Chapter 3.10
Investment Law and Trade Law

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A. INTRODUCTION

International investment law and international trade law are two fields of law that have run on separate tracks for much of their history. Consequently, they are classically taught to law students as two separate fields, and many academic texts dealing with either field only mention the other briefly. International trade law presents its own body of law, chiefly focused around the General Agreement on Tariffs and Trade (GATT), as well as the World Trade Organization (WTO) and its complementary agreements, such as the General Agreement on Trade in Services (GATS), or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This field also classically includes a number of multilateral and bilateral trade agreements, such as the North American Free Trade Agreement (NAFTA), and its replacement, the USMCA. By contrast, international investment law, as previously discussed in other chapters of this book, is chiefly found in bilateral investment agreements (BITs) and, to a lesser extent, in special investment chapters within trade agreements. Beyond these difference in sources, the two fields also differ in what sort of topics they cover. International trade law focuses on the cross-border movement of goods, services and related questions such as intellectual property rights. By contrast, as the name already shows, international investment law is chiefly focused on foreign investments and their legal protection. Thus, on a surface level, the fields are indeed separate from each other, mostly using different legal sources and dealing with different forms of economic activity (short-term trade vs. long-term investment).

However, the origins of these two legal fields and, potentially their future, are closely intertwined with each other. This can be observed from their historical roots, partially shared terminologies (such as with regards to standards of treatment), and the more recent trend that sources of international investment law are increasingly found embedded in more and more comprehensive trade agreements. All of this, but especially the latter element, can point towards a possible confluence between the two legal fields with regards to their future.

In this chapter, we will examine these interconnections and parallel developments. In particular, the chapter will focus on three main topics: first, establishing the common themes between the two fields, their shared origins, and their parallel development, alongside some of their differences. This will allow the reader to contextualize the strange relationship between these two fields of law more easily. Second, we will examine the WTO Agreement on Trade-Related Investment Measures (TRIMs). This complementary international agreement to the Marrakesh Agreement (which created the WTO) is one of the few examples where the main body of international trade law deals with investment. In the same section, we will also examine the General Agreement on Trade in Services (GATS) very briefly, as it also connects to the topic of investment. Third, we will discuss the work of the WTO Working Group on the Relationship between Trade and Investment. This WTO Working Group has been directly dealing with the topic of this chapter, and thus its work and output is

important for our purposes. In this context, we will also briefly explain the historical development of the Working Group, since it ties closely to their work. Fourth, we will analyze the re-convergence of the two fields of law in the past two decades. In this part, we will mainly deal with two topics of particular note: the emergence of investment chapters in international trade agreements, and the possible decline of the World Trade Organization and the reframing of international trade law that would necessarily follow, and how this phenomenon ties back to the aforementioned trade agreements. Through these examinations, the chapter is intended to provide a comprehensive overview of the issues.

B. The Common Themes Between International Investment and Trade and the Parallel Development of Investment Law and Trade Law

The most obvious thematic connection between international trade and international investment law lies in their fundamentally similar natures. In both cases, simply speaking, an international body of law seeks to establish an equal playing field between domestic and foreign economic actors. Thus, their shared motivation is economic liberalization and globalization. This is easily evidenced. The foundation of modern international trade law is the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). The aforementioned instrument and international organization both seek to advance the demolition of trade barriers between their signatory states, regulation and minimization of remaining trade barriers toward a balance of import and export trade, and the general promotion of interdependent, globalized and liberalized economies across the world.[1] In a similar, though less clear-cut way, international investment law seeks to foster increased cross-border investment by providing special privileges and ensuring the rights of foreign investors and their investments via international agreements. Thus, while their exact methodology somewhat differs, both legal fields ultimately share mostly the same objectives (when projected to a more general viewpoint).

In a similar broader sense, there is an inherent connection between some international trade law questions and some international investment law questions. Compared to its earliest days of covering merely trade in goods, modern international trade law covers a wide range of topics, including services[2] and intellectual property,[3] while also interacting with various environmental and health-related measures undertaken by states, for example, through the so-called SPS Agreement,[4] which deals with sanitary and phytosanitary measures to protect human, animal and plant life and health. As for international investment law, while there is the obvious focus on investments, these investments, depending on their exact nature, can easily interact with trade in goods or services

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1 Zeiler, *The Expanding Mandate of the GATT: The First Seven Rounds,* in Narlikar, Daunton and Stern (eds), *The Oxford Handbook on the World Trade Organization*, Oxford Univ. Press 2012, pp. 102-121, at 103-104.

