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An Investment Agreement within the WTO for Sustainable Economic Development of Low-Income Countries

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Declaration

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgement has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

Ethics clearance is not required for this research.

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Abstract

Trade and foreign direct investment (FDI) activities are rapidly increasing worldwide. Consequently, international trade and investment laws are merging, essentially contributing to economic development. While the World Trade Organisation (WTO) does not have an investment treaty regime, many bilateral agreements in the form of Free Trade Agreements (FTA) involving trade and FDI have emerged. Low-income countries (LIC) may not always uphold their regulatory autonomy in concluding the FTA with more powerful trading nations. This gap can be mitigated by converging international trade and investment within the multilateral framework of the WTO. LICs are unable to reap the benefit of an international trade and investment regime, operating in isolation. In the current investment regime, striking a balance between the host states' regulatory autonomy and the protection of investors' rights may become arduous with the complexities and uncertainties of international investment law. Again, within international trade law the Generalized System of Preferences (GSP), devised for the economic development of developing countries, has not been able to develop LICs' economic status since GSP remains at the discretion of the preference-granting countries. To address the structural shortcomings of international economic law, this thesis proposes to establish: (i) a comprehensive international investment agreement (CIIA), as a WTO covered agreement, and (ii) an international investor dispute settlement understanding (IIDSU). The introduction of a CIIA and IIDSU will resolve a plethora of international investment law issues, and would clarify the applicable substantive and procedural laws, refining the enforcement of awards, establishing the forum where litigation takes place, and facilitating alternative dispute settlement mechanisms. The thesis also argues that the category of 'developing countries' in the WTO agreements is flawed and does not provide a true picture of countries' economic development, particularly their share of international trade and FDI. Hence, the thesis proposes a new category of LIC on the basis of their share of world trade and FDI. It argues that the convergence of trade and investment within the WTO as proposed in this thesis will contribute to the sustainable economic development of LICs.

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Conference Papers

‘The Regulatory Framework of the Generalised System of Preferences in the WTO/GATT’ at the Curtin University Research Day 9 November 2017

“Complexity of the Law Governing International Investment Arbitration” at the Curtin Law School Research Day 29 November 2018

Award

Received the Best Paper Award for Disciplines - Business Law & John Curtin Public Policy for my extended abstract of thesis

Table of Contents

List of Tables

List of Acronyms and Abbreviations

AAPL	Asian Agricultural Products Ltd
ACP	African, Caribbean and Pacific (Group of States)
ACWL	Advisory Centre on WTO [World Trade Organization] Law
ASEAN	Association of Southeast Asian Nations
BIA	Bilateral Investment Agreement
BICA	Binding International Commercial Arbitration
BIICL	British Institute of International and Comparative Law
BIT	Bilateral Investment Treaty
BRIC countries	Brazil, Russia, India and China
CBS	Curtin Business School
CDP	Committee for Development Planning (UN)
CEO	Corporate Europe Observatory
CETA	Comprehensive Economic and Trade Agreement
CIDSM	Comprehensive Investment Dispute Settlement Mechanism
CIIA	Comprehensive International Investment Agreement
CIS	Commonwealth of Independent States (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan)
CITES	Convention on International Trade in Endangered Species (of Wild Fauna and Flora)
DRD	Declaration on the Right to Development
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DVA	Domestic Value-Added
EC	European Communities
EDNY	Eastern District of New York
ECLAC	Economic Commission for Latin America and the Caribbean
EPI	Economic Performance Index
EU	European Union
EVI	Economic Vulnerability Index

FCN	Friendship, Commerce and Navigation (Treaty)
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIRA case	*Canada – Administration of the Foreign Investment Review Act* (case)
FOB	Free on Board
FSA	Financial Services Agreement (Agreement on Financial Services)
FSIA	*Foreign Sovereign Immunity Act of 1976* (US)
FVA	Foreign Value-Added
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GRS	Graduate Research School (Curtin University)
GSP	Generalized System of Preferences
GVC	Global Value-Added (Chain)
HAI	Human Assets Index
HDI	Human Development Index
ICA	Investment Covered Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	International Convention for the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IDCA	*1978 Investment Disputes Convention Act* (Papua New Guinea)
IDSB	Investment Dispute Settlement Body
IDSU	Investment Dispute Settlement Understanding
IDU	Investment Dispute Understanding
IIA	International Investment Agreement
IIDSM	International Investment Dispute Settlement Mechanism
IIDSU	International Investment Dispute Settlement Understanding

IJV	International Joint Venture
ILA	International Law Association
IMF	International Monetary Fund
IPA	*1992 Investment Promotion Act* (Papua New Guinea)
IPC	International Food and Agricultural Trade Policy Council
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
LDC	Least-Developed Country
LIC	Low-Income Country
LLDC	Landlocked Developing Country
LNTS	League of Nations Treaty Series
MAI	Multilateral Agreement on Investment
MDG	Millennium Development Goal
MFN	Most-Favoured Nation
MNE	Multinational Enterprise
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NT	National Treatment
NYC	New York Convention
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PIIE	Peterson Institute for International Economics
PPP	Purchasing power parity
PSNR	Permanent Sovereignty over Natural Resources
PTA	Preferential trade agreement
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDT	Special and differential treatment
SIDS	Small island developing State
TBT	Technical barriers to trade
TNI	Transnational Institute
TPP Agreement	Trans-Pacific Partnership Agreement
TRIMs Agreement	Agreement on Trade-Related Investment Measures

TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UN GAOR	United Nations General Assembly Official Records
UNCD	United Nations Committee for Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNCTS	UN Commission on Transnational Corporations
UNTS	United Nations Treaty Series
USA/US	United States of America/United States
USMCA	United States- Mexico- Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WCED	World Commission on Environment and Development
WEO	World Economic Outlook
WTO	World Trade Organization

Chapter 1: Introduction

Trade and foreign direct investment (FDI) have rapidly increased worldwide with the objective of achieving development.[1] Cross-border trade and investment provide greater opportunities to improve countries' economic development and can be considered as a major engine that benefits the entire world.[2] The relationship between modern trade and investment is deeply rooted in international economic law established in the nineteenth century.[3] The cross-fertilisation of these two systems provides a basis for introducing uniform rules in a multilateral agreement.[4] This thesis argues that converging of trade and investment under the World Trade Organization's (WTO) framework will bring economic development to countries and predictability to the international investment law.[5] Therefore, this study conceptualises convergence of trade and investment to draft a comprehensive international investment agreement (CIIA) with an international investment dispute settlement understanding (IIDU) to establish uniform rules for investment.

FDI provides greater opportunities for countries' economic development.[6] FDI also

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[1] Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond* (Oxford University Press, 3rd ed, 2009) 16; Americo Beviglia Zampetti and Torbjorn Fredriksson, 'The Development Dimension of Investment Negotiations in the WTO' (2003) 4(1) *The Journal of World Investment* 399, 405.

[2] Hoekman and Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond* above n 1, 16; Tomer Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law' (International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 10-11, November 2011) available at <http://ssrn.com/abstract=1957686> accessed on 22 April 2018, 4; Johanna Kalb, 'Creating an ICSID Appellate Body' (2005) 10(1) *University of California Los Angeles (UCLA) Journal of International Law and Foreign Affairs* 179, 180; Regis Y. Simo, 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility'(2020) 23 (1) *Journal of International Economic Law* 65,66.

[3] Jurgen Kurtz, *The WTO and International Investment Law*: *Converging Systems* (Cambridge University Press, 2016) 32.

[4] Ibid 18; Stephanie Hartmann, 'When Two International Regimes Collide: An Analysis of the Tobacco Plain Packing Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms' (2017) 21(2) *University of California Los Angeles (UCLA) Journal of International Law and Foreign Affairs* 204, 207.

[5] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (hereinafter referred to as the *WTO Agreement*); Fenghua Li, 'The Driving Forces of Convergence of WTO Dispute Settlement Mechanism and International Investment Arbitration' (2018) 52(3) *Journal of World Trade* 479, 480; Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform' (2014) 108 *Proceedings of the Annual Meeting* (*American Society of International Law*) 255, 255.

[6] Karl P Sauvant, 'New Sources of FDI: The BRICs Outward FDI from Brazil, Russia, India and China (2005) 6(5) *Journal of World Investment and Trade Law* 639, 639; Vantila Denisia, 'Foreign Direct

plays a crucial role in financing development and reducing the fiscal gaps of low income countries (LICs).[7] For instance, according to the UNCTAD World Investment Report 2018 and Least Developed Countries' Report 2019, FDI is the most stable component to reduce the balance of payment gap and it works to overcome economic crises of LICs.[8] Economic development through FDI can only be achieved if transparent rules and regulations are in place to control investment through regulatory autonomy.[9] However, rules relating to FDI have become more and more complex as a result of various types of FDI agreements entered into by States through bilateral investment treaties (BITs).[10] At the present time, more than 3,300 BITs have been established worldwide, leading to the fragmentation of investment law.[11] This complexity has created uncertainty in the settlement of FDI-related disputes, particularly in the absence of both a uniform system of rules to govern and regulate FDI[12] and a multilateral investment agreement that can deal with FDI-related disputes.[13] Converging trade and investment is compelling as trade and investment are

Investment Theories: An Overview of the Main FDI Theories' (2010) 2(2) *European Journal of Interdisciplinary Studies* 104, 104.

[7] UNCTAD, *The World Investment Forum 2016 Review* (UN Publication, Nairobi, Kenya, 17-21 July 2016) 5; Denisia, above n 6; This thesis defines LICs as countries whose gross domestic products (GDP) constitutes less than 1%.

[8] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations Publication, Geneva, 2018) 11; *UNCTAD, The Least Developed Countries Report 2019: The Present and Future of External Development Finance-Old Dependence, New Challenges* (United Nations, New York, 2019) 2.

[9] Nikesh Patel, 'An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty (2017) 26(1) *Minnesota Journal of International Law* 273, 283; Eric M Burt, 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' (1997) 12(6) *American University International Law Review* 1015, 1023; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 91; Anthea Robert, 'Triangular Treaties; The Extent and Limits of Investment Treaty Rights (2014) 56 (2) *Harvard International Law Journal* 353, 360.

[10] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva, 2017) 111.

[11] UNCTAD, Database of International Agreement Navigator; Jansen N Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18(4) *Journal of World Investment and Trade* 585, 585; see also *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 99.

[12] UNCTAD *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva 2017), 114; Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed' (2014) 29(2) *ICSID Review* 372, 378; Frank J Gracia, Lindita Ciko, Apurv Gaurev and Kirrin Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18(4) *Journal of International Economic Law* 861, 862.

