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*International Administrative Governance: Studying the Policy
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*An Examination of Institutional Bias in Providers of Legal
Advisory Technical Assistance
on Selected Trade and Investment Issues*

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Abstract

Developing countries sometimes request the assistance of intergovernmental organizations to help write new laws, policies and regulations where they did not exist, to review draft legislation, or to assist in the updating and amendment of outdated laws and policies. This paper seeks to examine the extent to which policy advice provided by intergovernmental organizations differs depending upon the provider, and assesses the extent developing countries are conscious of those biases when they request technical assistance. Advice on the sensitive topics of intellectual property, investment and competition that have been provided to policy makers of developing countries by different multilateral agencies is examined. On the supply side, the paper draws upon advisory reports published by the secretariats of international organizations. On the demand side, this review is complemented by a survey of the extent to which those requesting advice in developing countries are conscious of policy bias when they ask for advisory services.

Keywords: intergovernmental organizations, technical assistance, policy advice, bias, developing countries, intellectual property, investment, competition

An Examination of Institutional Bias in Providers of Legal Advisory Technical Assistance on Selected Trade and Investment Issues¹

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Background

The secretariats of public intergovernmental organizations (IGO) such as the United Nations (UN), its programmes, departments and specialized agencies, the World Bank, the Organization for Economic Development and Cooperation (OECD) and the World Trade Organization (WTO), among others, provide, within their respective areas of competence, prescriptive advice to developing countries on their domestic policies. In most cases, this advice is solicited by the recipient country and delivered by the IGO as technical assistance (i.e., advisory services).³ Such advice will often recommend changes to existing laws, regulations or policy positions.

Because their respective areas of competence and mandates sometimes overlap, a number of IGOs may provide advice on the same topic. This is particularly true in the realm of economics, where a number of organizations are working on trade, investment and related issues. The World Bank, the United Nations Conference on Trade and Development

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³ IGOs also provide prescriptive advice which is not necessarily solicited through the publication of thematic flagship reports. These include, for example, UNDP's *Human Development Report*, UNCTAD's *World Investment Report*, and WIPO's Global Innovation Index, among others.

(UNCTAD), the UN's Regional Economic and Social Commissions, the OECD and the United Nations Development Programme (UNDP) all have specialists working on investment policies, for example.

This paper is designed to provide an initial glimpse into whether IGOs offer advisory services that are distinct from one another on similar topics in the economic realm; that is, whether their prescriptive advice may reflect certain policy biases and where such biases potentially come from. The paper also attempts to address the question of whether the developing countries that request advice from IGOs are conscious of those biases when asking for technical advisory assistance on their domestic policies.

The Administrative Policy Making Paradigm

Policy making and implementation is one of the basic functions of government administrations in any country, whether developed or developing. In his address to the 1997 United Nations International Technical Forum on Public Administration and Development in New York, then-Under-Secretary General for Development Support and Management Services at the United Nation Secretariat Jin Yongjian stated that:

“[e]very government has administrative objectives to accomplish: (1) agenda-setting and policy-making; (2) strategic planning, especially macro-economic management; (3) management of finances, personnel, information, and materials; (4) environmental protection and resources management; ((5) social development and service delivery; ... (6) providing a guiding framework for central-local relations

and local administration; and, (7) an overall legal framework, especially for the promotion of private sector development” (Jin, 1997).

Laws and regulations for issues affecting trade, investment and related economic issues, therefore, are often initially prepared by relevant bureaucracies such as ministries of trade/commerce or industry, intellectual property (IP) offices, competition authorities and investment promotion agencies.

The policies ultimately adopted by a country on a given issue reflect the unique political and decision making processes of that country (Page, 2006). Some policy changes require the passage of a bill into law or an amendment of an existing law by the national legislature, while others fall within the regulatory ambit of the given ministry or government agency. Still others may reflect the policy priorities and imperatives of political leaders. The degree of inputs that civil society, lobbyists and other interest groups may have on policy making will also differ from country to country. In many cases, though, the original text for any regulatory or legislative change emanates from a bureaucratic agency or ministry (or from a combination of these).

It is within this policy making context that IGOs, among others, provide advice to developing country bureaucracies on trade, investment and related economic issues.

Existing Research and Literature

Existing literature in this area is limited, despite the fact that significant amounts of official development assistance (ODA) is spent on policy advisory work, whether through bilateral

funds or through IGOs.⁴ Earlier work in the field of development assistance related to intellectual property policy suggests that a wide range of views exist with respect to the appropriate level of intellectual property protection in a country, and that capacity building and technical assistance by IGOs and foreign universities seem to have, relative to other providers of such technical assistance, an impact on the extent to which the recipient believes the country should have stronger IP protection or greater access and policy flexibility in this area (Morin, 2013 and 2014).

Morin's samples examined only the issue of intellectual property and cautions the reader about extrapolating too much from the paper's findings. Some of his findings are very relevant to the present study, though, as well as for re-thinking the way in which technical advisory assistance on wider issues of economic policy is provided. One of the underlying assumptions made by Morin in his studies is that different types of technical assistance providers have underlying policy positions that are reflected in the training and advice they give to developing countries. Thus, training and advisory work provided by the US Department of Commerce is likely to reflect American commercial interests, while training provided by civil society organizations is likely to have a very different viewpoint. This point is underlined in his observation that non-governmental organizations (NGOs) appear to offer their technical assistance to those who already share their normative preferences (Morin, 2013, p. 23).

⁴ Due largely to the way that government ODA budgets are presented, the precise amount that bilateral agencies and IGOs dedicate to policy advisory work in developing countries is difficult to determine. Such costs include, however, staff time, travel, meeting costs and publication costs, among other items.

The other important point which one can infer from Morin's studies are that there appears to be both a supply of and demand for policy advice, even within the limited numbers of actors providing technical assistance to developing country governments. This seems true not only in IP, but in other areas of economic law as well, such as in competition and investment. For example, on the supply side, service providers are advertising their products regularly to developing country clients, as can be seen in a piece from the OECD in their monthly *Observer* magazine, which, while appearing as an article in the magazine, is pretty much marketing their Policy Framework for Investment to policymakers in potential client countries. It states, in relevant part, "[w]hether policymakers want to boost investment in low-carbon activities, engage in long-term investment in infrastructure, or strengthen due diligence in agriculture, the OECD Policy Framework on Investment offers support" (OECD, 2015).