2 See General Agreement on Trade in Services (GATS), https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

3 See WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), https://www.wto.org/english/docs_e/legal_e/31bis_trips_e.pdf.

4 See WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

if the foreign investment requires imported goods or services to flourish or is aimed, at least in part, at producing goods or services for export from the host state. Another topic common to trade and investment is the protection of intellectual property. In a similar fashion, the environmental or public health regulation of a state can affect both questions of international trade and foreign investment. Thus, while the legal fields are somewhat delineated from each other on the purely theoretical level, there are many overlapping issues in actual practice.

Another of the most obvious thematic connections between international trade law and international investment law are the standards of treatment. In essence, both legal fields share several standards relating to the treatment of foreign investments (in case of international investment law) and foreign goods and services (in case of international trade law). To be specific, we can mention most the favored nation (MFN) treatment[5] and national treatment / prohibition of discrimination[6] as the most classic parallels. These standards essentially exist in both legal fields, sharing not only their name but also their essential characteristics. Naturally, both legal fields have their own specific spin on them, but their natures are ultimately identical, at least on the fundamental level.

Despite these shared standards, there are also standards of treatment that appear only in one field, but not the other. A classic example of this is the fair and equitable treatment standard (and the related legitimate expectations standard),[7] which only appears in the context of international investment law.

All these common thematic links lead up to and are somewhat explained by the shared origin of both legal fields. International trade law and international investment law both emerged from the same drive towards a new economic order following the end of the Second World War (WW II). In both legal fields, while there were preliminary developments in the 19th and early 20th centuries when the importance of international trade and cross-border transfer of capital and investments greatly increased, it was not until this most notorious of wars that both legal fields developed into their modern shapes.[8]

Without delving too much into the specifics, it was over the course of WW II that the United States and the United Kingdom increasingly realized the necessity of establishing a new world economic order in the post-war period (at least with regards to countries with capitalist economies), partially to ensure that the inevitable reconstruction of Europe will be more efficient, and partially to shore up their own socioeconomic models. A representation of this increasingly obvious goal can be

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[5] For international trade law, see Article I of the General Agreement on Tariffs and Trade (GATT). https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

[6] For international trade law, see Article III of the General Agreement on Tariffs and Trade (GATT). https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

[7] See in general, OECD, *Fair and Equitable Treatment Standard in International Investment Law* (2004) OECD Working Papers on International Investment 2004/3, http://dx.doi.org/10.1787/675702255435.

[8] Toye, *The International Trade Organization,* in Narlikar, Daunton and Stern (eds), *The Oxford Handbook on the World Trade Organization*, Oxford Univ. Press 2012, pp. 85-101, at 85-90.

found in the Atlantic Charter,[9] which stated as early as 1941 both countries' goals with regards to reducing trade barriers and increasing global economic cooperation after the end of the war. This was followed by the Bretton Woods conference in 1944,[10] which likewise contributed to further enshrining these goals of economic liberalization. It was during this conference that a new international monetary and financial world order was brought into being, as represented by the establishment of the International Bank for Reconstruction and Development (IBRD or World Bank),[11] and the International Monetary Fund (IMF),[12] two new international organizations that would play key roles in the development of the global economy in the decades that would follow.

After the Bretton Woods conference settled the monetary and financial questions of this planned new economic order, discussions shifted to trade and related aspects. The result of these negotiations, spearheaded by the United States and held in Havana, Cuba between 1947 and 1948, was the 1948 Havana Charter.[13] The Havana Charter is notable in the history of international trade law, as it established the principal rules of international trade, including the GATT. It also attempted to create a new international organization called the International Trade Organization (ITO) that would oversee the Charter's implementation and enforcement in international trade relations.[14] Beyond trade questions, the Charter also heavily referenced foreign investments and contained some provisions on the topic. In fact, one of the stated objectives of the Charter was to encourage the international flow of capital for productive investments.[15] Thus, we can see how at the cusp of the modern world economy, trade and investment were still closely tied together.