[13] Surya P Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40(1) *The International Lawyer* 121, 122; A.A. Fatouros, 'Towards an International Agreement on Foreign Direct Investment?'(1995) 10(2) *ICSID Review* 181,188.

essentially interlinked with development.[14] Therefore this thesis takes development as a conceptual framework for suggesting the possibilities and avenues for convergence.

Investment law has little regard for the regulatory autonomy of host States to balance economic and political objectives for the benefit of their citizens.[15] Investors have challenged the regulatory authority of States.[16] These challenges hamper States' sustainable economic development activities as BITs do not strike a balance between States' regulatory autonomy and investor protection.[17] Regulatory autonomy means that States should have institutional legitimacy and the flexibility to make laws for sustainable economic development which includes the protection of environment, improvement of public health, community welfare, better living standards and employment.[18]

Sustainable economic development creates a sustainable future for the natural environment and all living beings. It ensures that the economic, social and natural environments are developed and preserved for the present and future generations.[19] Hence, instead of intervening in the regulatory autonomy of States, FDI should contribute to the achievement of sustainable economic development by improving the economic status of LICs in terms of the inflow of capital, technology transfer, improvement of management skills, reduction of unemployment, reduction of the

[14] OECD, 'Open Markets Matter: The Benefits of Trade and Investment Liberalisation' (*Policy Brief*, October 1999) 6.
[15] Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) *ICSID Review* 503, 509; Kumar Ingnam, 'Trade and Investment Rules for Inclusive and Sustainable Development: Nepalese Legal Perspectives' (2013) 2(1) *Kathmandu School of Law Review* 114,115; Helen V Milner, 'The Political Economy of International Trade' (1999) 2(1) *Annual Review of Political Science* 91, 108; Kabir A. N. Duggal and Laurens H. van de Ven, 'The 2019 Netherlands Model BIT: Riding the New Investment Treaty Waves' (2019) 35 (3) *Arbitration International* 347,352.
[16] *Tecnicas Medioambientales Tecmed S.A.v The United Mexican States* (ICSID Case No. ARB (AF)/00/2) (Award) (29 May 2003) [97]
[17] Steven R Ratner, 'International Investment Law through the Lens of Global Justice' (2017) 20(4) *Journal of International Economic Law* 747, 748; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) (Award) (28 March 2011) [381].
[18] Robert, above n 9, 366; David A Gantz, 'The Evolution of FTA Investment Provisions: from NAFTA to the United States–Chile Free Trade Agreement' (2004) 19(4) *American University International Law Review* 679, 684; Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design'(2018) 51 (1) *International Lawyer* 109, 109.
[19] Aaron Cosbey, 'Sustainable China Trade: A Conceptual Framework' (IISD Working Paper, April 2009) 2, available at <www.iisd.org> accessed on 01 July 2017.

balance of payments deficit, and the price reduction of goods through competition.[20] Moreover, investment law can be employed to promote investment in LICs,[21] encourage investment, and build investors' confidence so LICs can increase their level of investment.[22]

At the same time, host States should not frustrate investors' investments unless compelling reasons exist, such as posing a threat to the environment, interference with domestic politics, or threatening the host State's national economy by a sudden withdrawal of foreign capital.[23] Even though FDI contributes to the economic development of LICs, unless proper rules are in place, FDI can cause environmental pollution, encourage corruption and foster stark inequality between people and countries.[24]

The prevailing investment law is, to a greater extent, one-sided: for instance, international investment law promotes and protects investors' rights unfairly vis-à-vis

[20] *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019)150; UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations Publication, Geneva, 2018) 11 and 129; Burt, above n 9, 1021; Zampetti and Fredriksson, above n 1, 437; *The Future of World Trade: How Digital Technologies are Transforming Global Commerce* (World Trade Report, 2018) 134; Sèna Kimm Gnangnon and Michael Roberts, 'Aid for Trade, Foreign Direct Investment and Export Upgrading in Recipient Countries (WTO Working Paper ERSD-2015-10, 4 December 2015) 1, 3; William L Casey, Jr, 'Can FDI Serve as an Engine of Economic Growth for the Least Developed Countries?' (2015) 23 (1&2) *Journal of Competitiveness Studies* 73, 79; Bernard M Hoekman, Keith E Maskus and Kamal Saggi, 'Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options' (2005) 33(10) *World Development* 1587, 1588; *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) para 20; *Communication from Japan, Agreement on Investment, Preparation for the 1999 Ministerial Conference* WTO Doc WT/GC/W/239 (6 July1999) para 5(a); Lise Johnson, Lisa Saches and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58(1) *Columbia Journal of Transnational Law* 58,61.

[21] Denisia, above n 6.

[22] *UNCTAD Economic Development Report 201*9 (UN Publication, 2019) 37; Dirk Willen te Velde, 'Foreign Direct Investment and Development: An Historical Perspective' (Background Paper for 'World Economic and Social Survey for 2006', Overseas Development Institute) available at <dw.tevelde@odi.org.uk> accessed on 5 April 2018, 25.

[23] Sornarajah, above n 9; Surya P Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40(1) *The International Lawyer* 121, 122; see also *ASEAN Comprehensive Investment Agreement* (ACIA) signed 26 February 2009 (entered into force 24 February 2012) article 17 (1) a, b and c.

[24] Ratner, above n 17, 751.

host States.[25] This undermines the regulatory autonomy of host States (whether developed or developing) with no reciprocal duty imposed upon investors.[26] In contrast, trade law provides for reciprocal duties among the WTO members and the WTO has introduced a rule-based legal system for international trade, which is lacking in investment law.[27] Therefore, as a solution an investment covered agreement within the WTO should be established to create a rule-based legal system for investment in the world. This chapter discusses the challenges for establishing a CIIA, Special and Differential Treatment (SDT) principles, the importance of defining LICs in the WTO, the historical evolution of trade and investment law, the reasons why the WTO has failed to introduce a CIIA, the cross-fertilisation of trade and investment under the WTO, a rule-based dispute settlement system for trade and investment, the objectives and the significance of the study to lay the framework for the thesis.

1.1 International Investment Law, as it Currently Operates, Pose Challenges to Countries

First, investment law is uncertain and differs from case to case.[28] Second, the applicable law, the forum where a dispute is heard and the choice of law can be different and, therefore, more complicated for each case.[29] Third, the arbitrability of

[25] Ibid 751; Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 41.

[26] *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) (Jurisdiction) (14 January 2010) [500].

[27] The General Agreement on Tariffs and Trade (GATT) Articles I and III and XX and various other covered agreements, have been drafted for the purpose of regulatory autonomy. Jose E Alvarez, 'Is Investor–State Arbitration 'Public'?' (2016) 7(3) *Journal of International Dispute Settlement* 534, 561; Simon Klopschinski, 'The WTO's DSU article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs' (2016) 19(1) *Journal of International Economic Law* 211, 236; Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [135 and 136]; Jürgen Kurtz, 'WTO Norms as "Relevant" Rules of International Law in Investor-State Arbitration' (2014)) 108 *Proceedings of the Annual Meeting* (*American Society of International Law*) 243, 245.

[28] *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment Treaties by Treaty Parties* 39th session UN Doc. A/CN.9/WGIII.191 (17 January 2020) paras 6 and 7; Newcombe and Paradell, above n 25, 41; UNCTAD *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva 2017) 132; Stephan W Schill, 'Multilateralizing Investment Treaties Through Most-Favored-Nation Clause' (2009) 27(2) *Berkeley Journal of International Law* 496, 499.

[29] Hoi Seng Victor Leong and Jun Hong Tan, 'The Law Governing Arbitration Agreements: BCY v BCZ and Beyond' (2018) 30(1) *Singapore Academy of Law Journal* 70, 70; Jansen N Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017) 18(4) *Journal of World Investment and Trade* 585, 586; Andreas A Frischknecht and Stephanie Sado, 'Barriers to Recognition' in Andreas A Frischknecht and Yasmine Lahlou (eds),

investment disputes, and the recognition and enforcement of investment awards are complex as the courts of enforcing countries must consider whether such awards are contrary to public policy of the host countries.[30] It is difficult to identify which public policy is relevant and should be considered by arbitrators and courts.[31] Fourth, the current investment law is pro-investor, riddled with incoherent decision-making[32] and inconsistent interpretations, with a high level of monetary compensation[33] and lacking an appellate mechanism.[34] Fifth, there is no CIIA to govern the investment in the world, creating unpredictability in investment law.

Investment arbitration can be defined as a process of settlement of disputes between States or between States and private parties or juristic persons[35], with the forum, the choice of law and the appointment of persons as arbitrators spelled out in the agreement to hear cases through a quasi-judicial system.[36] An arbitration agreement

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Enforcement of Foreign Arbitral Awards and Judgments in New York (Kluwer Law International, 2018) 61, 64; Newcombe and Paradell, above n 25, 76.

[30] The *Convention of Recognition and Enforcement of Foreign Arbitral Awards* (NYC) provides for rules for the recognition of foreign commercial arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*) (entered into force on 7 June 1959) (hereinafter referred to as NYC) article V(2) b; 163 States have signed the New York Convention up to 2020 and under the New York Convention more than 3000 cases which have been determined are found online. NYC is attracting investments to countries. Herbert Smith Freehills: Inside Arbitration, Perspective on Cross-Border Disputes, issue 6 July 2018, 2; 1958 New York Convention Guide, available at newyorkconvention1958.org accessed on 27.02.2020; Tomer Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law' (International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 10-11, November 2011) available at <http://ssrn.com/abstract=1957686> accessed on 22 April 2018, 3; Marike R P Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 157; *Convention of Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*) entered into force on 7 June 1959 article I; Peter Gillies, 'Enforcement of International Arbitration Awards – The New York Convention' (2005) 9 *International Trade and Business Law Review* 19, 19.

[31] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) *Journal of International Arbitration* 157, 159.

[32] Kalb, above n 2, 200.

[33] Todd Weiler, 'Methanex Corp. v U.S.A.: Turning the Page on NAFTA Chapter Eleven' (2005) 6(5) *Journal of World Investment and Trade* 903, 920.

[34] Sardinha, above n 15, 504; Noam Zamir and Peretz Segal 'Appeal in International Arbitration—An Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 (1) *Arbitration International* 79, 79.

[35] Alan Redfern, Martin J Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (London and Maxwell, 4th ed, 2004) 1; Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin J Hunter (eds), *International Arbitration* (Oxford University Press, 6th ed, 2015) 1; Jan Paulsson, *The Idea of Arbitration* (1st ed, Oxford University Press, 2013) 1; Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50(2) *Harvard International Law Journal* 491, 497.