There has to date been no attempt to systematically examine the extent to which IGO providers of technical assistance may differ substantively in the provision of prescriptive policy advice on controversial economic issues that are the subject of government laws and regulations. If such differences exist, then where do those differences emanate from? On the demand side, there has been no examination of the extent to which those government ministries and agencies requesting advice from IGOs ask for technical assistance are conscious of potential policy bias by the providing organization. Indeed, it may be that developing countries are quite sophisticated 'consumers' of policy advisory services. The purpose of this paper is to make an initial probe into these issues using the methodology outlined below.

Methodology

On the supply side, this paper examines three areas of economic law and policy, namely (1) competition, (2) intellectual property, and (3) investment. These areas are chosen specifically because they are areas that generate debate and are subject to a wide spectrum of opinions, and therefore potentially gauge the extent to which IGO providers of advice exhibit biases in their policy prescriptions. As mentioned above, the extent of bias and controversy has been studied earlier by Morin in the case of intellectual property. The remaining two areas are ones where a comprehensive and binding multilateral agreement has been elusive due to the inability of governments to begin negotiations on establishing global standards; it should be noted that both competition and investment issues were among those abandoned by the WTO in the current Doha Development Round of negotiations during their 2003 Ministerial meeting in Cancun, Mexico.

Some explanation should perhaps be made of why each of the above policy areas can be controversial, and thus better reveal potential policy bias.⁵ In the area of investment, the debate concerns the degree to which domestic markets should open up to foreign investment and the ease with which foreign investors are able to do business in the country (and conversely the degree to which such foreign investment is seen as a threat by domestic industries). They may include the scope of negative lists which delineate those sectors in

⁵ The author recognizes that this is a simplification, and that the debates tend to be more nuanced depending upon the subject matter of policy making and the country in question.

which foreign investment is prohibited or limited; the instances where governments can expropriate; national treatment issues including available tax incentives; and the forum in which investors may seek redress for certain disputes, among others. (UNCTAD, 2012)

With respect to intellectual property, the debate centers on the extent to which certain IP rights, such as patents and copyrights, should be made available and conversely, the optimal size of the public domain which is freely accessible. Beyond the scope of availability, the debate also includes the question of whether certain countries are sufficiently engaged in the enforcement of IP rights. While the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) established certain minimum standards to which all WTO Members must, subject to limited exceptions⁶, adhere, these standards are framed in language that often leaves substantial leeway for governments to craft policies in a manner that best serves their domestic needs (UNCTAD-ICTSD, 2006). Finally, competition policies address controversial issues including the regulation of mergers and acquisition and the treatment of state-owned enterprises. Again, the debate focuses on whether the adoption of certain rules ultimately favors domestic or foreign constituents. It should come as no surprise, then, that these are all topics which were included in the negotiation of megaregional preferential investment and trade agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) agreements. Ultimately, these are all subjects which go to the heart of domestic and international discussions on the desirability of further economic liberalization.

⁶ LDCs are exempt from applying TRIPS minimum standards until 2021; they are also exempt from having to offer patents on pharmaceutical products until 2033.

The second methodological challenge is to find appropriate advisory reports to carry out a comparison between the prescriptions given by one IGO with another. The author of this study chose to limit comparisons to publicly available advisory reports and studies of national policy regimes prepared by IGOs in the three respective areas of investment, competition and intellectual property. In this regard, governments may choose to receive an advisory report containing prescriptive policy advice without a publication, as is often done in the case of IP advice provided by WIPO. Because of the difficulty in obtaining unpublished advice provided by IGOs, the present study is limited to those organizations that have actually published studies in these areas. As mentioned earlier in a footnote, prescriptive advice is also given by IGOs in the form of ‘flagship’ reports, which are not addressed to specific requesting countries but still seeks to generate impact in the form of policy changes in the audience countries to which the publication is addressed. Such ‘flagship’ reports are also excluded from the scope of the study.

In order to be able to compare studies, it was necessary to find at least two organizations that have made publicly released studies on the same topic area in the same country. A cross comparison of such studies is presented in the color-coded table below.

Table 1

**Publicly Available Advisory Reports by International Organizations in the Fields of
Investment, Intellectual Property and Competition**

	UNCTAD	OECD	WTO	EIF/DTIS	WHO
Investment	Bangladesh	India	India	Cambodia	
	Nepal	Indonesia	Pakistan	Lao PDR	
	Mongolia	Myanmar	Brunei	Bangladesh	
	Sri Lanka	Vietnam	Mongolia	Bhutan	
	Vietnam		China	Nepal	
			Myanmar		
Intellectual Property	Cambodia	Indonesia	Malaysia		Thailand
	Indonesia		Hong Kong SAR		
	Thailand		Chinese Taipei		
	Vietnam		Macao SAR		
	Nepal		Vietnam		
			Indonesia		
Competition	Philippines		Bangladesh		
	Pakistan		Korea		
	Mongolia		Singapore		
	Indonesia		Nepal		
			Thailand		
			Cambodia		
			Sri Lanka		
			Maldives		
			Philippines		

Compiled by the author (2016)

From this table, the following advisory reports were chosen for comparison:

In the area of intellectual property policies (color-coded yellow in Table 1), the following advisory studies on Indonesia were chosen for comparison: UNCTAD's *Development Dimensions of Intellectual Property in Indonesia* (2011) and the OECD's *National*

Intellectual Property Systems, Innovation and Economic Development with Perspectives on Colombia and Indonesia (2014).

In the area of competition policies (color-coded red in Table 1), the following advisory studies on the Philippines were chosen for comparison: UNCTAD's *Voluntary Peer Review of Competition Law and Policy: Philippines* (2014) and the WTO's *Trade Policy Review of the Philippines* (2012).