As is well known, however, the Havana Charter failed to manifest in practice, due to the refusal of the US Congress to ratify the Charter. Its substantive rules regarding trade were mostly salvaged in the form of the GATT, but the ITO and the investment-related characteristics of the Charter effectively disappeared until some aspects were revived in the WTO decades later.[16] We can understand this to be the separation between trade and investment matters during the second half of the 20th century. One notable exception to this – albeit not with substantive rules – was the 1955 Resolution on International Investment for Economic Development, in which GATT contracting

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9 For further information on the Atlantic Charter, see Brinkley and Facey-Crowther (eds.), *The Atlantic Charter,* Palgrave Macmillan 1994.

10 For further information on the Bretton Woods conference, see Lamoreaux and Shapiro (eds.), *The Bretton Woods Agreements*, Yale Univ. Press 2019. See also Steil, *The Battle of Bretton Woods - John Maynard Keynes, Harry Dexter White, and the Making of a New World Order*, Princeton Univ. Press 2014.

11 See the IBRD's website, https://www.worldbank.org/en/who-we-are/ibrd.

12 See the IMF's website, https://www.imf.org/en/Home.

13 See the Havana Charter's text, https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

14 See in general, Toye, *The International Trade Organization,* in Narlikar, Daunton and Stern (eds), *The Oxford Handbook on the World Trade Organization*, Oxford Univ. Press 2012, pp. 85-101.

15 Article I of the Havana Charter.

16 Toye, *supra* note 14, at pp. 95-97.

parties encouraged countries to sign bilateral agreements for the protection of foreign investments.[17]

The historical development of international investment law is well-covered by the rest of this book. We can, however, briefly discuss the further history of international trade law to underscore this separation. After the failure of the ITO, and the adoption of the GATT, international trade law mostly operated within the context of multilateral negotiating rounds aimed at further developing the GATT. This culminated in the so-called Uruguay Round between 1986 and 1994. The principal result of this negotiation round was the rejuvenation of the original GATT, and the creation of the World Trade Organization, a specific international organization aimed at managing the implementation of GATT, and the resolution of trade disputes between its member states.[18] This Round also resulted in the creation of the Agreement on Trade-Related Investment Measures (TRIMs), one of the annexes of the 1994 Marrakesh Agreement that created the WTO, which we shall discuss in the next part. Beyond the GATT and the WTO-related developments, international trade law developed through bilateral and multilateral trade agreements, especially in the past thirty years. These will be discussed in the final part of this chapter.

In general, we can observe that despite their thematic connections and shared origin, trade and investment law mostly developed on parallel but separate routes, with the former principally evolving via multilateral agreements, while the latter, as discussed earlier in this book, evolved via bilateral investment agreements. Even so, there are certain interaction points between the two fields, and these shall serve as the subject for the rest of this chapter.

C. The Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS)

As mentioned in the previous part, the TRIMs agreement was one of the outcomes of the Uruguay Round of negotiations. To understand this agreement, it is necessary to briefly discuss first the so-called *Canada — Administration of the Foreign Investment Review Act (FIRA)* case from 1984. In this particular trade dispute, the USA raised a complaint regarding the Canadian government's decision to mandate so-called local content requirements (required purchasing of certain products from Canadian sources) and foreign export requirements (mandatory export a certain percent of the investment's output) as conditions for the approval of certain foreign investment projects. One a side note, this is an excellent example of a situation when trade and investment issues can overlap with each other. Interestingly, the GATT panel overseeing the dispute concluded that the local content requirements were infringing Article III:4 of the GATT (national treatment obligation) due to discrimination between imported and domestic goods, but also determined that the export

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17 Christy, *Negotiating Investment in the GATT: A Call for Functionalism,* Mich. J. Int'l L. 1991, Vol. 12, pp. 743-798, at 776.

18 For a detailed overview of the Uruguay Round see Preeg, *The Uruguay Round Negotiations and the Creation of the WTO,* in Narlikar, Daunton and Stern (eds), *The Oxford Handbook on the World Trade Organization*, Oxford Univ. Press 2012, pp. 122-139.

requirements were not infringing the GATT.[19] As this dispute took place relatively shortly before the Uruguay Round, it was only natural that so-called trade-related investment measures, like export- and local content requirements, would come up for discussion by the GATT signatory states.

