



Harvard Law School Trade Innovation Initiative: Summary of Findings on Trade and Development in Free Trade Agreements

This research paper was prepared during the 2015 Fall Semester by the Trade Innovation Initiative (TII), a student project at Harvard Law School under the Law and International Development Society (LIDS). Contributors include: Lauren Anstey, Ted Brackemyre, Gianna Ceophas, Luke Holladay, Ben Hopper, Camille Martini, Jordan Movinski, Caroline Wilson, and Keke Wu. This paper has been developed under the supervision and guidance of Katrin Kuhlmann, a co-founder of TII, Lecturer on Law at Harvard Law School, and President and Founder of the New Markets Lab.

1. Introduction

The research conducted by TII presents a perspective on trade and development that treats development concerns and objectives not as distinct and separate challenges, but as inherent in all aspects of trade. This work encompasses regulatory and legal issue areas where economic actors in developing countries face their most persistent challenges¹ as well as other aspects of sustainable trade and development. In doing so, emphasis is placed on expanding the approach towards trade and development common in the free trade agreement (FTA) context and also strengthening certain sectors and processes that are often not central to traditional FTAs.

The prevailing focus of both FTAs and multilateral approaches to trade and development has been Special and Differential Treatment (SDT).² SDT provisions are meant to recognize the needs and interests of the developing world, but in practice they tend to concentrate on access to the existing trade regime, while not fully addressing the internal challenges developing economies face, including the development and implementation of legal, regulatory, and institutional systems capable of addressing development objectives in specific sectors. An approach that focuses on development-minded and market-driven legal, regulatory, and institutional reforms within key sectors parallels the problems actually faced by economic actors in developing countries. For instance, a small-scale farmer in sub-Saharan Africa does not struggle with the details of trade agreements, but rather is faced with practical obstacles in agriculture, environment, and labor. An SDT-style carve-out or exception may provide that farmer easier access to global markets, in theory, but, in practice, such a farmer will never be able to realize this possibility if legal and regulatory hurdles still stand in the way. This paper builds on work to reframe SDT³ and advocates for a paradigm shift towards certain building blocks of development-led trade.

¹ Katrin Kuhlmann, "Reframing Trade and Development: Building Markets Through Legal and Regulatory Reform," E15 Initiative International Centre for Trade and Sustainable Development and World Economic Forum and ICTSD (November 2015).

² Frank J. Garcia, "Beyond Special and Differential Treatment," *Boston College International & Comparative Law Review* 27 (Spring 2004): 292-294.

³ See Andrew D. Mitchell, "Bind Rationale to Need: Operationalizing Special & Differential Treatment in the WTO," *Proceedings of the Annual Meeting (American Society of International Law (American Society of International Law) 103 (March 2009): 430-32. Andrew D. Mitchell and Tania Voon, "Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?," *Global Governance* (Lynne Rienner Publishers) 14, no. 3 (July 2009): 343-357.*

In short, advocated here is a two-pronged approach to re-orientating trade and development discussions. First, the building blocks of development-led trade must be emphasized, as they are underserved by traditional FTAs, and addressing those building blocks will allow the development challenges faced by actual enterprises in developing markets to be dealt with more precisely, effectively, and efficiently. These building blocks include non-tariff issues such as sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), trade facilitation measures, and services. Second, a survey of existing FTAs has revealed several aspects in which aspects of FTAs could be strengthened to better meet the needs of stakeholders in developing markets. In particular, this project has identified five specific challenges:

