jure* discrimination. It thus applies to both the pre-establishment and post-establishment stage. The definition of ‘commercial presence’ (mode 3) includes “any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service” (Article XXVIII(d) of GATS). ‘Constitution’ and ‘acquisition’ refer the pre-establishment stage of investment and ‘maintenance’ to post-establishment stage.

Furthermore, Article XVI GATS (Market access) expressly prohibits measures in the absence of scheduled limitations which relate to the pre-establishment stage such as measures that limit the number of service suppliers (Article XVI:2a), the total value of service transactions or assets (Article XVI:2b), the total number of service operations or on the total quantity of service output, or measures

³⁶ WT/WGII/W/121 of

³⁷ UNCTAD World Investment Report 2015 considers the ‘expansion’ of investment as part of the pre-establishment dimension, http://unctad.org/en/PublicationChapters/wir2015ch3_en.pdf

³⁸ WT/WGII/W/32 of 6 April 1998

which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service (Article XVI:2e) or measures that curb the participation of foreign shareholding (Article XVI:2f).³⁹

Various questions and issues concerning National Treatment not exhaustively discussed in the WGTI

Several important issues to the National Treatment obligation were not clarified in the WGTI. They include the following questions⁴⁰

- Should the national treatment standard apply to investors but also to investment (and which types of investment) – this issue is also closely related to scope/definition
- Do foreign and domestic investors have to be ‘like’ and how is likeness determined?
- Do foreign and domestic investors have to be in like/identical/same circumstances?
- Does national treatment cover ‘de jure’ as well as ‘de facto discrimination’?
- Should treatment to foreign investors be ‘no less favourable, ‘as favourable as’?
- How would the national treatment principle relate to other possible standards of treatment in a future multilateral agreement?
- Whether and how the National Treatment principle applies to subnational authorities –should they extend preferential treatment of domestic investors also to foreign investors?
- If certain measures for investment at the pre-establishment stage are prohibited (similar to Article XVI GATS), what would be the actual need/additional value of a national treatment obligation applying to the pre-establishment stage?

d) Issue 4 - Modalities for pre-establishment commitments based on a GATS-type approach

Scheduling pre-establishment commitments on a positive list basis?

In GATS, WTO Members have discretion in choosing which sectors to ‘bind’ (subject to negotiations). Paragraph 20 of the Doha declaration refers to this modality as the ‘GATS-type, positive approach’.

Once a sector is ‘bound’ or ‘committed’ (i.e. positive-list approach), Members are not allowed to apply the six forms of market access limitations listed under Article XVI.2 (Market Access)⁴¹ unless they have scheduled such limitations with respect to specific modes of supply in that sector (i.e. negative list approach).⁴² Thus, **GATS in effect utilizes a hybrid approach - a combination of positive and negative list approaches.**

³⁹ Article XVI:2d of GATS concerns limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier, which are more relation to the operation/post-establishment stage

⁴⁰ Some of this issues are discussed in UNCTAD Series on issues in international investment agreements (National Treatment), 1999, <http://unctad.org/en/Docs/psiteiid11v4.en.pdf>

⁴¹ These include a) limitations on the number of services suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; b) limitations on the total value of service transactions or assets; c) limitations on the total number of service operations or on the service output expressed in terms of designated numerical units; d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ; e) measures which restrict or require specific types of legal entity or joint venture; f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

⁴² In GATS, limitations to Article XVII (National Treatment) obligations are also scheduled on a negative list basis. Furthermore in GATS, the MFN obligation is ‘unconditional’ and applies to all service sectors, whether or not committed. Any exemptions have had to be listed, also on a negative list basis.



Arguably the GATS-type approach offers some level of flexibility or ‘policy space for development’, as the EU put it in one WGTI submission.⁴³ Nonetheless, in practice once a sector or sub-sector is opened, each limitation to market access within that sector or sub-sector would have to be listed otherwise it would be prohibited. For instance, once a service sector is committed for market opening, a joint venture requirement (Art XVI.2e) cannot be implemented in that sector unless the Member has put it in its Schedule. Applied to investment, this could well result in pressure on developing countries to schedule as few limitations as possible leading to high levels of investment liberalisation.