This discussion was marked by a deep division between developed and developing countries. Developed countries seemingly supported the introduction of new trade disciplines that would prohibit a wider range of investment measures compared to the GATT, while developing countries opposed this.[20] This can be easily explained by the recurring theme of international investment law in general: countries that primarily export capital tend to prefer strong protections for investments, while those that primarily import capital tend to prefer giving a greater degree of freedom to host states. This general trend triggered controversial discussions in the Uruguay Round of negotiations. As a consequence of these disagreements, the TRIMs Agreement is a compromise, only dealing with a limited number of trade-related investment measures.

The TRIMs Agreement itself is neither particularly long, nor detailed, for an international agreement. It contains only nine articles and an annex, and only the first three articles deal with substantial provisions in a strict sense. To be specific, Article 1 establishes that the TRIMs Agreement only deals with investment measures related to trade in goods, thus naturally excluding those related to trade in services, for instance.[21] This article itself underscores the agreement's nature as a compromise between two sharply divided interest groups among the WTO member states.

Article 2 concerns itself with national treatment and quantitative restrictions. This is more of a referential article, noting that no WTO member state shall apply trade-related investment measures that are inconsistent with the national treatment (Article III) and quantitative restrictions (Article XI) rules found in the GATT.[22] National treatment should be familiar to the reader, as its nature is fundamentally similar to the investment law use of the term. However, quantitative restrictions might merit a short explanation. In essence, the GATT distinguishes *fiscal* measures and *non-fiscal* measures in restraint of trade. Since the contracting parties bind their import duties in so-called schedules of concessions, they must not charge higher duties than those bound and published in the schedules (Article II). This is supposed to make trade predictable, for example if a manufacturer is contemplating an investment at home or abroad to serve a certain market, they will know the import duty rate the destination country can no longer exceed. The problem is that a country could try to circumvent its bound duty rate with other fiscal measures, for example processing- or stamp fees, border adjustment taxes, and the like. That is the reason why Article II of the GATT not only prohibits "ordinary custom duties" in excess of those fixed in the schedule of concessions, it also applies to "all other duties or charges of any kind", i.e. any fiscal measures, no matter how they are

[19] For the panel report see https://www.wto.org/english/tratop_e/dispu_e/gatt_e/82fira.pdf.

[20] See the TRIMs Agreement's introduction on the WTO website: https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm.

[21] Article 1 of the TRIMs Agreement.

[22] Article 2 of the TRIMs Agreement.

called or determined.[23] In this context, fiscal measures are defined as payments to the government that are not “commensurate with the cost of services rendered”,[24] for example the actual cost of a required safety inspection.

Even if countries can no longer impede imports with higher customs duties or disguised fiscal measures, they could achieve the same effect with non-fiscal measures, in particular regulatory measures of any kind. For this reason, Article XI of the GATT prohibits non-fiscal- or non-tariff barriers in the form of “quantitative restrictions.” In light of the purpose of these rules, namely to prevent countries from imposing measures that deny market access without good reason, the notion of *quantitative restrictions* must be interpreted widely. It includes measures that consist of export or import quotas that numerically limit market access for certain types of goods, where a total ban is simply understood as a zero quota. However, quantitative restrictions can also be any “other measures”[25] of the government that have the same effect as numeric limits, i.e. they reduce the number of exported or imported goods without specifically saying so. Onerous requirements for the design, production, labeling, packaging, distribution, marketing, use, or disposal of the goods – from the cradle to the grave of a product – can easily have that effect because fewer manufacturers may try to sell out of or into a given market, and if they still do, the price of the goods may be higher and the demand accordingly lower. It has been said that anything that makes trade more difficult or more expensive, without being a fiscal measure, is a quantitative restriction falling under Article XI.[26]

Obviously, the prohibition of quantitative restrictions understood in such a comprehensive way cannot stand without exceptions. Otherwise, countries would neither be able to stipulate minimum health and safety requirements for imported goods, nor demand their environmentally responsible disposal at the end of their useful life. That is where Article XX of the GATT comes in. However, even Article XI has some intrinsic limitations since it allows for certain exceptions, such as temporary quantitative restrictions intended to ameliorate “critical shortages of foodstuff or other products essential to the exporting contracting party”.[27] All of these rules are naturally transposed into the TRIMs Agreement, by virtue of its Article 2(1). In this context, the TRIMs Agreement also provides an “illustrative list” what “trade-related investment measures” may look like. Although it does not provide a definition, the second paragraph of Article 2 refers to the Agreement’s Annex, containing an illustrative list of measures “that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT [...] and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT...”. We will return to this later.