In the area of investment policies (color-coded light green in Table 1), the following advisory reports for Bangladesh were chosen for comparison: UNCTAD's *Investment Policy Review of Bangladesh* (2013) is compared with the *Diagnostic Trade Integration Study (DTIS) of Bangladesh* (2015) published by Enhanced Integrated Framework (EIF), a multilateral trust fund with its Secretariat located in the WTO. While there have been numerous published reports on Viet Nam by the OECD (2009), UNCTAD (2008) and the WTO (2013), the WTO report was largely descriptive while the UNCTAD report was designed primarily to provide the beneficiary with a strategy to attract investment in the electricity sector, making direct comparisons with the OECD report difficult. An effort is made to highlight relevant comparisons/contrasts nonetheless.

As IGOs rarely proceed to undertake advisory services at the same time in the same country, a complete head-to-head comparison of advisory studies with the same terms of reference

and the same time frame is not possible. The above advisory studies were therefore chosen as the closest available for comparison on the same policy areas in the same countries.

On the demand side, a survey was designed and administered to developing country civil servants who are either: 1) responsible for producing draft regulations or legislation on the above topics: 2) responsible for negotiating preferential trade and investment treaties that contain provisions related to these topics: or 3) responsible for liaising with and requesting technical assistance from IGOs on the above topics. The respondents were from Cambodia, China, Egypt, Indonesia, the Philippines, Thailand and Viet Nam. The survey constitutes an attempt to gauge the extent to which they take into account potential policy biases of IGO technical advisory assistance providers. A copy of the survey is attached to this study in the **Annex** to the paper. This survey was administered to 63 individuals over the period of January 2016 to May 2017.

Analysis

1. Advisory Services to Developing Countries on Economic Issues Provided by IGOs

This section compares those advisory reports of the countries identified in Table 1 and examines the extent to which the advice provided is similar or different, and hypothesizes on the possible roots of policy bias by those IGOs in the three areas of intellectual property, competition and investment.

A. Intellectual Property

This sub-section compares the recommendations made to the Government of Indonesia in UNCTAD's 2011 advisory report entitled *Development Dimensions of Intellectual Property in Indonesia* with the OECD's 2014 study on *National Intellectual Property Systems, Innovation and Economic Development with Perspectives on Colombia and Indonesia*⁷. The former was prepared in response to a request for technical assistance to UNCTAD from Indonesia's Directorate General on Intellectual Property Rights (DGIPR) and the latter was prepared by the OECD in collaboration with Indonesia's Ministry of Science and Technology (RISTEK).

Both documents analyze the national intellectual property system in Indonesia. The UNCTAD document, in line with its terms of reference, provides prescriptive advice on how the country's IP policies can be improved to support the specific development objectives of, respectively, greater access to medicines, the transfer of technology and competition. The OECD document looks more broadly at the question of how the IP system can be improved to encourage innovation in a developing country environment, and provides prescriptive advice to this end. Both reports were undertaken based on a fact-

⁷ The OECD study actually analyzes and provides recommendations to both Colombia and Indonesia. For purposes of ensuring a comparison, the author examines only the sections related to Indonesia in the OECD study.

finding mission to Indonesia by their respective staff, where numerous stakeholders from various ministries, agencies, universities and private sector representatives were interviewed. The UNCTAD report also benefited from a post-drafting, pre-publication validation workshop in Jakarta, while the OECD report benefited from an OECD peer review presentation in London. UNCTAD's report makes 19 specific recommendations in its report, while OECD's report makes 15.

There are a number of areas where both UNCTAD and OECD come to the same conclusions and make similar recommendations. Both advisory reports recognize the importance and potential of capitalizing on the traditional knowledge of and genetic resources in Indonesia. According to recommendation 13 of the OECD report:

“IP related to traditional knowledge, genetic resources, folklore and GI is particularly relevant for Indonesia. Policy should encourage communities to generate economic value based on their assets, as these uses will bring the biggest payoff” (OECD, 2014).

UNCTAD's report makes a recommendation to include a mandatory disclosure of origin requirement in their patent law for applications utilizing local genetic resources and traditional knowledge (Recommendation 11). Recommendation 1 of the UNCTAD report also argues that:

“[t]he possibility to obtain a simple patent (utility model) for minor changes in chemical structure or new methods of delivery could be maintained in the Patent Law provided the applicable criteria are met, as a means to incentivize research and

product development in areas of strength for Indonesia such as biodiversity and TK-based medicines” (UNCTAD, 2011).

Driven largely by statistics from DGIPR showing overwhelming use of the patent system by non-residents as opposed to locals, both reports recognize that for Indonesia, non-patent IP vehicles could potentially constitute a more effective way to promote local innovation than patents. According to the OECD:

“[d]epending upon the activity, trademarks, design and utility models can involve a larger group of innovators than patents. Therefore, Indonesia should address the weak use of utility models by residents. Unregistered design rights can also be a way to support SMEs in fast-moving industries such as fashion . . . ” (Recommendation 14, OECD, 2014).

Recommendation 13 of the UNCTAD report also stresses the importance of making the utility model system more readily accessible to local inventors:

“Indonesia should consider whether it is appropriate to remove industrial applicability and establish a separate standard for utility for the grant of simple patents.” (UNCTAD, 2011).

Finally, both reports emphasize the importance of screening for quality patents. Recommendation 9 of the OECD report encourages Indonesia “to shift away from a ‘quantity’ approach to a ‘quality’ approach in its IP incentive policy. Many of the recommendations in the UNCTAD report recommend revisions to the Patent Law that would permit DGIPR to reject bad quality patents, including requiring more disclosure

(Recommendations 10 and 11), and reaffirms the importance of pre- and post-grant challenges to patents as an important check on bad quality patents (Recommendation 19).