The GATS-style hybrid approach is therefore not as flexible as it is sometimes portrayed. If this approach is taken, it will also be very important to clarify this list of prohibited pre-establishment measures (such as the one in GATS Article XVI) and to have as short a list as possible.

Definition of pre-establishment commitments not clarified

In the WGTI discussions, the definition of ‘pre-establishment commitments’ or ‘measures’ was not clarified. UNCTAD (1999)⁴⁴ provides an overly comprehensive definition of pre-establishment measures:⁴⁵

- (a) Measures relating to the admission and establishment. These measures could be classified in (i) Controls over access to the host-country economy and (ii) Conditional entry into the host-country economy; (such as local content rules and minimum capital requirements).
- (b) Measures relating to ownership and control, which can be subdivided into (i) Controls over ownership; (ii) Controls based on limitation of shareholder powers; (iii) Controls based on governmental intervention in the running of the investment; (iv) Other types of restrictions (such as restrictions on leasing and owning land).

Some of these measures are clearly related to the pre-establishment stage whereas others, in a strict(er) sense, are arguably not:

- Measures that control access to the host country economy are clearly related to the pre-establishment stage of investment. They include bans on FDI in certain sectors, quantitative restrictions on the number of foreign companies, the requirements for investment to take a certain legal form or a requirement of local presence, compulsory joint ventures with State participation or with local private investors, screening or authorization of investment proposals, restriction on certain forms of entry (e.g. on mergers and acquisitions) and prohibiting foreign investment in certain zones or regions of the country.
- Measures that control ownership or limit shareholder powers for foreign investors are also associated with the pre-establishment stage.
- The other groups of measures affect the entire operation of the investment, for example those that give investors conditional entry into the host country economy (e.g. local content requirements), or restrictions to lease or own land (‘other types of restrictions’).

In one submission, the EU clarifies that “Unlike MFN and NT, which are relative standards of treatment, market access provisions address the host country’s regulations on the entry and establishment of investment in absolute terms. In other words, in addition to the principles of non-discrimination, a host country may commit to refrain from applying certain specific restrictive measures to the entry of foreign investment regardless of whether they are discriminatory or not.”⁴⁶ Thus, the EU envisages a future multilateral investment agreement containing provisions on non-discrimination (Most Favoured Nation treatment and National Treatment) as well as incorporating

⁴³ ‘Concept paper on policy space for development’, WTO document WT/WGTI/W/154 of 7 April 2003

⁴⁴ UNCTAD Series on issues in international investment agreements, "Admission and Establishment", 1999. http://unctad.org/en/Docs/iteit10v2_en.pdf

⁴⁵ This definition is not necessarily in the interests of developing countries especially if a GATS-type approach which includes the negative list is used.

⁴⁶ WT/WGTI/W/121 of 27 June 2002

market access provisions that stipulate generally prohibited measures affecting the entry and establishment of investment.

Scheduling of (pre-establishment) commitments

In the most specific submission on this topic, the EU provided an example on how pre-establishment commitments could be scheduled in a GATS-type approach:

EU example of a method of scheduling pre-establishment commitments

| Commitments | Limitations on market access | Limitations on national treatment |
|---|---|--|
| Horizontal commitments (on all sectors) | | <i>Unbound for special preferences granted to "special minority" persons or companies.</i> |
| Sector A | | <i>Unbound for all existing subsidies to domestic enterprises, for the purpose of upgrading the level of workers' skills</i> |
| Sector B | <i>Foreign investors can only operate through joint ventures, in which they shall not own more than 50% of the capital.</i> | |
| Sector C | <i>Prior approval by the State authority is required for the establishment of new companies or the acquisition of existing local companies.</i> | |

Source: WT/WGTI/W/154 of 7 April 2003, Annex 'Examples of pre-establishment commitments in a GATS-type approach'.