[36] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124(8) *The Yale Law Journal* 2804, 2922; 'EU Finalises Proposal for Investment Protection and Court System for TTIP', European Commission Press Release, IP/15/6059

needs to be distinguished from an underlying contract. The underlying contract determines the contractual rights of the parties which are referred to as the substantive rights of the parties. In an arbitration agreement, parties enter an agreement to settle disputes peacefully.[37] This is known as party autonomy,[38] since the parties agree on the law governing arbitration and the procedure.[39] Therefore, the arbitration agreement is a vehicle that brings substantive investment law to the forefront and establishes a quasi-judicial forum in an ad hoc fashion. However, the issues of ad hoc appointment of arbitrators for adjudication of disputes, procedural uncertainty, determining and applying the substantive law, and the choice of law and the forum where disputes are adjudicated question the legitimacy of the investment dispute settlement mechanism.[40]

The currently available investment arbitration mechanisms fail to consider the basic principles of independence of arbitrators, transparency and accountability.[41]

(12 November 2015); Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet and Maxwell 2005) 59.

[37] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*, article 7; *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd* [2002] 1All ER (comm) 627 [32]; Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) vol 1, 464.

[38] '[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars … so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party'. *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24 para 31; Simon Greenberg and Kristina Osswald, 'The Arbitrator Selection Process in International Commercial Arbitration' in Jorge A Huerta-Goldman and Antoine Romanetti (eds) *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 115, 116; Klaus Peter Berger, 'Institutional Arbitration: Harmony, Disharmony and the "Party Autonomy Paradox"' (2018) 34 (4) *Arbitration International* 473, 482.

[39] Blackaby, Partasides, Redfern and Hunter (eds), *International Arbitration* above n 35, 72.

[40] 'EU Finalises Proposal for Investment Protection and Court System for TTIP', European Commission Press Release, IP/15/6059 (12 November 2015); Charles N Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(2) *Chicago Journal of International Law* 471, 475; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301, 301.

[41] Langford, Behn and Lie argued, after considering 1,039 investment cases involving 3,910 individuals, that present arbitration procedural rules need to be amended because arbitrators are hostile toward LICs; pro-investor friendly attitude; and corruption. Langford, Behn and Hilleren Lie, above n 40; 301, 302, 305, 328; Gus Van Hatren, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' 2012(1) *Osgoode Hall Law Journal* 211, 252; Bernardo M. Cremades and David J. A. Cairns, 'Corruption, International Public Policy and Duties of Arbitrators' in International Centre for Dispute Resolution, *Handbook on International Arbitration & ADR [Alternative Dispute Resolution]* (3rd ed, Juris-Net, LLC, 2017) 23, 25; *United Nations Commission on International Trade Law (UNCITRAL): Submission by IISD Regarding the Reform of Investment-Related Dispute Settlement*, 50th sess. (International Institute of Sustainable Development, 2017) 1, 11;

Therefore, the issues of impartiality, independence and appointment of arbitrators in the recent past have led to the public' loss of confidence in the arbitration system.[42] A small number of arbitrators dominate the arbitration of investment disputes as often they become repeat players in advocating investment arbitral disputes, and act as counsels as well as arbitrators.[43] This leads to 'double-hatting' and failure on their part to consider a host State's regulatory autonomy to make laws in the public interest.[44]

The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides procedures exclusively for conciliation and arbitration of investment disputes, and for the recognition of investment arbitral awards following disputes among member countries and the nationals of another member State.[45] The enforcement of investment arbitral awards depends mainly on the willingness of the third State when enforcement action is taken to recognise and enforce these awards.[46]

Furthermore, foreign investment awards are sometimes subject to State immunity,[47] and their execution is governed by execution laws of the enforcing States under the

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Abimbola Akeredolu and Chinedum Ikenna Umeche, 'Arbitrators' Impartiality and Independence: Commentary on Gobowen v AXXIS' (2018) 34(1) *Arbitration International* 143, 144.

[42] Karl P Sauvant and Federico Ortino, 'Improving the International Investment Law and Policy Regime: Options for the Future' (Ministry of Foreign Affairs of Finland, 15 December 2013) 1, 74.

[43] Alec Stone Sweet, Michael Yunsuck Chung and Adam Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration' (2017) 8(4) *Journal of International Dispute Settlement* 579, 586; Maria Angelica Burgos, 'Double-Hatting in International Commercial Arbitration?' in Carlos Gonzalez-Bueno (ed) *40 under 40 International Arbitration* (Kluwer Law International, 2018) 87, 87;
UNCTAD, *'Investor–State Dispute Settlement: Review of Development in 2017*, IIA Issue Note No. 2 (June 2018) available at <https://Investmentpolicyhub.unctad.org/Publications/Details/1188> accessed on 17 January 2019, 1, 6.

[44] Sweet, Chung and Saltzman, above n 43, 579, 608; Maria Angelica Burgos, 'Double-Hatting in International Commercial Arbitration?' in Carlos Gonzalez-Bueno (ed) *40 under 40 International Arbitration* (Kluwer Law International, 2018) 87, 88.

[45] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) articles 1 (2) and 54 (1); More than 706 cases have been registered under the ICSID Convention up to 31 December 2018. *ICSID Caseload Statistics* (2019 Issue-1)1, 7; 163 countries have become signatories to the ICSID Convention. *ICSID Annual Report 2019*, 11; Collins C Ajibo, 'Legitimacy Challenges in Investor–State Arbitration Interpretative Principles: Reflecting on a Balancing Tool' (2013) 10(3) *Manchester Journal of Economic Law* 382, 382.

[46] Jansen N Calamita, 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID' (2017) 32(3) *ICSID Review* 611, 612.

[47] Caroline Kleiner and Francesco Costamagna, 'Territoriality in Investment Arbitration: The Case of Financial Instruments' (2018) 9(2) *Journal of International Dispute Settlement* 315, 317; Sadie Blanchard, 'Ambient Ufficio S.P.A. and Others v Argentina Republic (2014) 15(1-2) *Journal of World*

ICSID Convention, which favours the host States.[48] Domestic courts do not provide adequate rules for foreign investors when a dispute arises between a FDI host State and an investor or investing State.[49] After selecting a forum, choosing the underlying contract law and selecting law governing arbitration, if a State invokes State immunity at the implementation stage of the arbitral awards, investors have no remedy under international law.[50] The question therefore arises as to whether countries have an effective mechanism available to litigate investment disputes.[51]

Investment law is governed by BITs that do not have appellate mechanisms.[52] Under the ICSID Convention, aggrieved parties can seek a review and annulment of the arbitral awards; however, no appellate mechanism exists for appeal,[53] which is a major obstacle for the world's investment regime raising the question of legitimacy under international investment law.[54] The appellate procedure would enable errors of law, and jurisdictional and procedural issues to be considered and corrected.[55] In contrast, the review and annulment processes of the ICSID Convention consider only whether the tribunal has acted within its jurisdiction and according to the procedure laid down

Investment and Trade 314, 320; Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101(4) *The American Journal of International Law* 711, 711.

[48] *ICSID Convention* article 54 (3).

[49] UNCTAD, *Course on Dispute Settlement, International Centre for Settlement of Investment Disputes* (United Nations New York and Geneva, 2003) (UNCTAD/EDM/Misc.232) 3.

[50] *ICSID Convention* article 54 (3); Nicholas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *The American Journal of International Law* 48, 55 and 57; *Republic of Argentina v NML Capital LTD* (Discovery Case) 134 S. Ct 2250 (2014); Alan O Sykes, 'Public Versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34(2) *The Journal of Legal Studies* 631, 631; Olga Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor–State Arbitration System' (2015) 26(1) *The American Review of International Arbitration* 47, 52.

[51] *Working Group on the Relationship between Trade and Investment, Consultation and the Settlement of Disputes between Members*, WTO Doc. WT/WGTI/W/134 (7 August 2002) (Note by Secretariat) 3; *Republic of Argentina v NML Capital LTD* (Discovery Case) 134 S. Ct 2250 (2014).

[52] David A Gantz, 'Increasing Host State Regulatory Flexibility in Defending Investor–State Disputes: The Evolution of U.S. Approaches from NAFTA to the TPP' (2017) 50(2) *International Lawyer* 231, 231; David A Gantz, 'The Evolution of FTA Investment Provisions: from NAFTA to the United States–Chile Free Trade Agreement' (2004) 19(4) *American University International Law Review* 679, 684; Sardinha, above n 15, 510.

[53] *ICSID Convention* articles 51 and 52; *Maritime International Nominees Establishment v Republic of Guinea* (Decision of Partial Annulment) ICSID Case No. ARB/84/4 (14 December 1989) paras 5.08 and 6.55.

[54] Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11' (2005) 25(2) *Northwestern Journal of International Law and Business* 279, 280.

[55] Mark Huber and Greg Terposky, 'The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism (2017) 32(3) *ICSID Review* 545, 574.

under the relevant BIT.[56] Under the annulment process, the annulment tribunal cannot consider any error of law, which is a major stumbling block for investment law.[57]

In addition to the absence of an appellate mechanism, current investment law protects capital exporters of developed countries.[58] This can be seen in fair and equitable treatment (FET) being granted to investors in current BITs; host States bearing the responsibility to pay full compensation for the expropriation of investors' property as an international obligation; and the widening of the scope of FET by arbitrators to protect investors' rights rather than host States' rights.[59] As a result, a host State's authority to ensure social justice for its subjects is limited and undermined.[60] This can be further exacerbated by institutional flaws in international investment law as no permanent international investment dispute settlement system exists.[61] International investment disputes are heard in an ad hoc manner; arbitrators are appointed to hear investment disputes between host States and investors; and precedent is not applicable to investment cases.[62]

Under investment law, no strategy exists that allows the consideration of LICs' inequitable status, such as special circumstances which warrant the giving of concessions to bolster their fragile economies.[63] The reason is that, more often, investment disputes are usually not between one State and another State, but between investors and host States.[64] Most LICs are respondents in investment disputes. Litigating an investment dispute incurs large costs as these countries have to litigate

[56] Christoph Schreuer, 'From ICSID Annulment to Appeal, Halfway Down the Slippery Slope' (2011) 10(2) *The Law and Practice of International Courts and Tribunals* 211, 212.
[57] See *ICSID Convention* article 52 (1).
[58] Sornarajah, above n, 9, 62; Sungjoon Cho and Jurgen Kurtz, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29(1) *The European Journal of International Economic Law* 169, 188.
[59] Sweet, Chung and Saltzman, above n 43, 581.
[60] See Robert, above n 9, 380.
[61] Sweet, Chung and Saltzman, above n 43, 584.
[62] Ana M Lopez-Rodriguez, 'Investor–State Dispute Settlement in the EU: Certainties and Uncertainties' (2017) 40(1) *Houston Journal of International Law* 139, 146, 147.
[63] E V K Fitzgerald, 'Developing Countries and Multilateral Investment Negotiations' in E C Nieuwenhuys and M M T A Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International, 2001) 35, 64.
[64] Horacia A Grigera Naon, 'The Settlement of Investment Disputes between States and Private Parties: An Overview from the Perspective of the ICC' (2000) 1(1) *Journal of World Investment* 60, 61.

against multilateral enterprises.[65] Therefore, there should be a mechanism for LICs to overcome the litigation cost.[66] On the other hand, the WTO has also considered the disparity between countries and SDT principles have been introduced into WTO agreements to achieve the economic development of LICs, and the WTO has also introduced the Advisory Centre for LICs to provide legal assistance for trade disputes.[67] In this context, this thesis argues that a convergence of trade and investment within the WTO regime will pave the way for introducing SDT-like provisions for investment regime with clarity and to establish a centre for legal assistance to LICs.