There does not appear to be any recommendation by one IGO that directly conflicts with the recommendation of the other. The latter report even cites the earlier one as source material (see p. 176, OECD, 2014). The main difference between these two advisory studies is one of emphasis, and this appears to stem from their respective terms of reference and the Indonesian agency with whom the respective IGOs collaborated. The UNCTAD report focused on possible amendments to the Patent Law, which was within the purview of its client, DGIPR. The OECD report, while examining IP laws, focused more on how IP law relates to the national innovation system of Indonesia, which is very much within the purview of its client, RISTEK. At least 3 of the recommendations contained in the OECD report deal with how to commercialize inventions by public sector researchers and the potential role of IP (Recommendations 8, 9 and 12). On the other hand, the UNCTAD report emphasizes the issue of access and maintaining a robust public domain (Recommendations 1 – 8 (relating to access to medicines); 10 – 14; 15; and 17 – 19).

The difference in emphasis can also be seen with respect to how the first draft of the report, which was prepared in both instances pursuant to a fact-finding mission in Indonesia, was validated. The authors of the UNCTAD report undertook a validation of local stakeholders, which presumably aimed to increase the likelihood of support of the recommendations by Indonesian interest groups that are affected by the DGIPR bill to amend the Patent Law. The authors of the OECD report undertook a peer review workshop in London hosted by the United Kingdom's Intellectual Property Office and took on board comments on the

draft chapters by noted experts from developed countries and WIPO in the field of intellectual property law and innovation.

Institutionally, neither UNCTAD nor OECD is a treaty-body secretariat. Although UNCTAD has historically been both a forum where inter-governmental treaty negotiations took place⁸ and a think-tank for inter-related issues of trade, investment, technology and development, it has in recent years focused on the latter, complementing its research with policy-level technical assistance to developing countries (UNCTAD, 2014b). The OECD is a 34-member intergovernmental organization dedicated to research and analysis on economic development issues and provides related technical assistance. The key difference between the two institutions in terms of substance is that the views of the latter organization reflect those of the 34-member donor governments that provide ODA to developing countries, while the former has a membership that is essentially the same as that of the UN General Assembly. Further, UNCTAD's Secretary-General has traditionally been from a developing country.

Significantly, the request to UNCTAD for technical assistance came as DGIPR was preparing revisions to their Patent Law.⁹ DGIPR is staffed by legal experts who, for the most part, generally do not need external assistance in drafting legal text in the local Bahasa language as such. The request for advisory services could therefore be seen as an attempt by the recipient to use the outcome recommendations of an IGO as impetus to secure

⁸ Though it's the UNCTAD secretariat is not its treaty-body secretariat, important commodity agreements such as the International Tropical Timber Agreement were negotiated under UNCTAD auspices.

⁹ An amendment to the Patent Law was passed in July 2016 that appears to take on board a number of suggestions from the respective advisory reports.

widespread support for legislative revisions. The OECD study makes no mention of the origins of their report beyond its cooperation with RISTEK, but does mention that it is part of two larger OECD research initiatives on the “the ways in which development challenges shape innovation performance, in particular how development contests shape conditions for successful national IP policies” and “assessing country innovation policies by providing insights into a specific tool for innovation policy: intellectual property rights” (p. 4, OECD, 2014).

B. Competition

This sub-section compares UNCTAD’s 2014 *Voluntary Peer Review of Competition Law and Policy of the Philippines* with the sections concerning competition in the WTO’s 2012 *Trade Policy Review of the Philippines* (i.e., pp. 46 – 48 on government procurement; and pp. 55 – 58 on, respectively, competition policy and price controls, and on state-trading, state-owned enterprises, and privatization, WTO 2012b). The UNCTAD report was prepared as a result of consultations between the Government of the Philippines and UNCTAD, and upon the formal request of the Intergovernmental Group of Experts on Competition Law and Policy. The analytical approach is to examine the competition regime of the country against the non-binding Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices¹⁰, which serves as one possible template for model competition policies. The WTO Trade Policy Reviews examine the

¹⁰ The Multilateral Set was adopted by the UN General Assembly in 1980, and is reviewed every five years at UN conferences.

“regular collective appreciation and evaluation of the full range of individual [WTO] Members’ trade policies and practices and their impact on the functioning of the multilateral trading system” (p. iii, WTO, 2012b), and generally includes a section dedicated to an analysis of the country’s competition policies. The emphasis is on the extent to which the Member adheres to commitments made under multilateral trade and plurilateral trade agreements. Members agree to periodic reviews as a condition for their WTO membership. Both documents seek to identify weaknesses and provide policy prescriptions in this field.

Both the UNCTAD and WTO documents highlight that, at the time of writing, the Philippines lacked a comprehensive competition law,¹¹ and both documents take note that the Philippines’ Department of Justice has been designated the lead agency for ensuring the development and passage of comprehensive competition laws and regulations.

From there, however, the two reports differ in emphasis. The Voluntary Peer Review concentrates mainly on recommendations regarding what the new competition law should contain, as well as recommendations directed at building the capacity of a new competition agency for the Philippines.¹² The Trade Policy Review is largely factual in terms of all of

¹¹ The Philippines has since enacted its Competition Act in 2015.

¹² For example, the 2014 UNCTAD Report contains the following recommendations:

“Any competition law should contain a provision to ensure, where the offender is a corporation, partnership, association, firm or other entity, that the financial liabilities are joint and several directed against directors, executive officers, general partners and the like” (p. 34)

“Any budget proposal to fund a Competition Agency must at the same time consider the funding implications for the NBI and NPS” (p. 35)

“Any new regulatory model should be established in a manner that has considered the call for independence from political interference with the UNCTAD Model Law on Competition, and is

the measures that the Philippines has taken in order to conform to the norms expected by the rest of the WTO Membership, and is critical mostly where those norms have not been met. It notes in the area of government procurement, for example, that:

“[n]evertheless, foreigners’ participation in the procurement of goods remains restricted, and seems to depend upon the source of the funds for the project and the domestic availability of the procured goods and services” (para. 67, WTO, 2012b)

The WTO Report notes at the end of the section on procurement, however, that the Philippines is “neither a signatory nor an observer to the WTO Plurilateral Agreement on Government Procurement” (para. 68, WTO, 2012b). The WTO Report is also quite critical of the Philippines’ Price Act, which allows the imposition of price ceilings on certain goods and commodities in times of crises (para. 106, WTO, 2012b).