The limitations in Sector B (joint venture requirement, foreign equity cap) and Sector C (prior approval for foreign investment) are clearly related to the pre-establishment stage of investment.⁴⁷ Such limitations to market access would require a definition of 'market access' in the main text of a possible multilateral investment agreement that would enable the scheduling of limitations. While it is not explicitly stated in the EU submission to the WGTI, if the GATS model would be followed, it is likely that market access provisions/pre-establishment commitments would be crafted upon Article XVI GATS ('Market Access'). As a matter of fact, the requirement for prior approval by the State authority for the establishment of new companies or the acquisition of existing local companies (the limitation inscribed for Sector C in the example above) could be considered a similar limitation as GATS Article XVI:2(a) or (b). The joint venture requirement and foreign equity cap are similar limitations to those listed in GATS Article XVI:2(e) and (f).

The recent EU-Viet Nam FTA follows this approach. In sectors where market access commitments are undertaken, Parties shall not maintain or adopt a number of listed measures – a list similar to Article XVI:2 GATS (see table on next page).

⁴⁷ The EU examples of limitations on national treatment, however (subsidies and preferences for minorities), are measures that can apply to both stages. Nonetheless, the EU also put these 2 examples the rubric of 'pre-establishment commitments'.

Market access in GATS and Market Access in Investment Chapter of EU-Vietnam FTA

| Article XVI:2 GATS | EU-Viet Nam FTA ⁴⁸ |
|---|---|
| 1. With respect to market access through the modes of supply identified in Article I , each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.(8) | With respect to market access through establishment and maintenance , each Party shall accord treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in the schedule of specific commitments contained in Annexes [...] (lists of commitments on liberalisation of investments). |
| 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: | In sectors where market access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its schedule of specific commitments contained in Annexes [...] (lists of commitments on liberalisation of investments) are defined as |
| (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; | (a) limitations on the number of enterprises that may perform a specific economic activity , whether in the form of numerical quotas, monopolies, exclusive rights or the requirements of an economic needs test; |
| (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; | (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test; |
| (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;(9) | (c) limitations on the total number of operations or on the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; |
| (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; | (f) limitations on the total number of natural persons that may be employed in a particular sector or that an investor may employ and who are necessary for, and directly related to, the performance of the economic activity in the form of numerical quotas or the requirement of an economic needs test. |
| (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and | (e) measures which restrict or require specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity. |
| (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment | (d) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; |

⁴⁸ EU-Vietnam FTA: Agreed text as of January 2016, Chapter 8: Trade in Services, Investment and E-Commerce, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf

e) Issue 5 - Development provisions

In this area, five WTO Members made specific submissions: Canada, Switzerland, EU, India and TPKM.

Switzerland argued that “A transparent and predictable FDI regime is one of the key conditions to attract international investment. A multilateral agreement on such investment will provide a common basic framework in this important policy area. Both host and home countries should benefit with the establishment of a clear framework including all the main elements mentioned in para 22 of the Doha Declaration”. Switzerland considered that the method of scheduling would allow for enough flexibility: “A multilateral Agreement on investment will have to include development provisions allowing developing countries to take commitments according to their overall policy objectives and their level of development.”⁴⁹

Likewise, the **EU** posited that “rather than only including specific development or S&DT provisions, which can certainly be useful in certain cases, we believe that the development dimension should be incorporated in the overall structure of a MIF (Multilateral Investment Framework). The end result of a MIF should be development friendly.” It added that “However, the level of commitments of each country will determine the value added of an MIF for itself and its real contribution to improvement of FDI conditions world-wide to the benefit of development”⁵⁰

In the EU’s view, other possible elements of development provisions would include:

- A flexible, GATS-type structure based on positive commitments could be used for market access and NT provisions at the pre-establishment stage.
- Technical assistance
- Right to regulate to be ‘explicitly recognized’
- Possible exceptions for public interest (e.g. security, protection of public moral, public order and consumers, exercise of governmental authorities)
- Restrictions to safeguard the Balance of Payments in accordance with IMF rules
- The question of investors’ behaviour and their responsibility vis-à-vis host countries could also be addressed, such as the consideration of the OECD Guidelines for multinational enterprises.