1.2 Special and Differential Treatment and Developing Countries

The aims of SDT are to derogate from the non-discrimination principle incorporated in the most-favoured nation (MFN) treatment for developing countries, in order to provide unequal treatment which allows them to participate as equal parties with developed countries in international trade since resource constraints prevent such involvement by developing countries.[68] The SDT is the theoretical basis of generalised system of preference (GSP). The GSP is a central part of the GATT/WTO strategy that is intended to assist developing and least-developed countries (LDCs), allowing exceptions for MFN derogation on the basis of non-reciprocity.[69] For example, the European Union (EU) provides a GSP program called Everything But Arms (EBA) to

[65] *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS) — Cost and Duration* 36 session UN Doc.A/CN.9/WGIII/WP.153 (31 August 2018) para 7,8and 9; *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session* (Vienna, 27 November–1 December 2017) 51st session UN Doc.A/CN.9/930 (19 December 2017) para 36 ; *Submission from the Government of Morocco, Possible Reform of Investor-State Dispute Settlement (ISDS) United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform*) 37th session UN Doc. A/CN.9/WG III.161(4March 2019) para 14; Eric Gottwald, 'Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?' (2007) 22(2) *American University International Law Review* 237, 239.

[66] *Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Advisory Centre* 38th session UN Doc. A/CN.9/WGIII/WP.168 (25 July 2019) para 19.

[67] Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO LAW' (Brooking Global Economy and Development Paper No 37, 2009) 1,3

[68] Seung Wha Chang, 'WTO Trade and Development Post-Doha' (2007) 10(3) *Journal of International Economic Law* 553, 554; Constantine Michalopoulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries' (Working Draft, 28 February 2000) 15.

[69] Lorand Bartels and Christian Haberli, 'Binding Tariff Preferences for Developing Countries under Article II GATT' (2010) 13(4) *Journal of International Economic Law* 969, 972.

the LDCs for duty-free and quota-free market access.[70] The objective of this strategy is to promote the economic development of developing countries through preferential market access for their exports to developed countries.[71] The GATT Article XVIII,[72] the GSP Decision of 1971 and the Enabling Clause of 1979 were introduced to grant preferential market access to developing countries as these countries were unable to integrate the trade liberalisation process, and to provide a more equitable economic order.[73]

The SDT provides rules regarding rights and privileges for developing countries and LDCs '[to] ... secure a share in growth of international trade commensurate with the needs of their economic development'.[74] However, the language of the SDT provisions is ambiguous,[75] making it difficult to ascertain the rights and obligations of member States.[76] The SDT provisions enshrined in the covered agreements are often referred

[70] *Proposal for a Regulation (EC) Applying a Scheme of Generalized Tariff Preferences* COM (2001) 241 final (10.05.2011); *Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007* (OJ L 211, 6.8.2008) 1; Sharmin J Tania, 'Duty-Free-Quota-Free Market Access for LDCS: Falling Within or Outside the GSP Downsides' (2013) 29(1) *Connecticut Journal of International Law* 115, 129.

[71] Bartels and Haberli above n 69; Jane Ford, 'A Social Theory of Trade Regime Change: GATT to WTO' (2002) 4(3) *International Studies Review* 115, 123.

[72] 'The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living* and are in the early stages of development'. *GATT article XVIII:1.*

[73] *Generalized System of Preferences* ("GSP Decision") GATT Doc. BISD 18S/24 (Decision of 25 June 1971).

[74] *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) ('*WTO Agreement'*) hereinafter referred to as the *WTO Agreement*, Preamble; see T Ademola Oyejide, 'Special and Differential Treatment' in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO: A Handbook* (World Bank, 2002) 504, 504.

[75] The reason is the ambiguity of the language of the SDT provisions, for example: 'does not direct any action, but merely encourages or promotes active participation of industrialized country Members in the development efforts of developing countries ...' Peter Lichtenbaum, 'Special Treatment vs Equal Participation: Striking Balance in the Doha Negotiations' (2002) 17(5) *American University of International Law Review* 1003, 1014; Panel Report, *United States – Anti-dumping and Countervailing Measures on Steel Plate from India* WTO Doc WT/DS206/R (28 June 2002) [7.104], [7.105], [7.106], [7.107], [7.110], [7.112]; Amin Alavi, 'On the (Non-)Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' (2007) 41(2) *Journal of World Trade* 319, 323.

[76] See Panel Report, *United States – Anti-dumping and Countervailing Measures on Steel Plate from India* WTO Doc WT/DS206/R (28 June 2002) [7.110 and 7.112]; Manuela Tortora, 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', WEB/CDP/BKGD/16, Geneva, January 2003) 8; *Committee on Trade and Development*

to as 'soft law' as they cannot be enforced if a developed country breaches these provisions since they are merely the best endeavour provisions.[77] Although SDT provisions are in place under the covered agreements to safeguard developing countries, the economic development and integration of LICs into the multilateral trading system have been very slow.[78]

The SDT provisions embodied in the GATT Article XVIII, the GSP and the Enabling Clause are vague[79] and are discretionary for the preference giving countries.[80] As a result, developed countries can, at their discretion, withdraw from the GSP schemes.[81] Therefore, it is questionable whether the GATT Article XVIII, the GSP, the Enabling Clause and the SDT provisions provide adequate rules enabling LICs to achieve economic development and adequate market access without FDI. The GSP provides for non-reciprocal and discriminatory preferences based on developing countries'

Special Session, The WTO Work Programme on Special and Differential Treatment, Communication from the European Communities WTO Doc (11 December 2002), [3]; *Tortora stated that the SDT provisions are drafted in a vague language that does not clearly define the rights and obligations of member States.* Manuela Tortora, 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', WEB/CDP/BKGD/16, Geneva, January 2003) 8; *Committee on Trade and Development Special Session, The WTO Work Programme on Special and Differential Treatment, Communication from the European Communities* WTO Doc (11 December 2002) para 3.

[77] One could argue that if the SDT provisions are vague and lacking direction, what is the purpose of introducing a CIIA under the WTO? However, it should be noted that the SDT provisions are not the substantive law of covered agreements but are in place to balance disparity among countries. See Alavi, 'On the (Non) Effectiveness of the World Trade Organisation Special and Differential Treatments in the Dispute Settlement Process' above n 75, 323. See Chang, above n 68, 564; Gustavo Olivares, 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and Least Developed Countries' (2001) 35(3) *Journal of World Trade* 545, 548; Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How', WTO Staff Working Paper ERSD-2004-03, 9; *Zanzibar Declaration, Meeting of the Ministers Responsible for Trade of the Least Developed Countries*, WTO Doc WT/L409 (6 August 2001) 2; Panel Report, *United States – Anti-dumping and Countervailing Measures on Steel Plate from India* WTO Doc WT/DS206/R (28 June 2002).

[78] Jianfu Chen, 'S&D Treatment for Developing Countries in the WTO Trade Regime: A False Solution on a Wrong Footing for LDCs', in Jianfu Chen and Gordon Walker (eds), *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Federation Press 2004) 109, 129.

[79] Ibid 116; Tania, 'Duty-Free-Quota-Free Market Access for LDCS: Falling Within or Outside the GSP Downsides' above n 70, 130**;** Caf Dowlah, 'The Generalized System of Preferences of the United States: Does It Promote Industrialization and Economic Growth in Least Developed Countries? *'* (2008) 1(1) *The Law and Development Review* 72, 73.

[80] Ruth Gordon, 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime' (2006) 8(1) *Berkeley Journal of African-American Law & Policy* 79, 91.

[81] Alex Ansong, 'Creating WTO Law by Stealth: GSP Conditionalities and the EC-Tariff Preference Case' (2013) 14(2) *The Estey Central Journal of International Law and Trade Policy* 133, 138.

economic disparity.[82] The GSP is then an important exception to the MFN doctrine to address the inequality in trade capacity among the GATT/WTO member States.[83] This study argues that the GSP is not enough to enhance market access and increase export revenue for LICs. FDI can fill in this gap and contribute to increase export opportunities for LICs.

The GSP+ program grants additional tariff reduction to a selected number of developing countries that need special assistance[84] and, in turn, must conform to international conventions and good governance practices.[85] In addition, the EU and the United States (US) impose certain conditions and pre-conditions to grant GSP+ to LICs such as the protection of human rights, labour standards and environmental safeguards.[86] Therefore, the question arises whether the conditionality imposed by the EU and the US on the GSP recipient countries is legal according to the WTO,[87] as the WTO GSP was intended to address economic disparity and has nothing to do with political criteria.[88]

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[82] *Decision on Trade Negotiations among Developing Countries of November 26, 1971*, BISD, 18th Supp 26 (1971) L/3636 (30 November 1971) <http://gatt.stanford.edu>, accessed 10 May 2010; *Background Document to the High Level Symposium on Trade and Development*, Geneva (17–18 March 1999) prepared by the Development Division of the WTO <http://www.wto.org,5> accessed on 15 July 2010.

[83] 'Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties'. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* ("Enabling Clause") GATT Doc. L/4903 (Decision of 28 November 1979) article 1.

[84] EU grants the GSP for developing countries with income below upper middle-income level classified by the World Bank and they do not get benefit from any special arrangement such as a Free Trade Agreement to access the EU market. GSP+ beneficiaries have to ratify 27 international conventions. *European Commission, Policies and Information Services, Generalised Preferential Treatment* (24 May 2019).

[85] *Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalized Tariff Preferences* (European Commission, COM 2011) 241 final (10.05.2011) 2; Weifeng Zhou 'The Effectiveness of EU's Generalized System of Preferences: Evidence from ASEAN Countries' (2012) 11(1) *Journal of International Trade Law and Policy* 65, 69.