Like Indonesia, the Philippines has no shortage of legal experts that can draft legislation in the local Tagalog language, even in areas where they may be drafting such laws for the first time. As in the case of the two studies compared in the field of intellectual property, the two studies examined in the field of competition do not contradict one another, but they do emphasize different substantive areas after both note the absence of comprehensive competition legislation, a deficiency which has since been rectified.¹³

One possible explanation of the difference in emphasis lies in the intergovernmental bodies to which these reports are presented. The Intergovernmental Group of Experts on

likely to be perceived by the wider community as effectively independent of the political system”)p. 32).

¹³ The Philippines enacted a competition law in July 2015 (Republic Act No. 10667).

Competition Law and Policy, to which the UNCTAD Voluntary Peer Reviews are presented, is largely one made up of competition authorities. The WTO Trade Policy Reviews are presented to the whole WTO Membership periodically to examine their compliance with multilateral and plurilateral trade agreements. It is possible, therefore, that the WTO may have more of an interest in seeing that the commitments contained in their agreements become an international norm.

C. Investment

This sub-section compares recommendations on investment in the pharmaceutical sector in UNCTAD's *Investment Policy Review of Bangladesh* with the *Diagnostic Trade Integration Study (DTIS) of Bangladesh* (2015) published by Enhanced Integrated Framework (EIF). While a *WTO Trade Policy Review for Bangladesh* was published in 2012, there is far less material on the sector in this study as compared to the Investment Policy Review and the DTIS, and is therefore excluded from the scope of examination hereunder. The EIF is a multi-donor trust fund for the Least Developed Countries (LDCs) whose Secretariat is physically located within the WTO, and whose fund is managed on a day-to-day basis by the United Nations Office of Project Services (UNOPS). Its projects are collectively and informally termed 'Aid for Trade' with the aim of enabling LDCs to become more active players in international trade by providing funds to help them address identified 'supply side' constraints.¹⁴ Along with the WTO, the World Bank exercises a significant amount of influence in the overall management and direction of Aid for Trade funds under the EIF.

¹⁴ See <http://www.enhancedif.org/en/about> (last accessed on 22 December 2015).

The 2013 *Investment Policy Review of Bangladesh* was undertaken in response to a request for technical assistance to UNCTAD by the country's Ministry of Industry. These Reviews, which are often presented under an agenda item during regular meetings of UNCTAD's Commission on Investment, Enterprise and Development, are "intended to help countries improve their investment policies and to familiarize governments and the international private sector with an individual country's investment environment" (UNCTAD, 2013). The Ministry in this case requested that the analysis and recommendations focus on attracting foreign direct investment (FDI) in physical infrastructure, the information and communications technology (ICT) sector and the pharmaceutical sector. The methodology involved a fact-finding mission followed by a national workshop and an intergovernmental presentation and discussion of the findings at UNCTAD's Commission on Investment, Enterprise and Development.

The DTIS report for Bangladesh was prepared in response to a request from Bangladesh to avail of EIF funds for trade-related assistance to LDCs. The counterpart working with the core EIF team drafting the study was the WTO Cell, which is part of the country's Ministry of Commerce. The report itself was prepared by a team led by World Bank staff and consultants, pursuant to consultative workshops and one-on-one meetings. This was followed by a validation workshop organized jointly with the WTO Cell and the World Bank. DTIS recommendations usually lead to the creation of an Action Matrix to facilitate financing of future activities in furtherance of integrating the country into the global trading system. Both advisory studies identify the pharmaceutical sector of Bangladesh as a key sector for growth and opportunity. The EIF's analysis and recommendations are contained

in Chapter 14, Volume 3 of the DTIS report, which contains sectoral studies. The Investment Policy Review makes four main recommendations with respect to the pharmaceutical sector, contained in recommendations 8.1 – 8.4 of the report (p. 89, UNCTAD, 2013).

The analysis and conclusions of these two advisory reports are similar. Both praise Bangladesh and its local pharmaceutical industry for achieving close to full self-sufficiency through manufacturing of essential medicines. Both recognize that the lack of capacity at the national drug regulatory authority undermines the future growth potential of the industry. Both emphasize the importance of gradually introducing the industry to foreign competition by making it easier to form joint ventures in this sector, as well as the completion of a dedicated park to manufacture active pharmaceutical ingredients (API) to enable price reductions that would make Bangladesh's pharmaceutical products more competitive with generic products from China and India.

The one salient difference between the two reports lies in the area of strategies to attract foreign investment into the pharmaceutical sector. While both advisory reports recognize that the local industry ought not, in the long term, to rely on an exemption from the TRIPS Agreement to grant patents on pharmaceuticals as a means to attract investment from countries like India (which had until 2005 kept medicines off-patent but must now offer patent protection to medicines under the TRIPS Agreement) to build up its generic pharmaceutical industry, the UNCTAD report suggests that “relevant public health flexibilities under the TRIPS Agreement need to be incorporated in clear, unambiguous terms into national legislation” (p. 66, UNCTAD 2013). The DTIS, on the other hand,

steers completely clear of this type of strategy and comments that “TRIPS appears to be less and less relevant for Bangladesh now” (The World Bank, 2014).¹⁵

The similarity of results may stem from the fact that the methodology employed is quite similar, involving fact-finding followed by a local validation workshop of a draft. These instances may have provided an opportunity for greater input by local stakeholders on the respective final documents. Indeed, the latter DTIS study quotes as source material earlier UNCTAD work regarding the pharmaceutical industry (p. 170, The World Bank, 2014). Assuming that the stakeholders consulted were similar, the lack of time lapse between the earlier study (published in 2013) and the latter (published in 2014) may also have been a factor that led to similar analyses and recommendations.

While there may not have been any specific need to carry out a study that largely repeats the analysis and conclusions by UNCTAD under the Investment Policy Review (at least with respect to the pharmaceutical sector), comprehensive DTIS studies are a pre-requisite to access EIF funding.

Finally, while excluded in this paper from a detailed comparison since they were designed for different purposes, it should be noted that the OECD’s *Investment Policy Reviews – Vietnam: Policy Framework for Investment Assessment* (2009) and the *Investment Policy Review of Viet Nam* came to largely similar prescriptive conclusions as well. Both documents urged, in particular, reforms to the country’s extensive state-owned enterprises to allow FDI, along with greater and fairer competition.