Canada (in a submission on exceptions and balance-of-payments safeguards) also believed that “exceptions combined with reservations (including with respect to unspecified future measures) could provide much of the flexibility Ministers indicated would be necessary in any comprehensive investment agreement in the WTO. Developing countries may be expected to figure among them.”⁵¹ In its specific submission on development provisions, Canada indicated that technical assistance and capacity building would be important and “committed to actively participate” in technical assistance and capacity building”.⁵²

India considered that the key features of a possible investment agreement would determine its development-friendliness. Such key features would include:⁵³

- Definition of investment: focus on those investments that contribute to the expansion of trade, as clearly indicated by Ministers at Doha. Green field investment, for example, would be of more significance than mergers and acquisitions as they could have more beneficial effects on the economy
- Developing countries need to retain the ability to screen and channel foreign investment in accordance with their domestic interests and priorities

⁴⁹ WT/WTGI/W/133 of 18 July 2002

⁵⁰ WT/WTGI/W/140 of 12 September 2002

⁵¹ WT/WTGI/W/146 of 17 September 2002

⁵² WT/WTGI/W/131 of 3 July 2002

⁵³ WT/WTGI/W/148 of 7 October 2002

- There is a need to establish home-country and investor responsibilities and obligations, for example through a binding code of conduct on investors backed up by enforcement by home countries through their domestic laws that can be activated by any host country.
- Performance requirements should not be prohibited.
- Balance of Payments are needed to address possible damaging effect of capital outflows on balance-of-payments

TPKM considered that there could be room for ‘transitional arrangements’ (i.e. delay in full implementation of obligations) which should only apply to specific issues, such as the establishment of an enquiry point. It did not consider transition periods appropriate for commitments such as publication of regulations, or the extension of MFN treatment (i.e. no Special and Differential Treatment in the case of such obligations).

Similar to EU and Switzerland, TPKM stated that the commitment model under the GATS provides a substantial degree of flexibility, and that such special treatment could go far in meeting the needs of developing Members.

TPKM specifically disapproved of developing Members having the right to impose performance requirements on foreign investors.⁵⁴

f) Issue 6 - Exceptions and balance-of-payments safeguards

This topic can be divided into three subtopics: (i) General and security exceptions, (ii) Exceptions for bilateral and regional investment treatment and (iii) Balance-of-Payments safeguards. Most specific discussions under this topic related to the Balance-of-Payments safeguards.

With respect to general exceptions and security exceptions, TPKM states that the conditions mentioned in XX of GATT and XVbis of GATS are bases for general exceptions under a possible future multilateral investment framework.⁵⁵ Likewise, security exceptions could also be made applicable to an investment agreement. Japan submitted that “with regard to exceptions, we need to start our considerations with the elements composing general exceptions and security exceptions, referring to the exceptions in the existing WTO rules. Investment-specific elements, if any, should be appropriately reflected in the consideration.”⁵⁶

With respect to exceptions for bilateral/regional investment treaties, the discussions in the WGII were not very exhaustive. In its submission to the WGII, TPKM was of the view that the threshold should be at least be as high, if not higher than the existing arrangement provided for Article XXIV GATT and Article V GATS (i.e. exception to MFN treatment applies if an agreement covers ‘substantially all trade’ or ‘substantially all service sectors’).⁵⁷ This issue has gained in importance during the last 15 years due to the multiplication of bilateral and regional investment treaties, including investment chapters of preferential trade agreements.

On the issue of Balance-of-Payments (BOP) safeguards, the EU was of the view that a future ‘Investment for Development Framework (IDF)’ should include the possibility for members to take safeguard measures in case of BOP crises, under strict conditions. BOP safeguard measures should be applied:⁵⁸

- in exceptional circumstances

⁵⁴ WT/WGTI/W/126 of 1 July 2002, paragraph 7

⁵⁵ WT/WGTI/W/144 of 16 September 2002

⁵⁶ WT/WGTI/W/138 of 11 September 2002

⁵⁷ WT/WGTI/W/144 of 16 September 2002

⁵⁸ WT/WGTI/W/153 of 28 November 2002



- in a non-discriminatory manner
- in full compliances with the Articles of Agreement of the IMF and other relevant international provisions
- for a limited period of time
- phased out progressively
- must not go beyond what is necessary to address the BOP crises,
- avoid unnecessary damages to the interests of other members, and
- not be used to justify measures adopted to protect specific industries or sectors