[86] Lorand Bartels, 'The WTO Legality of the EU's GSP+ Arrangement'(2007) 10(4) *Journal of International Economic Law* 869, 875; Kevin C Kennedy 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preferences' (2012) 20(3) *Michigan State International Law Review* 521, 528; Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4(2) *Chicago Journal of International Law* 385, 386.

[87] Kennedy, 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preferences' above n 86, 521.

[88] *Generalized System of Preferences* ("GSP Decision") GATT Doc. BISD 18S/24 (Decision of 25 June 1971).

1.3 Category of LIC

This thesis argues that LICs' economic development is undermined due to the false notion of developing countries, and the GSP is not enough to gain market access due to the discretionary nature of the GSP and its ambiguity.[89] The WTO does not define developing countries, and countries can declare themselves as being developing countries and become WTO member States.[90] Notwithstanding their different size, capacity, trade relations, gross domestic product (GDP), per capita income, FDI and balance of payments, under the WTO, developing countries, as a whole, have been classified as a single category.[91]

The term 'developing country' does not accurately reflect the true economic status of a WTO member.[92] The 'developing country' classification harms those countries whose economies are far less developed than the higher income developing countries. The current WTO GSP system is not adequate without FDI to cater for the needs of LICs by allowing them to be treated as equal partners within the WTO. The literature has not identified a group of countries as LICs, as distinct from the general categories of developing and least-developed countries, according to FDI and trade capacity. Hence these countries should be categorised based on their volumes of trade and FDI.[93] Some LICs should not really be considered as developing countries due to the economic disparity among developing countries discussed in detail in Chapter 2.[94] Therefore, this study suggests that LICs be categorised on the basis of their trade

[89] Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' above n 86,386.
[90] Chen, above n 78, 111.
[91] For example, China, Brazil, South Korea and Sri Lanka are categorised as developing countries; yet China, Brazil and South Korea are considered to be countries with rapidly growing economies and their FDI capacity is very high, while Sri Lanka's economic status remains just above the level of the LDCs. China's merchandised exports for 2018 totalled US$2,487,045 Million and Sri Lanka's merchandised exports for 2018 totalled US$11,990 Million. WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data) <https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29.12.2019; See Chen, above n 78, 124.
[92] Keck and Low, above n 77, 7; Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford University Press, 3rd ed, 2009) 552; Chen, above n 78, 110.
[93] See Oyejide, above n 74, 507; *Trade and Foreign Direct Investment* WTO Doc WTO News, Press/57 (9 October 1996) (Note by Secretariat) 11.
[94] Fan Cui, 'Who are the Developing Countries in the WTO?' (2008) 1(1) *Law and Development Review* 123, 123.

capacity and FDI, by considering a certain percentage of FDI and trade attributed to that country. If a country's export and FDI constitutes less than 1% of the GDP, such countries should be categorised as LICs.

1.4 Origin of Trade and Investment Law

Trade and investment law are branches of international economic law which can be defined as a body of law that regulates rules for economic relations among States.[95] It governs relations between investors (including multilateral corporations) and States.[96] Modern international economic law is not confined to the law relating to trade and investment activities among States and between States and investors. Instead, it has broader connotations as it provides rules relating to sustainable economic development, investment law and laws to deal with international fiscal disciplines.[97] International economic law is a branch of public international law and now it also encompasses international commercial law.[98] Public international law recognises the sovereignty of States, reciprocal duties among States, mutual cooperation for protecting natural resources and preferential treatment for LICs.[99] International economic law spreads over public and private international law to the extent it deals with investment law. International trade and investment law emerged under commercial law as a body of private law (*lex mercatoria* and *jus gentium*).[100] Due to the Bretton Woods Accords, international economic law gradually became aligned with public international law.

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[95] Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' above n 13, 123

[96] Surya P Subedi, 'A Shift in Paradigm in International Economic Law: From State-centric Principles to People-centered Policies' (2013) 10 (3) *Manchester Journal of International Economic Law* 314, 316.

[97] Ibid.

[98] Ibid.

[99] Ibid 317; Jason Webb Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2009) 32(5) *Fordham International Law Journal* 1550, 1563; Thomas W. Walelde and George Ndi. 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31(2) *Texas International Law Journal* 215, 244.

[100] Ernst-Ulrich Petersmann, 'Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement' (2018) 21(1) *Journal of International Economic Law* 103, 105; William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations' (2010) 35(2) *Yale Journal of International Law* 283, 288.

Investment law deals with investment issues either between States, or between States and investors.[101] The investors' rights to sue States are known as 'derivative rights' because they arise from BITs signed by their respective home country.[102] The doctrine of international investment law was originally developed as a State responsibility to protect foreign nationals abroad on the premise of the minimum standard[103] and it also offered diplomatic protection to investors and their properties abroad.[104] Under public international law, a State is responsible for paying compensation for harm done to the national of another State. A State can take up its citizens' cases through diplomatic channels or by taking cases to the International Court of Justice (ICJ),[105] although the ICJ does not have a binding authority over its judgments.[106]

The concept of investment law in public international law is essentially linked to decolonisation, and the protection of foreigners and their property.[107] States that had newly regained their independence began to nationalise foreign-owned properties without providing compensation.[108] On the one hand, these countries believed that the nationalisation of foreign-owned properties was needed for economic development after they had been exploited by their colonisers. On the other hand, developed countries wanted to protect their trade and investment in their former colonies. This resulted in the emergence of Friendship, Commerce and Navigation (FCN) Treaties throughout the world that regulated the rules for the smooth functioning of foreign

[101] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico in 1992, which came into force on 1 January 1994 (Chapter 11, Investment) article; Tilmann Rudolf Braun, 'Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law: An Inquiry into the Nature and Limits of Investor Rights (2014) 15(1 and 2) *Journal of World Investment and Trade* 73, 78; *Corn Products International Inc. v United Mexican States* (Decision on Responsibility) ICSID Case No. ARB (AF)/04/01(NAFTA) (15 January 2008).
[102] *Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v The United Mexican States* (Award) 3 (ICSID Case No. ARB (AF)/04/05 (NAFTA) (21 November 2007) para 163.
[103] Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality' (2017) 42(1) *Yale Journal of International Law* 1, 5.
[104] Stephanie Hartmann, 'When Two International Regimes Collide: An Analysis of the Tobacco Plain Packing Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms' (2017) 21(2) *University of California Los Angeles (UCLA) Journal of International Law and Foreign Affairs* 204, 209.
[105] International Court of Justice (entered into force 24 October 1945); Kevin C. Kennedy, 'Parallel Proceedings at the WTO and NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reforms' (2007) 39(1) *The George Washington International Law Review* 47, 54.
[106] Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) *Yale Law Journal* 273, 286.
[107] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 3, 31.
[108] Sornarajah, above n 9, 1.

trade and commerce.[109] The first treaty of this nature was the Treaty of Amity and Commerce between the US and France which was signed on 2 February 1778.[110]

In the early years, 'gunboat diplomacy' was also used to resolve investment disputes by force.[111] Subsequently, the 'Hull Rule' was introduced under which, if the properties of investors were expropriated, they should be promptly and adequately paid compensation without the use of military intervention, this being a solution to protect investors and ensure the enforcement of investment awards.[112] After the acquisition of the property of foreign investors, the assessment of compensation was determined in accordance with the 'Hull Rule', developed by the US, which discussed 'prompt, adequate and effective payment'.[113] The Argentine jurist Carlos Calvo propounded the Calvo Doctrine, which provided for jurisdiction to be vested in municipal courts in the location of the investment if a dispute arose with regard to expropriation.[114] The Calvo

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[109] Herman Walker Jr, 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42(5) *Minnesota Law Review* 805, 806.

[110] Herman Walker Jr, 'Provisions on Companies in United States Commercial Treaties' (1956) 50(2) *The American Journal of International Law* 373, 374; Nicholas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' above n 50,51; *Treaty of Amity, Commerce, and Navigation, United States of America – Great Britain* (concluded 19 November 1794) (proclaimed 29 February 1796).

[111] Alschner, above n 103.

[112]The Hull Rule emerged due to a dispute between Mexico and the US over expropriation of properties belonging to the US investor in the 1930s. In this instance, the US Secretary of State Cordell Hull sent a letter to the Mexican Minister of Foreign Affairs stating that "[n]o government is entitled to private property, for whatever purpose, without provision for prompt, adequate and effective payment" OECD, '"Indirect Expropriation" and "the Right to Regulate"' in International Investment Law" (OECD Working Papers on International Investment, 2004/04) available at http://dx.doi.org/10.1787/780155872321 accessed on 20 October 2018, 1, 2, footnote 1 ; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) *World Development* 1567, 1569 and 1960; Malcolm N Shaw, *International Law* (4th ed, Cambridge University Press, 1997) 577.

[113] Sornarajah, above n 9, 36; Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, Oxford, 2003) 397; Riyaz Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24(4) *Fordham International Law Journal* 275, 281.

[114] OECD (2004),'"Indirect Expropriation" and "the Right to Regulate" in International Investment Law' (OECD Working Papers on International Investment, 2004/04) available at <http://dx.doi.org/10.1787/780155872321> accessed on 20 October 2018, 1, 2, footnote 1;
Wenhua Shan, 'From "North–South Divide" to "Private–Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment'(2007) 27(3) *Northwestern Journal of International Law and Business* 631, 632; the Calvo Doctrine originated in the 19th century when developed countries tried to use force to make developing countries comply with financial obligations. Carlos Calvo, an Argentinian jurist, stated that there was no greater obligation for foreign investors than for the local people of a country and when there was a dispute with a foreign investor, local remedies should be exhausted first; Manuel R Gracia-Mora, 'The Calvo Clause in Latin American Constitution and International Law' (1950) 33(4) *Marquette Law Review* 205, 206.