- First, FTAs could be better customized to address development considerations. This includes both coverage of the building block issues discussed below and the overall approach to development within many FTAs. Generally, the development-focused aspects of many FTAs lack specificity, yet the challenges facing entrepreneurs in developing countries are often best addressed with specific responses, instead of broad commitments. Further, a lack of clarity, both in terms of implementation as well as in defining the issues addressed, may hinder the ability of developing countries to implement an agreement's provisions when they are already operating at lower institutional capacities than their developed counterparts.
- Second, few FTAs include comprehensive and inclusive input or participation from the private sector or public. These stakeholders typically provide the best knowledge of specific development challenges and are the most efficient channel through which to address those challenges. Failing to incorporate these stakeholders into the formulation and implementation of such provisions fosters inefficiency and ineffectiveness.
- Third, existing FTAs frequently reiterate preexisting commitments, such as those made at the WTO and ILO, without a greater focus on implementation of those commitments. While current approaches reinforce building upon existing trade foundations (for example treatment of SPS and TBT), it may be unclear how to address specific concerns in practice.
- Fourth, FTAs lack sufficient linkages between differing issue areas. FTAs are typically organized into separate chapters, each addressing a single issue area. While such an approach may be necessary to effectively draft and negotiate such agreements, it proves problematic in practice. As alluded to above, development challenges cannot be addressed adequately by a single chapter of an FTA, suggesting that effective treatment of such challenges requires effective linkages between the various building blocks of development-led trade.
- Fifth, while capacity building has become closely linked with FTAs and other trade frameworks, it could be tied more explicitly to key challenges, sectors, and areas of focus. For example, building legal, judicial, and technical expertise is critical to identifying and implementing the concerns most affecting developing economies, and this type of capacity building could be enhanced from a trade perspective.

In identifying these challenges, this project has looked to various forms of FTAs, including U.S. bilateral FTAs, European Economic Partnership Agreements (EPAs), regional trade agreements (RTAs) in Africa and Asia, and the recently concluded Trans-Pacific Partnership (TPP). Throughout, illustrative examples, best practices and gaps are noted, and capacity building and the institutional structure of FTAs are discussed as overarching themes.

2. Regulatory Building Blocks

A. Technical Barriers to Trade and Sanitary and Phytosanitary Standards

Non-tariff issues such as SPS and TBT are common concerns facing enterprises in developing countries. While these issues are sometimes included in FTAs, this is often not done in a way that addresses the pressing challenges economic stakeholders in developing markets face. Notably, U.S. FTAs and African RTAs address specifically TBT and SPS, and some good practices could be drawn from these approaches.

With respect to TBT, the TBT chapters of U.S. FTAs are strikingly similar. Most are based on the basic premise of re-affirming the parties' commitments to the WTO TBT Agreement. Provisions that go beyond the scope of the TBT Agreement tend to focus on trade facilitation and the creation of TBT coordinators or committees. Specific references to technical regulations and their design and function are notably absent, although African RTAs and accompanying agreements do cover this area in greater detail.

The US-CAFTA-DR Free Trade Agreement (US-CAFTA-DR) stands as a benchmark for many of the U.S. FTA TBT chapters examined. US-CAFTA-DR Article 7.1 compels the parties to affirm their existing rights and obligations with respect to each other under the TBT Agreement. Further, US-CAFTA-DR Article 7.4 prioritizes trade facilitation, compelling parties to seek "trade facilitating initiatives," which "may include cooperation on regulatory issues, such as convergence, alignment with international standards, reliance on a supplier's declaration of conformity, and use of accreditation to qualify conformity assessment bodies." US-CAFTA-DR Article 7.5 also binds parties to "intensify their exchange of information" with respect to conformity assessment procedures, which aligns with Article 7.7 which provides for greater transparency across parties when developing technical regulations.

To enforce such provisions, U.S. FTAs typically resort to the formation of committees or coordinators to supervise implementation. In addition, several U.S. FTAs established working groups to examine the technical regulations of specific products, such as US-Singapore Annex 6A, which established a working group on medical products and US-Korea Annex 9B, where a working group on autos was created.

Even more so than the TBT chapters of the reviewed FTAs, the SPS chapters are strikingly similar and short. As noted previously, the main effect of these chapters is to re-affirm the parties' commitment to the WTO SPS Agreement and to establish a committee to review SPS measures. Once again, US-CAFTA-DR serves as a benchmark text for other U.S. FTAs. In fact, there is little substantive difference between US-CAFTA-DR, US-Korea, and US-Peru FTAs. Further, the US-Morocco and US-Singapore FTAs do not even include SPS chapters within the primary text. That said, a joint statement accompanies US-Morocco FTA, reiterating a commitment to the SPS Agreement and establish a working group to "strengthen effective cooperation on SPS issues." As such, the joint statement serves a similar purpose as the SPS chapter in the other FTAs. And, like the TBT chapters, U.S. FTA SPS provisions only allude to implementation by establishing committees and coordinators.