23 Article II(1)(b) of the GATT.

24 Article II(2)(c) of the GATT.

25 Article XI(1) of the GATT.

26 Professor Frank Emmert, lectures on WTO Law at Indiana University Robert H. McKinney School of Law, Fall 2022.

27 Article XI(2)(a) of the GATT.

Article 3 of TRIMs is also short, simply noting that “all exceptions” found in GATT “shall apply, as appropriate, to the provisions of the [TRIMs] Agreement.”[28] This means that general exceptions (Article XX of the GATT) and security exceptions (Article XXI of the GATT) can potentially both be used by WTO member states to justify noncompliance with provisions of the TRIMs Agreement.

With these three articles, we have reached the end of the substantive rules of the TRIMs. The rest of the Agreement concerns itself with procedural matters. Article 4 contains special rules for developing countries, allowing them “to deviate temporarily” from Article 2, just as they may deviate from their obligations under Articles III and XI of the GATT.[29] Article 5 concerns itself with notifications regarding implementation and transitional arrangements.[30] Article 6 establishes general rules for transparency.[31]

Perhaps most interestingly, Article 7 establishes a Committee on Trade-Related Investment Measures. The chief purpose of this Committee is to monitor the operation and implementation of the TRIMs Agreement, and to make reports to the WTO Council for Trade in Goods. The Committee is also tasked with providing consultation on the TRIMs Agreement to WTO member states.[32]

Article 8 transposes the dispute settlement mechanism of GATT (Articles XXII and XXIII, as well as the Dispute Settlement Understanding) into the TRIMs Agreement.[33] Meanwhile, Article 9 contains a requirement for the Council for Trade in Goods to periodically review the TRIMs Agreement.[34]

With the main body of the TRIMs Agreement briefly discussed, it is time to elaborate on its Annex. The Annex consists of two distinguishable parts. First, it lists illustrative examples of trade-related investment measures that clash with national treatment. These include mandatory or otherwise advantage-providing measures which require the purchase or use by an enterprise of products of domestic origin or from any domestic source (whether it is determined as particular products, a particular volume or value of products, or a particular proportion), as well as measures requiring that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports. Second, it provides illustrative examples of measures not compliant with the quantitative restrictions rules. These include measures that require the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports; measures that require the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the

[28] Article 3 of the TRIMs Agreement.

[29] Article 4 of the TRIMs Agreement.

[30] Article 5 of the TRIMs Agreement.

[31] Article 6 of the TRIMs Agreement.

[32] Article 7 of the TRIMs Agreement.

[33] Article 8 of the TRIMs Agreement.

[34] Article 9 of the TRIMs Agreement.

enterprise; or measures that require the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.[35]

In conclusion, we can see that the TRIMs Agreement is relatively restricted in its scope, and only concerns itself with rules on two categories of trade-related investment measures. It can also be seen as self-contained within the WTO legal framework, since it does not deal more broadly with the field of investment law. In a similar fashion, dispute resolution related to the TRIMs Agreement is exclusively state-to-state, thus limiting the potential for individual investors to use the TRIMs Agreement as a way to redress their grievances. In fact, the TRIMs Agreement confers no particular right directly to foreign investments. It contains a single prohibition of two different type of measures, but the prohibition is essentially framed within the context of the GATT and does not interact directly with investments. Even though the agreement, on its surface, seems to connected trade to international investment law, it does not do so in the specifics. Therefore, the existence of this agreement primarily shows us how separated the two legal fields have become over the course of the 20th century.

Beyond the TRIMs Agreement, we need to briefly mention the GATS Agreement. The GATS Agreement is chiefly concerned with cross-border trade in services. To be specific, it determines four different modes of trade in services, and then contains substantive rules for them in the vein of the GATT. The four modes of supply are 1) the supplier sends the service across the border into another country to supply consumers there (cross-border supply); 2) consumers cross the border into another country to pick up the service from the supplier (consumption abroad); 3) the supplier establishes a commercial presence in another country to supply consumers there (commercial presence); and 4) the supplier has natural persons crossing the border into another country to supply consumers there (presence of natural persons).[36] From our perspective, the mode most likely to interact with investments is commercial presence. However, investments themselves are only referred to very briefly, with regards to the specific commitment of Market Access in Article XVI of the GATS. Here, we can find an obligation that prohibits measures (in sectors where a signatory state undertook market-access commitments) that would impose “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.”[37] In a somewhat similar fashion to TRIMs, we can see that the GATS also does not really interact with traditional international investment law directly, but rather covers some investment-related situations incidentally, via the commercial presence mode of trade in services, as part of a much larger whole.