Doctrine is more favourable to developing countries who happen to be the host countries.[115] After decolonisation in the mid-20th century, as many States became independent, socialism emerged as an economic theory to develop the economies of these newly independent countries. As a result, developing countries were insisting that they should have exclusive control over the management of their natural resources.[116] This provided the foundation for a 'New International Economic Order (NIEO)' which challenged public international law on the protection of foreign nationals and the level of compensation given to foreign investors in the event of their property being expropriated abroad.[117] Moreover, the NIEO demanded a more equitable economic arrangement for international trade.[118]

The sources of international economic law can be found in international treaties such as the Marrakesh Agreement Establishing the WTO[119] and in laws created by international organisations, such as the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the ICJ, BITs and various arbitral tribunals.[120]

1.5 Debacle of Investment Regime

After the First and Second World Wars, the economies of States were in disarray, with States confronted with economic recessions due to the ravages of war.[121] No adequate system of rules was in place at that time that could govern cross-border trade and investment. Before the First World War, trade was conducted among merchants without the intervention of States. During the two World Wars, States put in place

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[115] Shan, above n 114, 632.
[116] *Declaration on the Establishment of a New International Economic Order*, GA Resolution 3201(S-VI) (1 May 1974); *Permanent Sovereignty over Natural Resources,* GA Resolution 1803 (XVII) (14 December 1962) ('*Permanent Sovereignty*').
[117] *Permanent Sovereignty over Natural Resources,* GA Resolution 1803 (XVII) (14 December 1962) ('*Permanent Sovereignty*') article 4.
[118] Subedi, 'A Shift in Paradigm in International Economic Law: From State-centric Principles to People-centered Policies' above n 96, 322.
[119] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (hereinafter referred to as the *WTO Agreement*).
[120] David Palmeter and Petros C Mavroidis 'The WTO Legal System: Sources of Law' (1998) 92(3) *The American Journal of International Law* 398, 398; Ignaz Seidl-Hohenveldern, *International Economic Law* (Dordrecht: Martinus Nihoff, 2nd revised ed, 1992) 31; Article 38 of *The Statute of the International Court of Justice*.
[121] Michael E S Hoffman, 'Principles for Post-War International Economic Cooperation'(2018) 52(1) *Journal of World Trade* 15, 15.

restrictions due to the political and economic uncertainty that then prevailed to reduce the gap in the balance of payments.[122] To liberalise trade and investment and to ensure economic cooperation for prosperity, the Bretton Woods Agreement established the International Monetary Fund [IMF] and the World Bank in 1944.[123] The Havana Conference on Trade and Employment was held on 21 March 1947 at Bretton Wood, but failed to establish the International Trade Organization (ITO) which was designed under the Havana Charter.[124] As a result, in 1947, the GATT was introduced as an interim agreement to remove tariff restrictions in order to allow free trade for economic growth.[125]

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[122] Salvatore Pitruzzello, 'Trade Globalization, Economic Performance, and Social Protection: Nineteenth-Century British Laissez-Faire and Post-World War II US-Embedded Liberalism' (2004) 58(4) *International Organization* 705, 709.

[123] *Articles of Agreement of the International Bank for Reconstruction and Development*, Bretton Woods (1944); Isaac O.C. Igwe, 'History of International Economy: The Bretton Woods System and Its Impact on Economic Development of Developing Countries' (2018) 4 (2) *Athens Journal of Law* 105, 111; Bretton Woods Conference, held in July 1944, resulted in the creation of two permanent financial organisations: (1) the World Bank, which was established to reconstruct the economies devastated by war; and (2) the International Monetary Fund, which was established to achieve economic growth and financial stability. See William J Davey and John Jackson (eds), *The Future of International Economic Law* (Oxford University Press, 2008) 5; Michel J Trebilcock and Robert Howse, The Regulation of International Trade (Routledge, 3rd ed, 2005) 23; Chantal Thomas, 'Balance–of–Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order' (2000) 15 (6) *American University International Law review* 1249, 1255.

[124] John H Jackson states that the US did not sign the ITO Charter due to the normalcy that returned after the end of World War II and due to the US election resulting in congress comprising a majority from one party and the president coming from the other party. John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2nd ed, 1997) 38. Hudec states that one reason behind the US refusing to sign the Havana Charter was the fact that the US refused to grant exceptions for tariffs and quantitative restrictions as a new preference for developing countries. See Robert E. Hudec, *Developing Countries in the GATT/WTO Legal System* (Gower, 1987) 24; Trebilcock and Howse, The Regulation of International Trade above n 123; Debra P. Steger, 'Redesigning the World Trade Organization for the Twenty-first Century', 5 available at<http://www.idrc.ca/openbooks/455-0Steger> accessed on 20th February 2017; H.W. Singer 'Prospects for Development' in S. Mansoob Murshed and Kunibert Raffer (eds) *Trade, Transfers and Development Problems and Prospects for the Twenty-first Century* (Edward Elgar Publishing Company, 1993) 7, 9; M. Rafiqul Islam, *International Trade Law* (LBC Information Services, 1st ed, 1999) 5; *General Agreement on Tariffs and Trade* 55 UNTS (which entered into force on 1 January 1948) ('*GATT 1947*'); John H. Jackson 'The Birth of the GATT-MTN System: A Constitutional Appraisal' (1980)12(1) *Law and Policy in International Business* 21, 30 footnote 41; *General Agreement on Tariffs and Trade* 55 UNTS (which entered into force on 1 January 1948) ('*GATT 1947*'); Raj Bhala, *International Trade Law: Theory and Practice* (Lexis Publishing, 2nd ed, 2001) 127; *GATT* art.XXIX states that 'Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force'; Richard Toey, 'Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948' (2003) 25(3) *International History Review* 282, 282.

[125] *General Agreement on Tariffs and Trade* 55 UNTS (which entered into force on 1 January 1948) ('*GATT 1947*'); Jackson 'The Birth of the GATT-MTN System: A Constitutional Appraisal' above n 124; *General Agreement on Tariffs and Trade* 55 UNTS (which entered into force on 1 January 1948) ('*GATT 1947*'); Raj Bhala, *International Trade Law: Theory and Practice* above n 124,127; *GATT* art. XXIX states that 'Part II of this Agreement shall be suspended on the day on which the Havana Charter

Article 12 of the Havana Charter provided rules for international investment for economic development and reconstruction.[126] The Havana Charter, Article I:2 recognised the importance of investment for the economic development of LICs.[127] The language in the Charter about provisions that related to investment was encouraging as it provided a legal basis to create future investment agreements.[128] However, the Havana Charter fell far short of creating a legal regime for investment as it lacked any direction and countries had discretion to enter into BIAs.

The GATT did not have rules to protect investment and did not incorporate the provisions of investment enshrined in the Havana Charter.[129] As a result, in 1955, the GATT member States adopted a resolution to provide protection for FDI and requested that member States enter into BIAs.[130] In the case of *Canada – Administration of the Foreign Investment Review Act* (FIRA case), an investment issue arose between Canada and the US under the administration of Canada's FIRA.[131] The US challenged the Canadian measures as violations of the GATT, Articles III:4, III:5, XI and XVII:1C

enters into force; Richard Toey, 'Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948' (2003) 25(3) *International History Review* 282, 282; Mark Huber and Greg Terposky, 'The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism' (2017) 32(3) *ICSID Review* 545, 547.

[126] Final Act of the United Nations Conference on Trade and Employment*: Havana Charter for an International Trade Organization* (Havana Charter which did not enter into force); Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' (2014) 24(1) *University of Pennsylvania Journal of International Law* 77, 98.

[127] Clair Wilcox, *A Charter for World Trade* (Arno Press, New York, 1972) 142.

[128] See Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 3, 37.

[129] Panel Report, *Canada – Administration of the Foreign Investment Review ACT* (*FIRA*) GATT Doc L/5504-30S/140 (25 July 1983, adopted 7 February 1984) [3.9]; Petros C Mavroidis, 'Regulation of Investment in the Trade Regime: from ITO to WTO' in Zdenek Drabek and Petros C Mavroidis (eds), *Regulations of Foreign Investment Challenges to International Harmonization* (World Scientific Publishing Co. Pte. Ltd, 2013) 13, 14; Burt, above n 9, 1058.

[130] *WTO Trade and Investment: Technical Information, Trade-Related Investment Measures* available at <https://www.wto.org/english/tratop_e_invest_info_e.htm> accessed on 28 June 2017.

[131] Under section 2(2) of *The Foreign Investment Review Act* of 1973, Canada being the host country imposed restrictions on foreign investors when purchasing Canadian products or undertaking the development of natural resources in Canada, requiring an agreement with the Canadian authority to decide on the quantum of exports of a product that should be sent to foreign markets to protect the Canadian 'economic environment'. GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act* GATT Doc. L/5504-30S/140 (25 July 1983) (adopted on 7 February 1984) [2.1], [2.3], [2.4] and [2.5]; Emily F. Carasco, 'The Foreign Investment Review Agency (FIRA) and the General Agreement on Tariffs and Trade (GATT): Incompatible?' (1983) 13 (2) *Georgia Journal of International and Comparative Law* 441, 451.

and these measure are relevant to protect the regulatory autonomy of Canada.[132] In the FIRA case, however, the GATT Panel held that Canada's measure on local content requirement was a violation of the GATT, Article III:4.[133] This case had to deal with both trade and investment issues, but the panel found it was difficult to decide the issue because investment rules were not part of the GATT jurisprudence.

During the Uruguay Round negotiations the US tried to include comprehensive rules for investment under the TRIMs Agreement owing to their experience of the FIRA case.[134] Developing countries, led by India, resisted this push as new investment disciplines would complicate the GATT agenda and would potentially be harmful to their development interests.[135] The WTO was established as an outcome of the Uruguay Round negotiations.[136] The General Agreement on Trade in Services (GATS)[137] and the Agreement on Trade-Related Investment Measures **(**TRIMs)[138] addressed investment in a limited way. The TRIMs Agreement prevents discriminatory investment measures and tries to liberalise investment. The TRIMs

[132] GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act* GATT Doc. L/5504-30S/140 (25 July 1983) (adopted on 7 February 1984) [3.1].
[133] Ibid [6.1].
[134] *Submission by the United States, Negotiating Group on Trade-Related Investment Measures, Group of Negotiations on Goods* (GATT) GATT Doc MTN.GNG/NG12/w/2 (1 April 1987); Patrick Low and Arvind Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1996) 380, 380; see Jonathan Bonnitcha, 'Investment Wars: Contestation and Confusion in Debate about Investment Liberalzation'(2019) 22(4) *Journal of International Economic Law* 629, 638.
[135] Burt, above n 9, 1017; Paul Bryn Christy III, 'Negotiating Investment in the GATT: A Call for Functionalism' (1991) 12 *Michigan Journal of International Law* 743, 785; Mina Mashayekhi and Murray Gibbs, 'Lessons from the Uruguay Round Negotiations on Investment' (1999) 33(6) *Journal of World Trade* 1, 5.
[136] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) When the GATT was originally established, 23 members joined. Of these, 11 members were LICs. The countries that were originally party to the GATT negotiations were Australia, Canada, Brazil, Belgium, Burma, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia, France, India, Luxembourg, Lebanon, Netherlands, New Zealand, Norway, Southern Rhodesia, Pakistan, South Africa, Syria, the UK, and the USA.
[137] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (*General Agreement on Trade in Services*); Ari Afilalo and Dennis Patterson, 'Global Economic Constitutionalism and the Future of Global Trade' (2019) 40 (2) *University of Pennsylvania Journal of International Economic Law* 323, 345 and 346.
[138] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*).