¹⁵ Both the DTIS and the Investment Policy Review of Bangladesh were prepared before the TRIPS Council agreed to an extension of the waiver that exempts LDCs from having to grant patents on pharmaceutical products from 2016 to 2033.

2. Findings of a Survey of Beneficiaries of Policy-Level Technical Assistance by IGOs

As noted in the methodology section, a survey was conducted to obtain the views of developing country beneficiaries of prescriptive policy advice on sensitive economic issues. This paper presents the results from an initial set of 63 responses from mostly, but not exclusively, Asian countries. The surveyed sample includes respondents from Least Developed Countries (Cambodia) and middle income countries, including rapidly industrializing economies such as China, Indonesia and Thailand. The respondents represent various ministries and agencies that have received policy advice or legislative drafting advice from a number of IGOs. They are, in order of frequency with which they were mentioned in the survey responses, WIPO, UNCTAD, WTO, UNDP, the World Bank, the World Health Organization (WHO), the Asian Development Bank (ADB), OECD, the Economic and Social Commission for Asia and the Pacific (ESCAP), the South Centre, the United Nations Industrial Development Organization (UNIDO) and the UN Food and Agriculture Organization (FAO). The respondents are either responsible for producing draft regulations or legislation on competition, intellectual property and/or investment, responsible for negotiating preferential trade and investment treaties that contain provisions related to these topics, and/or responsible for liaising with and requesting technical assistance from IGOs on these topics.

Respondents were asked to rank on a scale of ‘very important’, ‘important’, ‘somewhat important’ and ‘not important’ a series of factors they consider when requesting policy

advice or legislative drafting advice from an IGO. Of the factors, the most important factor for the beneficiary was that the IGO had authoritative and substantive expertise in the subject matter area (40 (63%) marked as ‘very important’), followed by the IGO being able to provide neutral, objective advice on potentially controversial issues (37 (59%) marked as ‘very important’). This was followed by the ability of IGO technical assistance to help defray costs associated with preparing legislation (25 (40%) marked as ‘very important’) and that the IGO is a treaty body secretariat that helps to ensure that policy choices are compliant with the country’s economic treaty obligations (24 (38%) marked as ‘very important’). When ‘important’ replies are added in, in addition to the above factors, the ability of the IGO to help explain the need for policy change to domestic stakeholders was also a leading reason for requesting advice (16 ‘very important’ and 33 ‘important’ replies).

When asked whether they thought that treaty body secretariats provided neutral policy advices on issues within their purview, 28 (44%) respondents indicated that IGOs did so most of the time, 17 (27%) respondents indicated that they did some of the time and the same number indicating that they always provided neutral advice.

With respect to the general level of satisfaction at the policy advice provided by international organizations, 21 respondents (33%) indicated that they were always satisfied with the advice, 20 respondents (32%) indicated that they were satisfied most of the time, and 12 (19%) respondents indicated that they were satisfied some of the time.

Respondents who were not satisfied with IGO advice all of the time were asked to indicate the reason why they were not satisfied with the policy advice that they received from IGOs

from a list, which also included the possibility to add reasons not listed. 26 respondents (41%) indicated that they had received policy advice that was standardized and not tailored to the country's needs. This was followed by 7 respondents saying that the policy advice was not delivered in a timely manner and 6 respondents saying that little or no attempt was made to secure the agreement of the country regarding the staff and/or consultants preparing the policy advice. Other reasons indicated by 2 or 3 respondents respectively included that: the advice was poorly researched or unsubstantiated; the advice was unsolicited; the advisory activity required significant cost sharing by the government; and that the provider did not attempt to build consensus around the recommendations made.

The respondents were further asked whether they had considered requesting an opinion from a second source in light of their dissatisfaction with the policy advice received. 24 out of the 63 respondents (38%) answered affirmatively, while only 3 answered negatively.

Respondents were asked to rank various types of organizations in their ability to meet the policy/legislative needs of their agency or Ministry. For the sake of analysis, the author has tabulated the results by type of organization where the respondent answered either '1', '2', or '3' as indicating confidence in the type organization to deliver, while rankings of '6', '7' or '8' were treated as organizations that were viewed by respondents as questionable in their ability to deliver on policy/legislative technical assistance needs of their country. Of the 63 respondents to the survey, an overwhelming number replied that IGOs would be their top 'go to' option for meeting policy/legislative needs of their country (43 ranked IGOs as a '1' and 5 ranked IGOs as a '3', with no rankings of '6', '7' or '8'). IGOs were followed by domestic universities, which received 5 rankings of '1', 13 rankings of '2' and

4 rankings of '3', and then by bilateral agencies in developed countries, which received 5 rankings of '1', 13 rankings of '2' and 4 rankings of '3'. It should be noted, though, that a significant number of respondents replied also that bilateral agencies were not a 'go to' option for policy and legislative advice (2 rankings of '6', 2 rankings of '7' and 5 rankings of '8').

Responses of '6', '7' or '8' were generally greater than responses of '1', '2' or '3' for foreign institutions as opposed to domestic ones. Foreign universities received 20 responses for the former group and 9 for the latter, while domestic universities received 5 for the former group and 28 for the latter. Foreign NGOs received 20 responses for the former group and 10 responses for the latter, while domestic NGOs received 19 for the former group and 18 for the latter. Foreign think tanks received 11 rankings total for each group, while domestic think tanks received 7 responses for the former group and 22 responses for the latter.