Korea as well as the EU linked the need for Balance of Payments safeguard with the requirement to allow free current and capital account transfers. The EU: “As a general rule, Members should allow all current and capital transfers related to established investments, and, as far as the making of new investments is concerned, all current and capital transfers related to those investments covered by the countries’ sectoral list of commitments”. Korea posited that “it is important for an IIA (International Investment Agreement) to strike a balance between a home country’s desire to obtain guarantees on the free transfer of investment-related payments and the concerns of a host country about the impact of a sudden repatriation of funds on its balance-of-payments.”⁵⁹ Korea considered the Balance-of-Payments clause a temporary derogation from the obligation of allowing the free transfer of payments.⁶⁰

TPKM said that the need for a Balance-of-Payment exception is not directly obvious as investors may carry their capital inflow with them. Nonetheless, it recognized that BOP safeguards “could be applicable in case of capital outflow” but warned that “this limits the use of investors’ own assets” (in other words, this is not preferred and could be tantamount to expropriation).⁶¹

Canada provides the text of the Balance-of-Payments safeguard in the Investment Chapter of the Canada-Chile FT, implying that this could be a blueprint for a Balance-of-Safeguard in a multilateral investment agreement⁶²

The table below summarizes the positions of WTO Members on BoP safeguard, as captured by their submissions to the WGII:

⁵⁹ WT/WGII/W/153 of 28 November 2002

⁶⁰ WT/WGII/W/143 of 16 September 2002

⁶¹ WT/WGII/W/144 of 16 September 2002

⁶² WT/WGII/W/146 of 17 September 2002



Positions on Balance-of-Payments safeguards

| | |
|--|--|
| Positions (BoP safeguard) | WTO Member |
| Need for BOP exception is less clear because investors may carry their capital inflow with them; but could be applicable in case of capital outflow (but this limits the use of investors' own assets) | TPKM |
| Possibility to take safeguard measures in case of BOP crises under very limited circumstances / Links BOP safeguard to commitment to allow free movement of current and capital transfers | EU, Korea |
| It would be appropriate to include balance-of-payments safeguards in the investment framework, based on existing WTO BOP safeguards and reflecting investment-specific elements, if any. | Japan |
| Example of 'Exceptions' Chapter of Canada-Chile FTA | Canada |
| BOP safeguard needed to address possible damaging effect of capital outflows on balance-of-payments | India (submission on development provisions) |

g) Issue 7 - Consultation and dispute settlement

Four WTO Members made submissions on this issue: Canada, TPKM, EU and Japan.

The general view from these submissions was that the existing WTO DSM should in principle be applied to disputes arising from a possible multilateral investment agreement.

Most submissions stated that the WTO DSM should only deal with disputes between Members. Canada went a bit further by stating that "it would be inappropriate to provide for an alternative dispute settlement mechanism, such as an investor-state dispute settlement option." Nonetheless, in the view of TPKM, "the possible future multilateral investment agreement could also have such an additional scheme so as to provide ways to resolved disputes between investors and host countries", which should exist in parallel with ICSID."

With regards to remedies available to Members through the WTO DSM, TPKM was of the opinion that monetary compensation to the home country of investors merits further discussion. Nonetheless, Japan reinforced that the remedy available to Members should be the recommendation to bring the measure into conformity with WTO rules. Japan also highlighted the difficulty in determining the level of nullification or impairment in the field of investment, especially in the pre-establishment phase.

With regards to forum-shopping, Japan calls for a discussion on whether 'forum-shopping' between WTO and BITs/RTAs should be allowed or not. At present, the WTO (without the investment agreement) is an additional avenue to contest governmental measures, even if the same or similar cases are under investor-state arbitration. The Australia Tobacco case is a prime example. Philip Morris Asia considers that Australia's Tobacco Plain Packaging Act 2011 constitutes a violation of the Australia-Hong Kong BIT (*inter alia* expropriation, and violations of fair and equitable treatment as well as full protection and security). At the same time, five dispute settlement cases against Australia have been lodged at the WTO.