Agreement is not a CIIA and its scope is confined to the existing GATT rules.[139] It exclusively covers investment measures relating to trade in goods only.[140] The operation of the TRIMs Agreement had been limited to the GATT, Articles III[141] and XI.[142] Therefore, the TRIMs Agreement had been based on the GATT's existing rules and did not adequately cover expropriation and compensation, which would not be the case if a CIIA was in place.[143] The TRIMs Agreement does not define investment measures but provides a list of measures that eliminate trade-distorting measures.[144] Moreover, LICs were unable to balance the restricted business practices of investors as the TRIMs Agreement prohibited trade-related investment measures (such as export performance requirements[145] and local content requirements).[146] Export performance requirements and local content requirements are important for LICs to achieve economic development, but the TRIMs prohibits that. [147]

The GATS is a covered agreement that provides rules only for the liberalisation of trade in services.[148] Services are a major driving force of economic development and

[139] GATT articles III and XI; Kurtz, *The WTO and International Investment Law: Converging Systems* above n 3, 49; *Measures*, Group of Negotiations on Goods (GATT) GATT Doc MTN.GNG/NG12/W/2 (1 April 1987) 3; Burt, above n 9, 1038.
[140] TRIMs Agreement article I.
[141] GATT 1994, art. III deals with national treatment on internal taxation and regulations for like, similar or substituted products.
[142] GATT 1994, art. XI deals with quantitative restrictions on imports or exports; Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* above n 3, 49; V N Balasubramanyam 'Putting TRIMs to Good Use' (1991) 19(9) *World Development* 1215, 1224; *Proposals Regarding the Agreement on Trade-Related Investment Measures in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration, Preparations for the 1999 Ministerial Conference, Communication from India WTO Doc WT/GC/W/203* (*14 June 1999)* para 1.
[143] Burt, above n 9, 1038.
[144] *TRIMs* Agreement article III:4.
[145] Export performance requirement is necessary for economic development and to reduce the balance of payment gaps.
[146] A certain percentage of domestic raw materials to be used to protect domestic industries and to increase economic activities.
[147] *Proposals Regarding the Agreement on Trade-Related Investment Measures in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration, Preparations for the 1999 Ministerial Conference, Communication from India WTO Doc WT/GC/W/203* (*14 June 1999*) para 1 and 2; Cui, above n 94, 130.
[148] WTO, 'Trade and Foreign Direct Investment', News Report, WTO Press Releases, Press/57 (9 October 1996) available at <https://www.wto.org/english/news_e/pres96_/pr057_e.htm>, accessed 05 February 2018, 32; Todd Allee, Manfred Elsig and Andrew Lugg, 'The Ties between the World Trade Organization Preferential Trade Agreements: A Textual Analysis' (2017) 20(2) *Journal of International Economic Law* 333, 350; Anders Ahnlid, 'Comparing GATT and GATS: Regime Creation under and after Hegemony' (1996) 3(1) *Review of International Political Economy* 65, 80.

commercial services exports were increasing dramatically in 2016, 2017 and 2018.[149] However, the GATS deals with commercial services and does not deal with the non-commercial services rendered by governments. This is the major weakness of the GATS as States, today, more often enter into commercial service agreements with investors.[150] The GATS does not cover the government regulatory authority on the non-commercial services supplied by a government[151] and it also limits the total value of FDI on the national treatment (NT) obligation.[152] Moreover, the GATS is not an investment agreement *per se*.[153]

Developed countries, after failing to establish a CIIA at the Uruguay Round of Negotiations from 1986 to 1994, explored the possibility of establishing an investment agreement in 1996 at the WTO Ministerial Conference held in Singapore.[154] This did not materialise as developing countries wanted to control multinational enterprises and preserve regulatory autonomy while developed countries wanted to protect investors' rights and have full liberalisation of investment.[155] At this meeting, however, member States did agree to study the relationship between trade and investment.[156]

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[149] World exports of commercial services increased by 8% in 2017. *WTO World Trade Statistical Review 2018*, 41; 'World exports of commercial services totalled US$4.8 trillion in 2016, up from US$2.9 trillion in 2006', in *Trends in World Trade: Looking Back over the Past Ten Years*, WTO World Trade Statistical Review 2017, available at <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm> accessed on 13 September 2018, 11; *Strong Trade Growth in 2018 Rests on Policy Choices*, WTO News 2018 (Press/820) (12 April 2018); World exports of commercial services totalled US$5.6 trillion. *WTO World Trade Statistical Review 2019*.

[150] *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (*General Agreement on Trade in Services*) art. I (b) and (c).

[151] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (*General Agreement on Trade in Services*) art. I (b) and (c).

[152] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (*General Agreement on Trade in Services*) art. XVI:2 (f).

[153] WTO, 'Trade and Foreign Direct Investment', 'News Report by the WTO', Press Releases, Press/57 (9 October 1996) available at <https://www.wto.org/english/news_e/pres96_/pr057_e.htm> 32.

[154] *Singapore Ministerial Declaration* WTO Doc WT/MIN(96)/DEC (18 December 1996) (adopted on 13 December 1996) para 20.

[155] Mavroidis, 'Regulation of Investment in the Trade Regime: from ITO to WTO' in Zdenek Drabek and Petros C Mavroidis (eds), *Regulations of Foreign Investment Challenges to International Harmonization* above, n 129, 33; Statement by Dr B B Ramaiah, Minister of Commerce, Singapore Ministerial Conference WTO Doc WT/MIN (96)/ST/27.

[156] WTO, '*Singapore Ministerial Declaration*' WTO Doc WT/Min (96) DEC (18 December 1996) (adopted on 13 December 1996) para 20 and 21.

Developed countries and developing countries were unable to reach an agreement to establish an international investment agreement at subsequent Ministerial Meetings held in Geneva (1998), Seattle (1999), Doha (2001) and Cancun (2003) as developed countries at the negotiations wanted to have a broad definition of investment.[157] Developing countries, due to their past adverse experience during the Uruguay Round of Negotiations, remained suspicious regarding how a CIIA would be of benefit to them as well as expressing disagreement on the definition of investment.[158] Developing countries also wanted to preserve intact their sovereign rights so they could make rules to address their development concerns. Hence, developing countries considered that portfolio investment would destabilize local entrepreneurs due to its volatility,[159] while developed countries wanted to include foreign portfolio investment in the definition of investment to improve the economic activities through increasing capital flow.[160] Developing countries opposed the inclusion of an investment regime in a trade organisation.[161] In particular, larger developing countries did not want an investment agreement under a trade organisation and were of the view that a CIIA under the WTO would hamper their economic development, which would benefit

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[157] *WTO Working Group on the Relationship between Trade and Development, Communication from the European Community and its Member States*, WTO Doc. WT/WGTI/W (27 June 2002) para 1; The WTO Draft Cancun Ministerial Text WTO Doc (13 September 2003) 14;
'Trade and Investment: Negotiate, or Continue to Study?' Doha WTO Ministerial 2001:Briefing Notes WTO Doc available at <
https://www.wto.org/english/thewto_minist_e/min01_e/brief12_e.htm> accessed on 01.10.2020;
Aaron Cosbey, Luke Peterson, Howard Mann and Konrad von Moltke, 'Investment, Doha and the WTO' (Report, The Royal Institute of International Affairs, September 2003) 1, 4; Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' (2014) 24(1) *University of Pennsylvania Journal of International Law*, 77, 78; David Ranson, 'Shrink or Sink: If the WTO Means to Stay Afloat, It Will Have to Lose Some Excess Baggage' (2001) 334 *New Internationalist* 9, 9; Zampetti and Fredriksson, above n 1,402.

[158] Working Group on the Relationship between Trade and Investment, *Communication from India*, WTO Doc WT/WGT/W/ 72 (13 April 1999) para 13; Sushma Ramachandran 'India to Oppose Multilateral Investment Regime at WTO', *The Hindu*, 30 July 2003, available at <https://www.thehindu.com/thehindu/2003/7/30/> accessed on 15 January 2019.

[159] *The WTO Agreement on Investment*, Actionaid, available at <www.actionaid.org.> accessed on 10 January 2019, 1, 3; 'Investment can be divided into two broad categories: portfolio investment and direct investment. The former involves acquiring shares of corporations without exercising any direct control over management of the organization'; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 157, 79 footnote 5; Sornarajah, above n 9, 196.

[160] Sornarajah, above n 9, 196. Kennedy is of the view that the EU's demand to have 'a comprehensive trade negotiation round that includes' investment deviates from the agricultural trade reforms pressed by developing countries**.** Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem', above n 157, 77.

[161] Ramachandran, above n 158; Stephen J Canner 'The Multilateral Agreement on Investment' (1998) 31(3) *Cornell International Law Journal* 657, 663.

developed countries.[162] In addition, developing countries wanted to address the imbalances in the existing rules before introducing new rules. Ultimately, investment was dropped from the negotiations partly due to the US stance at the Seattle Ministerial Conference which sought the exclusion of a WTO investment agreement from any new multilateral round of trade negotiations.[163]

After the conclusion of the Uruguay Round of negotiations, in 1995, developed countries unsuccessfully attempted to establish a multilateral agreement on investment (MAI) external to the WTO system. In 1998, this failed due to disagreement over an exhaustive definition of investment, and disagreement over the exceptions[164] given to the MFN principle[165] and NT principle.[166] The US wanted to include labour standards and environmental standards in the MAI and did not wish to abandon its extraterritorial jurisdiction; France and Canada brought proposals for exceptions for culturally-related issues such as cultural trade (publication and selling of books, music and films);[167] and the EU wanted provisions for exceptions for regional integration agreements. The EU's preference for the WTO as a future negotiation forum for investment was a salient feature of the negotiations.[168] Developed countries also failed in 1998 due to lack of transparency and the opposition of non-governmental organisations (NGOs)

[162] Burt, above n 9, 1017; Christy III, above n 135, 785.
[163] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 157, 79.
[164] The MFN and the NT principles can be derogated to preserve the regulatory autonomy purposes of members. *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade,* hereinafter referred to as GATT 1994) article XX.
[165] The MFN doctrine provides rules for non-discriminatory tariffs at the border level for like products. *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade,* hereinafter referred to as GATT 1994) article I.
[166] The NT deals with non-discriminatory taxes for like products at the national level (similar and substitute products). *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade,* hereinafter referred to as GATT 1994) article III ; Mick Hillyard, Multilateral Agreement on Investment (Research Paper No.98/31, House of Common Libery, 4 March 1998) 7.
[167] Hillyard, above n 166, 6.
[168] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 157, 89; Mina Mashayekhi, 'Trade-Related Investment Measures in UNCTAD', in *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations* (UN, New York and Geneva, 2000) 235.

on the ground that there was lack of scope for States to exercise their regulatory autonomy.[169]

Thereafter, the issue of CIIA came to the fore in the context of negotiations of the two mega trade and investment agreements. Transatlantic Trade and Investment Partnership (TTIP) was drafted by member States of the EU to fill the vacuum of a CIIA, but all countries did not accept it.[170] The major weaknesses of the TTIP were that it mainly dealt with investor and investment protection, it gave less attention to the regulatory autonomy of host States, and set lower standards for employee welfare.[171] It did not address the regulatory concerns of countries and NGOs, and citizens in the EU feared that they may lose job opportunities and experience lower labour standards.[172] Countries feared that the TTIP system, based on investment arbitration, would favour investors and harm the welfare policy of host States.[173] The EU negotiated the TTIP with the US, but after Donald Trump came to power as US President, the EU virtually abandoned its TTIP negotiation with the US.[174] In addition the TTIP text did not provide adequate rules for general exceptions.[175] The Trans-

[169] Jurgen Kurtz, 'NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment' (2002) 3(2) *Melbourne Journal of International Law* 213, 231.