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35 Annex of the TRIMs Agreement.

36 See Art. I(2) of the GATS. For a general description of the GATS see https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm. For comprehensive analysis see Mavroidis, *The Regulation of International Trade – The General Agreement on Trade in Services*, MIT Press 2020.

37 Article XVI(2)(f) of the GATS.

D. THE WTO WORKING GROUP ON THE RELATIONSHIP BETWEEN TRADE AND INVESTMENT

The WTO Working Group on the Relationship Between Trade and Investment was established as a result of the 1996 Ministerial Conference in Singapore. At the 1996 Ministerial Conference, the WTO members also established a similar Working Group concerned with the relationship between trade and competition policies. In the Singapore Declaration, the ministers established a need for a Working Group cooperating with the United Nations Conference on Trade and Development (UNCTAD), as well as other relevant intergovernmental bodies. They determined that the General Council of the WTO should keep the Working Group under periodic review and decide on its further progress and activities. The Ministerial Declaration also made it clear that future negotiations related to investment – specifically if directed at any establishment of multilateral WTO rules or disciplines related to investment – can only take place if an explicit consensus decision is achieved by the WTO member states in this respect.[38] As such, the Working Group's principal role was not to create new, investment-related trade rules, but rather simply to analyse the subject matter.

Over the course of its initial work period, the Working Group conceptualized a number of issues that should be studied, organized into four categories. The first category consisted of the implications of the relationship between trade and investment for development and economic growth, with questions such as balance of payments, industrialization, or transfer of technology. The second category consisted of issues related to the economic relationship between trade and investment, such as the degree of correlation between trade and investment flows, the relationship between the mobility of capital and the mobility of labor, as well as the impact of investment policies and measures on trade, among other subjects. In the third category of issues, the Working Group undertook to take stock and analyze existing international instruments and activities regarding trade and investment, such as existing WTO provisions, as well as bilateral and multilateral agreements and initiatives. And finally, in the fourth category, the Working Group set out to compile the results of the first three categories, and accomplish a number of tasks based on them, namely the 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 international rules on investment, including from a development perspective; and the rights and obligations of home and host countries and of investors and host countries.[39]

Before compiling its initial report to the General Council, the Working Group formally met a total of seven times between 1997 and 1998, carefully coordinating its meeting times with relevant UNCTAD bodies. The first two of these meetings consisted of preliminary determinations regarding the general nature of the future work to be undertaken by the Group. Substantive discussions began starting from the third meeting, during which three of the above-mentioned categories of study were also determined. The fourth category was added over the course of later meetings. During these discussions, the Working Group received numerous written contributions from WTO

38 Singapore Ministerial Declaration, para. 20, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

39 Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council, Annex 2, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/2.pdf.

Members, as well as UNCTAD and the Organisation for Economic Co-operation and Development (OECD). It also coordinated with the above-mentioned Working Group on the Interaction between Trade and Competition Policy with regards to overlapping subjects.[40]

The report compiled by the Working Group consists of 227 paragraphs; a comprehensive analysis would be beyond the scope of the present chapter. Instead, we will discuss the general composition of the report and highlight some of its key findings, especially in relation to the above-mentioned topics studied by the Working Group. With regards to composition, the report consists of four chief segments, as well as two annexes. The first segment serves as an introduction, while the second explains the procedural aspects of the Working Group up until the point of the report. The third segment contains the main body of the report, with its substantive findings divided into the four categories we already discussed. Regarding the first category, the Working Group's principal findings focused on transfer of technology. While it was not possible to determine *ex ante* whether there was a need for transfer of technology incentives or promotion, the Working Group found that these kind of measures were not market distorting in an oligopolistic environment. It further highlighted the need for finding pragmatic compromises between the interests of developing and developed WTO member states with regards to transfer of technology.[41]

For the second category, the Working Group discussed a large number of diverse topics. For our purposes, we can highlight its examination of country experiences regarding national investment policies. Here, the Working Group found that WTO member states sharply differed on the cost-benefit ratio of investment incentives. It also highlighted that investment incentives could have different market distortionary effects based on their nature.