TBT and SPS barriers are real constraints to trade that enterprises and entrepreneurs in developing countries face. Unfortunately, few FTAs include chapters addressing these issues, and, when such a chapter is included, the treatment given is broad and hurried. Some lessons could be drawn from the treatment of these issues in African RTAs, for example, which would also help better link these RTAs with developed country trading partner FTAs with similar countries or groups of countries. In general, more central provisions that create meaningful and effective processes for addressing specific TBT and SPS barriers in practice and involve the input of those actually affected by these measures would go a long way towards better incorporating the needs of the developing world into these agreements. This project did not seek out specific TBT or SPS best practices; however, since TBT and SPS are frequently underplayed in FTAs, further study on this matter could prove especially fruitful. In particular, assessing how the chapters of the TPP on SPS and TBT are implemented could be useful, as the TPP chapters in

many respects replicate the approach of prior U.S. FTAs, but also provide tailored provisions for certain industries, such as, *inter alia*, cosmetics, wine and distilled spirits, and organic products. The reach of these provisions will depend, in large part, on the manner in which they are implemented.

B. Trade Facilitation

FTAs are beginning to incorporate trade facilitation provisions aimed at development concerns, but this area also deserves greater focus. Some agreements are broader and more general in specifying what countries need for successful customs and trade facilitation. The EU-Central America Trade Agreement, for example, calls for cooperation between parties in trade facilitation. This cooperation is meant to ensure that the relevant authorities receive expertise, training, and capacity building on customs issues and other technical matters in order to enhance their ability to enforce regional customs procedures. The EU-Central America Trade Agreement also calls for capacity building through cooperation resulting in the development and strengthening of the relevant infrastructure. The FTA between the European Free Trade Association (EFTA) and the South Africa Customs Union (SACU) calls for coordinated efforts to provide technical and administrative assistance.

Other agreements are more specific and limited in scope of what is needed for customs and trade facilitation. The Free Trade Area of the Americas Draft Agreement provides for institutional assistance for setting up the offices and equipment needed to fulfill the obligations of the Agreement. The US-Morocco FTA calls on the US to provide Morocco with technical advice and assistance for improving risk assessment techniques, simplifying and expediting customs procedures, advancing technical skills, and enhancing the use of technologies that can lead to improved compliance with laws and regulations governing importation. US-CAFTA-DR calls for the provision of technical advice and assistance for the purpose of improving risk assessment techniques, simplifying and expediting customs procedures, advancing the technical skill of the personnel, and enhancing the use of technologies that can lead to improved compliance with regards to laws or regulations governing imports. Many of these examples could be further studied as possible best practices.

C. Other Areas

Other areas are of significance to development, such as services and intellectual property, which this project will cover in greater detail in a next stage. That said, this project's survey of existing FTAs has uncovered a variety of unique provisions with development ramifications. For instance, social issues are often addressed in FTAs by means of: (i) cultural provisions, such as in the Common Market for Eastern and Southern Africa (COMESA) and the EU-Chile EPA, (ii) provisions targeted at youth, as found in several EU EPAs, and (iii) education regulation, such as in the EU-Central America Association Agreement. Economic promotion of specific sectors is also included in several agreements, for example through provisions targeted at: (i) tourism, as found in the EU-Central America Association Agreement or EU-Egypt EPA, (ii) transportation, such as within the East African Community (EAC) or several EU EPAs, and (iii) energy, as seen in several EU association agreements.

3. Other FTA Sections with Development Implications

A. Environment

Most recently concluded FTAs feature environmental provisions seeking to balance the aim of international cooperation with the right to enact domestic environmental policy. Ultimately, these

balancing efforts often result in broad language that does not adequately address the specific environmental concerns facing developing countries. More specifically, many FTAs include provisions requiring enforcement of existing environmental law, prohibiting the lowering of existing standards in order to gain a competitive advantage, or reinforcing the ability of commitments to raise existing standards. In addition, clauses reiterating the prerogative for countries to establish their own levels of domestic environmental protection are often included, provided that the levels of environmental protection do not drop. The US-CAFTA-DR, for example, obliges each party to maintain or improve existing laws, while simultaneously granting discretion to determine environmental protection. The effective implementation of such provisions, however, may be limited by the narrow definition of environmental law. For instance, Article 17.3 of US-CAFTA-DR defines “environmental law,” but such a definition does not embrace certain issues critical to developing economies, such as measures concerning water and soil conservation or measures geared towards protecting natural resources.

