A COMPARISON OF BIT AND THE INVESTMENT CHAPTER OF FREE TRADE AGREEMENT FROM POLICY PERSPECTIVE

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ABSTRACT

This paper presents the recent development of BITs and the part of FTAs related to investment. In respect of the slower increase in the number of BITs as well as more FTAs being concluded and that it is a common practice for the FTAs to have an investment chapter, it is possible to incorporate investment matters into FTAs. Based on some key elements of investment rules in several FTAs and BITs, it is clear that the investment chapter can be designed perfectly and is actually designed to have very similar or even identical contents to those in BITs. Since there is no legal or technical barrier to incorporate the contents of a BIT into an FTA, the discretion whether to have a separate BIT or to have the contents of a BIT included in the FTA simply belongs to the parties. Furthermore, because there is no legal difficulty incorporating the investment treaties into a chapter of an FTA, BIT's certainly can be replaced by an investment chapter in FTA. Thus, there would be no difference incorporating investment provisions in the FTA investment chapter or in a BIT. However, there may be some concerns that need to be addressed in the case of countries which might not be able to avoid facing the trend of a more comprehensive mode of negotiations to have both trade and investment matters being included in the same set of negotiations, where the use of leverage between trade and investment matters is

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basically unavoidable.

KEYWORDS: *BIT, FTA, international investment, policy choice, UNCTAD*

I. INTRODUCTION

International investment rules are mostly found in bilateral investment treaties (BITs). However, they can also be seen in some agreements under the World Trade Organization (WTO), especially in the General Agreement on Trade in Services (GATS) and in the Agreement on Trade Related Investment Measures (TRIMS Agreement). More and more, a complete set of investment rules is also included in Free Trade Agreements (FTAs).[1]

Due to the facts that there are so many BITs and that there is the trend of incorporating investment provisions into FTAs, it should be important to look into the practice of including investment matters into the FTAs; the differences and similarities between the investment rules in BITs and FTAs as well as the policy choice that a country would encounter regarding such a trend.

The argument is that since investment matters have a lot to do with

[1] Under the General Agreement on Tariffs and Trade 1994, "[a] free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories." General Agreement on Tariffs and Trade 1994, art. XXIV:8(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. Economic integration under GATT 1994 also includes "customs unions", which is defined as the "substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union." *Id.* art. XXIV:8(a). But since the paper only discusses FTA, customs unions will not be covered by the paper. Note that under the General Agreement on Trade in Services, countries can also established economic integration regarding trade in services. General Agreement on Trade in Services, art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1168 (1994) [hereinafter GATS]. The paper includes economic integrations under the GATS into the calculation of the number of agreements.