As for the third category, the Working Group examined not just existing WTO rules relating to investment (which we largely also discussed in the previous part of this chapter), but also analysed bilateral investment treaties from an international trade law perspective. Here, the Working Group found that while some WTO member states (specifically those with the highest amount of BITs) advocated for regional and multilateral regulation, others contested this need.[42]

In the fourth category, the Working Group conducted an examination of different instruments with possible overlaps, particularly with regards to OECD materials.[43]

The final segment consists of a recommendation regarding further activities of the Working Group.

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[40] Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council, paras. 8-16, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/2.pdf.

[41] Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council, para. 44, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/2.pdf.

[42] Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council, para. 158, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/2.pdf.

[43] Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council, paras. 221-225, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/2.pdf.

After this initial report, the clarificatory and consultative role of the Working Group continued. Its mandate was renewed as part of the Doha Round of negotiations, but it was still bound to only discussing and clarifying the issues and was not empowered to draft new rules regarding investment provisions. The last documents to be released by the Working Group were of a meeting held in June 2003 as well as a relatively short report to the General Council of the WTO, not long before the fifth Ministerial Conference held in Cancún in September 2003. The Working Group noted its final observations regarding the possibility of investment negotiations in the context of the Doha Round, provided the concerns of developing countries were taken into account,[44] while other WTO member states expressed the view that the feasibility of a multilateral investment framework was still unclear.[45] No further documents were released by the Working Group to the public after that.

In conclusion, we can see that in the context of the WTO, discussions of investment and investment law never truly went beyond a clarification of issues and tentative attempts at considering the possibility of negotiating a multilateral investment framework. The relative stagnation of the subject-matter post-2003 can be explained with the general stagnation of the Doha Round. The differences between WTO member states, as exemplified by the results of the Working Group, proved insurmountable until now for any significant progress to be made.

E. A RE-CONVERGENCE OF TRADE AND INVESTMENT LAW?

As we can see from the previous parts, despite their shared origin, the two legal fields have mostly run on separate tracks. Despite tentative attempts by the WTO to connect trade law with investment law, results were only realized in a very limited fashion by the TRIMs and GATS Agreements. And as we could see from the previous part, despite the existence of a dedicated WTO Working Group related to trade and investment, it mostly served only to discuss, analyze and highlight the present issues for WTO member states. It did not offer any concrete provisions, which of course, was not part of its mandate the first place. Given the lack of formal progress on the topic since the 'rush' of the late 1990s and the early 2000s, we can conclude that a multilateral investment framework as part of the WTO 'ecosystem' is currently not feasible.

However, even if this international trade law regime for the time being cannot merge with investment law, what about other trade law regimes? Bilateral and even multilateral international trade agreements like FTAs traditionally existed in parallel to WTO rules, building stronger trade disciplines on top its foundations for a smaller number of countries. Moreover, as we have already discussed in previous chapters of the book regarding the development of investment law, an increasing number of international trade agreements have begun incorporating provisions and entire chapters on investment law. These chapters, in general, are structured similar to BITs but transposed into a trade agreement. In our view, while this means that the two legal fields are still dogmatically separate, their inclusion in the same instruments provides at least a perspective for further

[44] Report (2003) of the Working Group on the Relationship Between Trade and Investment to the General Council, para. 57, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/7.pdf.

[45] Report (2003) of the Working Group on the Relationship Between Trade and Investment to the General Council, para. 58, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTI/7.pdf.

convergence. Especially in light of the WTO's failure to produce a multilateral investment framework due to disagreements between WTO member states, it seems likely that other international trade agreements will instead provide the foundation for any integrated frameworks, although they will likely remain in the context of regional trade, investment and economic integration.[46]

In conclusion, the reason why the two topics could not truly reconverge under the WTO's umbrella was its global nature. As shown by the Working Group, and the compromise-like nature of the TRIMs Agreement, WTO member states have too significantly different expectations and strategies regarding the development of WTO-based investment regulation. These approaches have thus far been irreconcilable. By contrast, with their more limited geographic scope, other international trade agreements could provide the frameworks for mergers of trade and investment law. Naturally, the downside is that these mergers could lead to international trade law becoming just as fragmented as international investment law, at least with regards to its sources.

[46] For a thorough overview of the issues relating to this topic see Puig, *The Merging of International Trade and Investment Law,* Berkeley Journal of Intern'l Law 2015, Vol. 33, No. 1, pp. 1-59.