The framework proposed here illustrates several methods in which environmental provisions could be better suited for development. First, FTAs rarely mention the possibility of involving private actors, such as businesses or NGOs, in resolving environmental issues. Linking environmental provisions to private stakeholders would incorporate the needs of those actors and shed light on the sorts of specific actions needed to address those needs. Some FTAs involve civil society, such as the US-CAFTA-DR, US-Panama FTA, and US-Peru FTA, which include citizen contributions, but most do not. Second, not only must negotiating parties recognize the needs of those they represent, but also other needs of the countries involved and their citizens. For instance, US-Peru attempted to “identify some of the legal, institutional and capacity building needs of Peru”, resulting in “substantial changes in Peru’s forestry sector”.⁴

B. Agriculture

Development goals in agriculture are traditionally addressed in FTAs through exceptions to existing rules or market access, much in line with the traditional SDT approach, and little attention is paid to addressing specific challenges faced by farmers in developing countries. In particular, most FTAs limit their treatment of agriculture to issues of market access, export subsidies, and domestic production subsidies. Discussions surrounding agriculture at the recent WTO Nairobi Ministerial, as well as the Declaration on Export Competition, focused on those three aspects of agriculture and development as well. That said, one might look to the EPAs between the European Union and certain African RTAs, for examples of more comprehensive treatment of agriculture. For instance, the EPA between the EU and the EAC seeks to accomplish its agricultural goals through specific measures addressing, *inter alia*, technology and infrastructure. It should be noted, however, that the EPAs also follow traditional SDT principles and tend to liberalize future trade potential in order to preserve current market interests. As the work of numerous scholars and practitioners suggest, the EPA model overall may not be in the best interest of the African countries with which these agreements have been negotiated,⁵ although specific good practices could be pulled from the EPA model and further studied and applied.

Ultimately, the language in most FTA agriculture sections reveals a divide. On the one hand, there is the clear intention of developed countries to access to new markets and develop their own agricultural sectors, while, on the other hand, interventions tend to be focused on broader considerations in the

⁴ Chris Wold, “Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements,” 28 St. Louis U. Pub. L. Rev. (2008): 246.

⁵ See Antoine Bouet, David Laborde and Simon Mevel “Searching for an Alternative to Economic Partnership Agreements” International Food Policy Research Institute Research Brief No. 10, 2007 and Patrick Messerlin, “Economic Partnership Agreements: How to Rebound” in *Updating Economic Partnership Agreements to Today’s Global Challenges*, German Marshall Fund of the United States, Economic Policy Paper Series 09, Emily Jones and Darlin F. Marti, eds, (November 2009).

agricultural sector, albeit mainly in the context of global markets without a clearer link to developing country markets. There are a number of capacity building efforts focused on the agricultural sector, some of which are linked to various forms of trade agreements, and these efforts could be further developed as discussed below.

C. Labor

The provisions addressing labor in most FTAs reaffirm the parties' commitments as members of the International Labor Organization (ILO), while also affirming the rights of the parties to establish their own domestic labor standards. This is particularly true of U.S. FTAs, which appear almost entirely focused on reaffirming existing standards. EU Association Agreements follow this pattern generally as well, although certain agreements include unique language focused on specific social issues, such as employment policy in Bosnia and Herzegovina or poverty alleviation in Central America.

Among the biggest challenges that FTAs face when addressing labor are harmonization and implementation. Disparate labor, social security, and immigration policies, coupled with a lack of capacity both in resources and institutions, cause an uneven application of such labor provisions. The point being that labor provisions need to be specific enough and more focused on implementation, in order for the provisions to achieve their intended effects.

It is encouraging to see that some FTAs, such as the EAC Treaty, focus, in particular, on increasing labor opportunities for women. While specific treatment of women in the labor force has traditionally been ignored by many developed country FTAs, other agreements, such as the EAC Treaty, the TPP, and several EU agreements, have specifically addressed challenges faced by women.