TPKM suggested to include a standing consent to arbitration in a possible future multilateral investment agreement in WTO, with the choice of procedure at the discretion of the investor: "Members may also consider including a provision to the effect that whenever an investor requests dispute settlement, the host country will be required, at the choice of the investor, to agree with using either the procedure of the ICSID (if it is ICSID Member), the Additional Facility under ICSID, UNCITRAL or ICC rules."

Such a proposal would have deep and far-ranging consequences. In cases where no BIT is applicable, investors can start arbitration cases against WTO Members. Arbitrators would then presumably apply WTO law as well as interpret other areas of WTO law (in place of the Panel and Appellate Body).

Furthermore, standing consent to arbitration goes beyond or overrules what countries might have agreed to in their respective BITs such as:

- A waiting/cooling off period before an arbitration procedure can be started
- Requirement to resolve disputes ‘amicably’ through negotiations and consultation during a certain period of time.
- Exhaustion of local remedies
- Choice of forum – TPKM’s proposal gives the investor a discretionary choice which rules to use (ICSID, UNCITRAL or ICC)
- Fork-in-the-road provisions: once an investor chooses the forum it has to stick with it (final forum choice).

h) Investors’ and Home Governments’ Obligations

Investment agreements are asymmetrical and imbalanced. Investors are being accorded substantial rights without being subject to any specific obligations, while States only have obligations. In other words, an investor cannot breach any rights of the host State under investment treaties because no such rights actually exist.

Paragraph 22 of the Doha Ministerial Declaration stipulates that:

“Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.”

In this context, a group of developing countries (China, Cuba, India, Kenya, Pakistan and Zimbabwe) made proposals on investors’ and home governments’ obligations.⁶³ They called for legally enforceable norms of investors’ or corporate conduct, which are urgently required. They stated that “The proponents of a multilateral framework on investment in the WTO have been seeking binding rights of foreign investors that the host member governments should agree to provide. However, not much discussion has taken place in the Working Group on what could be the obligations on the part of foreign investors or the home governments.”

Several proposals with respect to investor obligations were made in various areas: (1) General principles; (2) Restrictive business practices (RBPs) (among others incorporating UNCTAD’s Set of Multilaterally Agreed Principles on RBPs into the WTO); (3) Technology transfer; (4) Balance of payments; (5) Ownership and control; (6) Consumer protection and environmental protection and (7) Disclosure and accounting.

According to the proponents, home Member obligations should be an integral part of the discussions in the WGII, including

- accepting obligations to enact legislation prohibiting foreign corrupt practices of their corporations and requiring them to follow in their overseas operations proper norms of consumer protection and environmental protection;

⁶³ WT/WGII/W/152 of 19 November 2002

- undertaking to provide information regarding the involvement of MNEs in any questionable dealings and other information on their background that may be useful for the host government at the time of approval as well as subsequently;
- undertaking to cooperate with the host governments in control of RBPs, transfer-pricing manipulation, financial speculation and other unethical, irresponsible or unaccountable practices of MNEs, and in recovery of the liabilities of MNEs resulting from their mis-conduct in host members;
- undertaking to refrain from measures and policies that oblige or influence their corporations in their overseas activities to behave or operate in a manner that is detrimental to the interests of the host members;
- undertaking to institute measures and policies that oblige their corporations to meet their obligations to behave in a responsible and accountable manner in the host members, and that oblige their corporations to contribute to fulfilling the needs and development objectives of the host members;
- undertaking to refrain from policies and measures to restrict their MNEs on transfer or diffusion of technologies to their partners in the host members, including on the pretext of security reasons in the areas of disclosure

India called for a discussion in the WGII on a “binding code of conduct on investors with a further stipulation that it shall be enforced by home countries through a set of precise domestic laws that can be activated by any host country.”⁶⁴