While the number of respondents is admittedly limited and not all respondents answered all of the questions of the survey, the results allow for the formulation of a number of interesting hypotheses for further research, and include the following:

1. From the point of view of the beneficiaries, there is clear value added of IGOs in providing prescriptive policy advice on economic issues such as trade, investment, competition and IP. When compared to other institutions providing prescriptive advice on these topics, IGOs were by far the most trusted. Recipients generally sought in IGOs authoritative and substantive expertise on the subject matter in

question, as well as the ability to provide neutral, objective advice on potentially controversial issues. This is consistent with the suggestion by Bayer, et al. (2012) that agency choice by beneficiaries is correlated with institutional competence.¹⁶

2. While bilateral agencies in developed countries were also a major ‘go to’ institution for prescriptive policy advice on these issues, a significant number of respondents appeared to be skeptical of their neutrality, as they are more likely to be seen as having a biased agenda that is tied to the national commercial and/or geopolitical interests of the donor.
3. There appears to be some value in having more than one institution providing beneficiaries with prescriptive advice on economic issues, insofar as a sizeable number of respondents have considered asking for a second opinion when they were not satisfied with the advice they received.
4. The biggest complaint from the recipients of prescriptive policy advice on economic issues appears to be that the advice was standardized and not tailored to the country’s needs. There are a number of possible explanations for this, including: that treaty body secretariats tend to emphasize treaty compliance and the need to adhere to uniform treaty standards; the tendency of IGO experts to recycle presentations and text from country to country; and insufficient attention to national conditions and feedback when formulating prescriptive policy advice. While the first of these explanations is structural (respondents seemed to generally agree that

¹⁶ Bayer, et al. examined why governments chose to become beneficiaries of environmental projects funded by the Global Environmental Facility (GEF), and ends with the question of whether their findings can be extrapolated to the development of other national policies such as public health.

treaty body secretariats provided neutral advice in accordance with the treaties they are charged with implementing even if the advice is not always tailored to the recipient), the latter two can potentially be triangulated through judicious project management.

5. The responses appear to confirm that a general level of sophistication exists about the content and timing of the policy advice they request from IGOs. A number of respondents stated that they deploy advice from IGOs strategically in order to help explain the need for policy change to domestic stakeholders. Further, the fairly large percentage of respondents who complained about the timing of delivery appears to indicate that with respect to the provision of advice by IGOs, timing matters as the advice requested may be tied to the preparation and presentation of policies to lawmakers or domestic constituents. The above response on second opinions tends to indicate that the demandeurs of prescriptive policy advice from IGOs appear to have a clear idea about the content of the advice they were hoping to receive and how it could be deployed strategically.
6. Leaving aside IGOs and bilateral agencies, and while there will undoubtedly be differences in countries where such institutions are still nascent, domestic institutions (i.e., universities, think tanks and NGOs) appear to be more trusted in the provision of prescriptive advice than foreign ones from the point of view of the beneficiaries.

The picture that emerges from this initial set of questionnaires is that the demandeurs of prescriptive policy advice appear to be quite attuned to the potential biases of the providers,

and will approach IGOs for advisory assistance selectively, deliberately and strategically. The output advice is scrutinized carefully, and due consideration is given to obtaining alternate advice from another provider if the advice does not meet the needs of the agency or ministry requesting it.

Conclusions – What the Supply and Demand Side Tell Us

The present study is based on a relatively small sample of publicly available advisory reports providing prescriptive policy advice on the topics of competition, intellectual property and investment, as well as on a limited number of collected surveys as of the time of writing, mostly from Asian countries. While the reasons why these substantive policy areas were chosen are mentioned earlier, the author acknowledges that this represents but a small fraction of the universe of policy advice given by IGOs to developing countries, and that there are less controversial areas where the policy advice provided by IGOs is less likely to be pronounced. It is nonetheless worthwhile to study those substantive areas which are most ripe for differences of opinion. With respect to the demand side, the population of bureaucrats who request policy advice is in any event limited. Future research efforts might involve expanding the survey to policy makers in other parts of the world, such as in sub-Saharan Africa or Latin America. The findings should thus be taken as preliminary.

The results of this study appear to provide support to the notion that despite the number of limited IGO actors providing advisory services in the areas of investment, competition and intellectual property policies, respectively, market-like forces appear to drive the supply-

side service providers to exhibit competitive behavior, as evidenced by advertisement-like appeals to their respective clientele. On the demand side, survey responses to date indicate that developing countries are increasingly sophisticated consumers when they weigh the organizations from which they seek prescriptive advice. In this regard, the study confirms the tacit suggestion by Morin of competitive pressures shaping the reality of technical assistance on issues such as IP.

The data from the survey and the comparative analysis of advisory reports is insufficient to make any definitive conclusions about the potential bias of treaty secretariats as opposed to IGOs that are not treaty secretariats. Certainly, the WTO's *Trade Policy Review* series and the EIF's DTIS utilize the compliance of the target country with its WTO commitments as a benchmark for success and guide for policy reform, but the other advisory reports analyzed in this study also worked within the ambit of treaty compliance. It is true that some reports by non-treaty secretariat providers of advice sometimes emphasized the policy space available while staying in compliance with their international obligations, but such advice tends to be issue specific such as in the context of TRIPS flexibilities and public health. Meanwhile, the questionnaire responses indicate that the demanders value both the views of treaty secretariats as an authoritative interpretation of their commitments, while they also seek advice that is tailored to their domestic needs.

The potential bias of treaty body secretariats is clearly an area that is ripe for further study. Initial work on this topic has been done by Hall (2015), who, for instance, suggested that the nimble response of fundraisers at the International Organization for Migration (IOM) and the comparatively slow response of the office of the United Nations High

Commissioner for Refugees (UNHCR) to tap climate change funding in recent years was at least partly due to mandate constraints of the latter as the guardian of the 1951 Refugee Convention. A particularly interesting hypothesis that could be examined is whether the advice provided by a treaty body secretariat is likely to encourage the accession of non-parties and to take positions that expand the reach of a treaty, while non-treaty body secretariats would be more likely to take positions that explore a potentially wider range of policy options.

The survey responses indicate that in many cases the demandeurs already have a good idea as to the content of the advice they seek, but that the IGO intervention helps to move certain administrative policy agendas forward to the extent that they are able to provide authoritative and comparatively objective advice. In many cases, the civil servants from the agencies and ministries concerned are capable of formulating policies themselves (i.e., drafting legislation and regulations) with the aid of domestic institutions, hence the survey results that domestic universities, think tanks and NGOs are more likely to provide the required advice than foreign ones. That there do not seem to be overtly contradictory advice from the suppliers of published advisory report on even these controversial economic issues may also indicate that the interventions are being used primarily to push Ministerial and agency agendas forward. The picture may change, however, when non-published advisory reports are examined.