D. Small- and Medium-Sized Enterprises

The treatment of small and medium sized enterprises (SMEs) has also begun to appear in FTAs, which is promising from a trade and development perspective, yet these provisions do not seem matched to the more specific needs and interests of SMEs in the developing world. First, too few are direct obligations (rarely going beyond information sharing and establishing committees), and most require parties to provide assistance to SMEs. Second, SME provisions lack specificity and detail, as the goals professed and institutions established often center around vague mandates and objectives. Third, SME provisions lack clear enforceability. For instance, Article 24.3 of the TPP states that no party has recourse to TPP dispute settlement for any matter arising under the SME chapter. Fourth, SME provisions are insufficiently linked to related issues. To illustrate, the TPP mentions SMEs in twelve different chapters, but fails to provide specific SME-related provisions outside of the SME chapter. Fifth, SMEs and those affected directly by SME provisions are not given the opportunity to provide sufficient input in the creation and enforcement of such provisions. Sixth, SME provisions are written with inconsistent definitions and terminology. FTAs do not all use the same terminology, the definitions provided from the terminology used are not always clear and the terminology is not always defined consistently across agreements. Seventh, the end-users of these provisions, i.e. SME owners and workers, etc., often fail to receive information that is relevant to them in a manner that is timely and easily understood. There are several sectors in which specific provisions geared towards SMEs could have a positive impact on development objectives. Such areas include trade facilitation, access to finance, infrastructure (particularly electricity), labor (especially as related to women), and anti-corruption. Further, SMEs have a special relationship with capacity building, which should be stressed in future FTAs.

E. State-Owned Enterprises

Existing FTA approaches to state-owned enterprises (SOEs) are lacking in several respects. First, similar to SMEs, SOEs provisions are plagued with inconsistent definitions and terminology. Second, many SOE chapters may not be designed with development in mind. Third, SOEs provisions often lack clarity. That said, FTAs may include specific discussions of anti-trust and competition policies, but the effect of SOEs on other sectors remains limited. To that point, SOEs often play a substantial role in the economies of

developing countries, yet SOEs are often not referenced explicitly or sufficiently in sections or chapters on related issues, such as telecommunications, transportation, infrastructure and energy, and labor.

F. Anti-Corruption

Many FTAs include at least some reference to the negative effects of corruption and provide for broad commitments to combat it. Some, such as the EAC EPA, go no further than a broad commitment, whereas others detail more specifically the aspects of corruption. However, none offers specific means of addressing those threats. Several U.S. FTAs contain nearly identical anti-corruption articles that go beyond simply condemning corruption to outlining a commitment to fight corruption that is reflective of the Foreign Corrupt Practices Act (FCPA). Treatment of corruption in the TPP mimics these articles, while also adding certain provisions about the integrity of public officials and international cooperation.

One aspect of anti-corruption work that appears to be missing in FTAs is a focus on compliance. Countries commit to prosecuting corrupt actors and spend a significant amount of time defining those corrupt practices, but the agreements contain no mention of how companies or citizens in the countries could achieve compliance. While compliance would likely be addressed in the laws proposed in each country, FTAs may be an effective place to begin detailing the most important aspects of compliance so that the countries have a similar understanding of the expected behavior of companies and officials. Ultimately, these agreements could lead to developing international standards of compliance.

One promising potential area of focus is having future trade agreements include language similar to Article 26.7.5 of the TPP which called for the parties to “adopt or maintain” accounting laws, including “the maintenance of books and records, financial statement disclosures, and accounting and auditing standards” to prevent corrupt accounting practices. This material—how countries keep records, how those records are shared, etc.—also seems much more fitting for trade agreements than laws criminalizing bribery. The TPP also takes a development-centered approach to corruption in the way it encourages the training of local officials and development of good procedures to ensure corrupt officials are removed from office. It may be helpful, however, to rein in the broad definitional language of the TPP so that countries see it as more enforceable and less as broad, condemning language.

4. Capacity Building

Capacity building is a principle that stretches across all of the aforementioned sectors, and it tends to fall within FTAs under two broad categories: (i) judicial and legal reform, and (ii) technical assistance.