According to the EU, the question of investors’ behaviour and their responsibility vis-à-vis host countries could be addressed in a future multilateral investment agreement. In their view, “the OECD Guidelines for Multinational Enterprises provide a useful example of how to ensure that MNEs conduct their activities in a responsible manner and in harmony with the policies of the countries in which they operate.”⁶⁵

There are several existing (draft) instruments that are relevant to this discussions including the draft UN Code of Conduct of Transnational corporations⁶⁶, draft International Code of Conduct on Transfer of Technology⁶⁷ (both negotiated under auspices under UNCTAD), UNCTAD’s Set of Multilaterally Agreed Principles on Restrictive Business Practices⁶⁸, the OECD Guidelines for multinational enterprises and the ILO Tripartite declaration of principles concerning multinational enterprises and social policy⁶⁹. The common element of existing instruments on investor obligations is that they are not binding, and enforcement mechanisms are rather weak.

This area remained essentially unexplored in the WGII. An issue for clarification in this area would include the scope of investor behaviour that should be disciplined.

Also more clarity would be needed on the manner in which a WTO agreement could enforce binding obligations on investors given the WTO’s inter-governmental character. Typically, such obligations would have to be enforced through measures of Members. An illustrative list of examples of such obligations could be

- an obligation of WTO Members to establish a contact point/Ombudsman where private parties in the host country affected by the activities of the foreign investor could file complaints,

⁶⁴ WTO document WT/WGII/W/148 of 7 October 2002

⁶⁵ WT/WGII/W/140 f 12 September 2002, paragraph 28

⁶⁶ The text can be retrieved from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891>

⁶⁷ See for more on technology transfer, UNCTAD Series on issues in international investment agreements, “Technology Transfer”, 2001 <http://unctad.org/en/docs/psiteitd28.en.pdf>

⁶⁸ <http://unctad.org/en/Pages/DITC/CompetitionLaw/The-United-Nations-Set-of-Principles-on-Competition.aspx>

⁶⁹ http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm



- obligations by the 'home governments' to provide information,
- obligations by the 'home governments' to cooperate,
- obligations by 'home governments' to adopt and enforce domestic laws that oblige their corporations to behave in a responsible and accountable manner in host countries.

A complexity in this debate is how to define 'home government', for example investment can be routed through other countries, not directly from the home country to the host country.

ANNEX 1 - WGTI PRIOR TO DOHA ROUND: CHECKLIST OF ISSUES SUGGESTED FOR STUDYANNEX2

3093

**Working Group on the Relationship
between Trade and Investment**

4 June 1997

CHECKLIST OF ISSUES SUGGESTED FOR STUDYNon-Paper by the ChairRevision

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements, not only category I, should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.

I. Implications of the relationship between trade and investment for development and economic growth, including:

- economic parameters relating to macroeconomic stability, such as domestic savings, fiscal position and the balance of payments;
- industrialization, privatization, employment, income and wealth distribution, competitiveness, transfer of technology and managerial skills;
- domestic conditions of competition and market structures.

In this work, the Working Group should seek to benefit from the experience of Members at different stages of development and take account of recent trends in foreign investment flows and of the relationship between different kinds of foreign investment.

II. The economic relationship between trade and investment:

- the degree of correlation between trade and investment flows;
- the determinants of the relationship between trade and investment;
- the impact of business strategies, practices and decision-making on trade and investment, including through case studies;



- the relationship between the mobility of capital and the mobility of labour;
 - the impact of trade policies and measures on investment flows, including the effect of the growing number of bilateral and regional arrangements;
 - the impact of investment policies and measures on trade;
 - country experiences regarding national investment policies, including investment incentives and disincentives;
 - the relationship between foreign investment and competition policy.
- III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment:
- existing WTO provisions;
 - bilateral, regional, plurilateral and multilateral agreements and initiatives;
 - implications for trade and investment flows of existing international instruments.
- IV. On the basis of the work above:¹
- identification of common features and differences, including overlaps and possible conflicts, as well as possible gaps in existing international instruments;
 - advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective;
 - the rights and obligations of home and host countries and of investors and host countries;
 - the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy.

¹The question of the timing of work under section IV was the subject of a decision taken by the Working Group at its meeting of 2-3 June 1997.