If true, then providers of prescriptive policy advice should not assume that their advice is being sought because of a lack of domestic capacity in developing countries to formulate policy as such. While the survey responses indicated that resource constraints will

sometimes require them to seek external assistance in economic policy formulation (a significant number reported that lack of funding was a reason why their agency or Ministry sought external assistance and a significant number also complained of having to cost-share), they did not reveal significant lack of technical capacity to formulate domestic policies, laws and regulations.

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Annex

**A Survey on International Organizations as
Providers of Policy Advice through Technical Assistance Projects**

1. Name _____
2. Gender ___ Male ___ Female
3. Age _____
4. Country _____
5. Ministry, Department or Agency _____

6. Functional Title _____

7. My responsibilities include the following (please mark all that apply):

- ___ representing my country in negotiations of preferential trade and investment treaties
- ___ providing advice/guidance to negotiators of preferential trade and investment treaties
- ___ preparing legislation on
 - ___ competition
 - ___ investment
 - ___ intellectual property
 - ___ other issues (please specify _____)
- ___ preparing regulations on
 - ___ competition
 - ___ investment
 - ___ intellectual property
 - ___ other issues (please specify _____)
- ___ establishing policies on
 - ___ competition
 - ___ investment
 - ___ intellectual property
 - ___ other issues (please specify _____)
- ___ formulating technical assistance requests to international organizations on
 - ___ competition
 - ___ investment
 - ___ intellectual property
 - ___ other issues (please specify _____)

8. My Ministry, Department or Agency has requested policy advice or legislative drafting advice from an international organization.

___ Yes

- No
- Don't Know

9. To which international organization(s) has your Ministry, Department or Agency requested policy advice or legislative drafting advice (mark all that apply):

- World Bank
- Asian Development Bank
- World Trade Organization (WTO)
- Enhanced Integrated Framework Secretariat (EIF)
- World Intellectual Property Organization (WIPO)
- Organization on Economic Cooperation and Development (OECD)
- United Nations Development Programme (UNDP)
- United Nations Conference on Trade and Development (UNCTAD)
- The South Centre
- UN Economic and Social Commission for Asia and the Pacific (ESCAP)
- United Nations Industrial Development Organization (UNIDO)
- Other (please specify): _____
- _____
- _____
- _____

10. Please indicate the relative importance of the following factors when your Ministry, Department or Agency requests, or has requested, policy advice or legislative drafting advice from an international organization:

- a) The international organization makes available legal drafting skills or economic analysis unavailable domestically
 Very Important Important Somewhat Important Not Important
- b) The international organization provides neutral, objective advice on potentially controversial issues
 Very Important Important Somewhat Important Not Important
- c) The international organization is a treaty body secretariat¹⁷, and ensures that policy choices are compliant with the country's economic treaty obligations
 Very Important Important Somewhat Important Not Important
- d) The international organization provides development-oriented interpretation of relevant economic treaties
 Very Important Important Somewhat Important Not Important

¹⁷ For purposes of this survey, a treaty body secretariat is an international organization that is responsible for the administration of a multilateral treaty (for example, the WTO for the TRIPS Agreement, or WIPO for the Patent Cooperation Treaty).

e) The international organization has authoritative and substantive expertise in the area
 Very Important Important Somewhat Important Not Important

f) The international organization helps explain the need for policy change to domestic stakeholders
 Very Important Important Somewhat Important Not Important

g) The international organization helps defend national policy choices against criticism from other countries
 Very Important Important Somewhat Important Not Important

h) Technical assistance provided by the international organization on policy issues helps defray costs associated with preparing legislation given our financial and/or human resource constraints
 Very Important Important Somewhat Important Not Important

i) Other(please specify): _____
 Very Important Important Somewhat Important Not Important

11. In your personal opinion, do you think that treaty body secretariats provide neutral policy advice on issues within your purview?

- Yes, always
- Most of the time
- Some of the time
- Never
- Don't Know

For those who answered 'yes, always', please proceed to question 13.

12. Please indicate the reason why you do not believe that treaty body secretariats always provide neutral policy advice on issues within your purview (check all that apply).

- Treaty body secretariats are more inclined to interpret treaties in a manner that gives the treaty wider application
- The recommendations provided reflect the views of the staff and consultants hired by the treaty body secretariats
- Treaty body secretariats are more concerned with treaty compliance than with the needs of my country
- Other (please specify)

13. I am generally satisfied with the policy/legislative advice that my Ministry, Department or Agency obtained from international organizations.

- Yes, always
- Most of the time
- Some of the time
- Never
- Don't Know

For those who answered 'yes, always', please proceed to question 16.

14. Please indicate the reason why you were not satisfied with the policy advice that you received from an international organization (mark all that apply):

- The policy advice was standardized advice that was not tailored to my country's needs
 - The policy advice was poorly researched and/or substantiated
 - The policy advice was incorrect
 - The policy advice was biased (if so, please explain how)
-
-
- The policy advice was unsolicited
 - The policy advice required significant cost sharing by my government
 - The policy advice was not delivered in a timely manner
 - Little or no attempt at consensus building around the recommendations was made
 - Little or no effort was made to secure the agreement of my country regarding the staff and/or consultants preparing the policy advice
 - Other (please specify)
-
-

15. My Ministry, Department or Agency has considered requesting a second opinion from another source (including another international organization) in light of recommendations contained in policy/legislative advice provided by an international organization.

- Yes
- No
- Don't Know

16. Please rank, in your opinion, the ability of the following organizations in their ability to meet policy/legislative advisory needs of your Ministry, Department or Agency:

- International Organizations
- Bilateral Agencies in Developed Countries
- Foreign Think Tanks
- Domestic Think Tanks
- Foreign Universities
- Domestic Universities
- Foreign NGOS

_____ Domestic NGOs

17. What would you recommend in order to improve the quality of policy/legislative advice provided to you policy/legislative advice in the area(s) under your purview?

Thank you for your cooperation!