First, with respect to judicial and legal reform, specificity is once again critical. The EU-Central American Agreement specifies three specific goals for judicial and legal reform: building capacities for policy design, implementation and evaluation of public policies, and reinforcing the judiciary system while fostering the involvement of civil society. However, even these goals are broad. While ambitious reform goals are not in and of themselves negative, practical implementation is likely more challenging when there is little concrete articulation of the process or end result desired. Even broader than the EU-Central America Agreement is the FTA between EFTA and SACU, which simply calls for “the furthering of a legal environment conducive to increased investment flows.” In countries where any number of reforms are needed, such a sweeping provision may overwhelm those attempting to implement reform, resulting in less efficient action. Further, when trade agreements are signed by a number of different parties, specifying particular goals or starting points for reform may not be plausible. For instance, varying levels of aid from more developed country trading partners may be necessary, or assistance in one area may be vital while less assistance is required in other areas. In bilateral trade agreements, specificity and flexibility could be built into the agreement, but in larger, multilateral agreements such flexibility may be reflected in provisions that call for the creation of a committee to determine what reform and

assistance is required. In a trade agreement calling for legal and judicial reform through capacity building, it may therefore be more useful to provide flexibility in how reform is implemented and may not be necessary for the trade agreement to articulate the reforms envisioned for each state.

Second, technical assistance is an area of focus and takes a number of forms. The recipients of such assistance will have varying levels of ability to implement and utilize the assistance. Similar to judicial and legal reform, technical assistance can be provided in several ways, including: building and training of human resources, customs and trade facilitation, standardization, and exchanging information. However, while technical assistance is increasingly a focus of trade agreements, it alone may be insufficient to effectively assist developing countries in taking advantage of trade. For instance, the FTA between EFTA and SACU, calls for EFTA to provide technical assistance to SACU states, in order to “(a) facilitate the implementation of the overall objectives of this Agreement, in particular to enhance trading and investment opportunities arising from this Agreement; [and] (b) support the SACU States’ own efforts to achieve sustainable economic and social development.” The Free Trade Agreement of the Americas Draft Agreement similarly calls on the more developed Parties to the agreement to provide technical assistance to the less developed Parties, and the US-Jordan FTA suggests that the US to “strive” to furnish Jordan with economic technical assistance. Such technical assistance provisions are encouraging but overly broad, lacking the specificity needed to be meaningfully implemented.

5. Institutional Structure

FTAs are governed by a variety of institutional structures. Many bilateral FTAs set up ad hoc committees to consider issues as they arise. African RTAs, in contrast, often establish permanent governmental structures. Further, FTAs differ in the amount of authority granted to the administrative institution created by the agreement. For instance, the EAC Treaty stipulates that “regulations, directives and decisions . . . [that are] binding on Partner States,” making it one of the most binding of the African RTAs and an institutional structure that does not require domestication at the country level for the agreement to take effect, although practice has shown that such country-level action is often still needed to bring laws and procedures into conformity with regional frameworks.⁶ In contrast, in the South African Development Community (SADC), only protocols are legally binding, and all other instruments require domestication in order to go into effect. Other African RTAs, such as the Economic Community of West African States (ECOWAS) and COMESA lie somewhere in the middle of this spectrum. ECOWAS rules and regulations are binding upon members once published in the national gazette, although several countries (notably Ghana and Nigeria) have national constitutional structures that require parliamentary ratification.⁷ COMESA instruments require domestication at the country level as well. These aspects will have increasing relevance as the parties to these RTAs enter into FTAs with other trading partners.

FTAs also differ in substance and in specificity. Many agreement (such as COMESA and the EAC Treaty) address specific non-tariff issues (the building blocks referred to above) and certain sectors outright, such as agriculture and environment, whereas other agreements are much more general in nature. The EAC Treaty is noteworthy for its treatment of specific concerns, such as transportation in landlocked countries (Article 89), harmonizing traffic laws (Article 90), seed multiplication and distribution (Article 106), and the role of women in business (Article 122). In contrast, the SADC Treaty only addresses the SADC’s institutional structure, leaving more specific goals to be worked out through additional instruments. Continued comparison of African regional economic communities (RECs) and their implementation could reveal that more specific provisions and clearer institutional roles link more closely with decisive development goals.

⁶ See Katrin Kuhlmann, “Harmonizing Regional Seed Regulations in Sub-Saharan Africa, A Comparative Assessment,” Syngenta Foundation for Sustainable Agriculture (September 2015).

⁷ See *ibid.*