[170] *Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce Chapter II-Investment* (EU Commission Draft Text TTIP-Investment) available at <https://trade.ec.europa.eu/doclib/html/153807.htm > accessed on 24.January 2019. See *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce Chapter II Investment* (EU Commission, Draft Text TTIP Investment); Patricia Gracia Duran and Leif Johan Ellasson, 'The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions' (2017) 51(1) *Journal of World Trade* 23, 26 and 27; Glyn Moody, 'TTIP Expected to Fail after US Demands Revealed in Unprecedented Leak' (Arch Technica, 5/3/2016) available at <https://arstechnica.com/tech-policy/2016/05/ttip-to-fail-leak> accessed on 3 February 2019, 1, 2.

[171] Duran and Eliasson, above n 170, 23, 24 and 30; Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' above n 15, 511.

[172] See *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce Chapter II Investment* (EU Commission, Draft Text TTIP Investment); Duran and Eliasson above n 170,26 and 27.

[173] Duran and Eliasson, above n 170, 30.

[174] Nils Wahl and Luca Prete, 'Blowin' against the Wind: On ACTA, AA, CETA, TTIP and the Forgetfulness of David Ricardo' (2017) 51(5) *Journal of World Trade* 763, 768; see Ana M Lopez-Rodriguez, 'Investor–State Dispute Settlement in the EU: Certainties and Uncertainties' (2017) 40(1) *Houston Journal of International Law* 139, 142.

[175] See *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce Chapter II Investment* (EU Commission, Draft Text TTIP Investment); TTIP Labour Standards, Study for the EMPL Committee, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy (IP?A/EMPL/2015-07, PE 578.992, June 2016) 1, 9.

Pacific Partnership (TPP) Agreement, however, was concluded on 5 October 2015[176] but the US withdrew from this Agreement.[177] The TPP is a regional agreement on trade and investment but it is not a CIIA.[178]

A new development took place when the European Commission (EC) introduced an investor-State dispute settlement system known as the investor-State court system under the Comprehensive Economic and Trade Agreement (CETA) between EU members and Canada.[179] The significant feature of the CETA 'Appellate Tribunal' is that it can determine errors of law and fact and the validity of interim measures, which are lacking in the ICSID Annulment Procedure.[180] The proposal of an investor-State court system is expected to lead to more problems than solutions, as the question may arise whether ICSID members will recognise arbitral awards given by the investor-State court system since the ICSID does not recognise an appellate mechanism**.**[181]

The United Nations (UN) also attempted to develop a multilateral international agreement to regulate international investment and to introduce FDI for economic development under its auspices in the 1970s. It established the UN Commission on Transnational Corporations (UNCTC) in 1974 but this was rejected by developed

[176] Among Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

[177] Wahl and Prete, above n 174, 765; Yusuf Ayotunde Abdulkareem, 'Conflict, International Trade and President Trump's Isolationist Policies (2018) 17(1 and 2) *Journal of International Trade Law and Policy* 34, 37; Yong-Shik Lee, 'Future of Trans-Pacific Partnership Agreement: Just a Dead Trade Initiative or a Meaningful Model for the North-South Economic and Trade Integration?' (2017) 51 (5) *Journal of World Trade* 907, 908.

[178] Preamble of the Trans-Pacific Partnership (TPP) Agreement. Developed and developing countries considered the 'TPP undermines domestic sovereign judicial authorities'; Lee, above n 177, 927.

[179] *Comprehensive Economic and Trade Agreement between Canada and the EU members* (CETA) (entered into force provisionally on 21 September 2017). The Appellate Tribunal under CETA is conferred jurisdiction to hear appeals of investment disputes and the 'Appellate Tribunal' has a wider jurisdiction than the ICSID Annulment Committee. Sonja Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2016) 19(1**)** *Irish Journal of European Law* 38, 38.

[180] *Comprehensive Economic and Trade Agreement between Canada and the EU members* (CETA) (entered into force provisionally on 21 September 2017) article 8.28; Elsa Sardinha, 'The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement' (2017) 32 (3) *ICSID Review* 625, 626; Christoph Schreuer, 'From ICSID Annulment to Appeal Halfway Down the Slippery Slope' (2011) 10(2) *The Law and Practice of International Courts and Tribunals* 211, 214.

[181] August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?–The Limits of Modifying the ICSID Convention and the Nature of Arbitration' (2016) 19(4) *Journal of International Economic Law* 761, 779 and 785.

countries on the grounds that it would be more developing country-friendly.[182] Therefore, to establish a CIIA for all countries, it is necessary that concerns of developing and developed countries, as well as concerns of NGOs, should be addressed. As both the *UNCTAD Human Development Report 2016* and the UN *Note by the Secretariat, 2020* on *Possible Reform of Investor-State Dispute Settlement* (ISDS) highlighted the importance of global investment rules for a sustainable development purpose, it is time now to establish a legal regime for investment under the WTO.[183]

1.6 Establishment of the Trade Regime

The Uruguay Round of Negotiations established the WTO in 1994.[184] The WTO is considered a new milestone in international trade as the WTO was able to establish substantive law and procedural rules and regulations for international trade through covered agreements.[185] Multilateral trade agreements constitute the core of the WTO and are binding on all WTO member States since members agreed to them as a single undertaking.[186] The plurilateral trade agreements are binding on member States who

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[182] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16(1) *The Journal of World Investment and Trade Law* 11, 26.

[183] UNCTAD, *Human Development Report 2016* (UN, New York and Geneva, 2016) 18; *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment Treaties by Treaty Parties* UN Doc. A/CN.9/WGIII.191 (17 January 2020).

[184] *WTO/GATT Ministerial Declaration on the Uruguay Round* (Punta Del Est Declaration) (20 September 1986); *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (hereinafter referred to as the *WTO Agreement*);
Uruguay Round Agreement Marrakesh Declaration of 15 April 1994, <http://www.wto.org/english/docs_e/legal_e/marrakesh-decl-e_htm> accessed on 05 February 2017.

[185] *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) article III.3; *WTO/GATT Ministerial Declaration on the Uruguay Round* (Punta Del Este Declaration) (20 September 1986); Gary P Sampson, 'The Future of the WTO in World Economic Affairs' (2005) 4(3) *World Trade Review* 419, 419; *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995); *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* ('Sutherland Report'), Report by the Consultative Board to the Director-General, Supachi Panitchpakdi, WTO, 2004, para 1; Anne van Aaken, Chad P. Bown and Andrew Lang, 'Introduction to the Special Issue on 'Trade Wars' (2019) 22(4) *Journal of International Economic Law* 529, 529.

[186] See Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2006) 17(5) *The European Journal of International Law* 969, 973; Gillian Moon, 'Trade and Equality: A Relationship to Discover' (2009) 12(3) *Journal of International Economic Law* 617, 620

have signed such agreements.[187] The WTO governs trade relations among 164 members as of 2020.[188]

They can reject plurilateral trade agreements, but no other WTO agreements.[189] All members have equal rights and equal obligations. The thesis argues that this rule-based system provides a sound background for the introduction in the WTO of a coherent investment agreement as a single undertaking.[190] The Ministerial Conference is the apex body of the structure and consists of Ministers of Trade representing each Member State.[191] The next highest authority is the General Council and it functions as the Dispute Settlement Body (DSB) and Trade Review Body (TRB).[192]

The Uruguay Round of Negotiations introduced a rules-based dispute settlement system to resolve trade disputes that may arise between the WTO member States upon violation of WTO obligations.[193] The WTO established a legal regime which provided a degree of predictability in the multilateral trading system.[194] The WTO dispute settlement process commences with consultation; if this fails, a panel is appointed, and

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[187] *WTO Agreement* article II:2 and 3; *Agreement on Trade in Civil Aircraft*, *Agreement on Government Procurement*, *International Dairy Agreement* and *International Bovine Meat Agreement*; Alex Ansong, 'Unclog WTO Decision-Making with the Provisions on Amendments in Article X of the WTO Agreement' (2018) 26(2) *African Journal of International and Comparative Law* 227, 227; Neha Mishra, 'Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows' (2019) 52(2) *Vanderbilt Journal of Transnational Law* 463, 465.

[188] 'Understanding the WTO: The Organization: Members and Observers' <www.wto.org/english/thewto_e/whatis-e/tif-e/org6-ehtm> accessed on 30 September 2019; *WTO Annual Report 2019*, 32; *WTO Annual Report 2020*, 30; Asif H Qureshi, *International Economic Law* (Sweet & Maxwell, 1999) 237.

[189] *WTO Agreement* (opened for signature on 15 April 1994) 1867-9UNTS 1, 33ILM 1125 (entered into force on 1 January 1995) article II.3; Alex Ansong, 'Unclog WTO Decision-Making with the Provisions on Amendments in Article X of the WTO Agreement' above n 187, 227.

[190] Note by Secretariat, Working Group on the Relationship between Trade and Investment, Consultation and the Settlement of Disputes between Members, WTO Doc. WT/WGTI/W/134 (7 August 2002) para 2.

[191] *WTO Agreement* article IV:1 The Ministerial Conference assembles every two years. Ministerial meetings have the supreme authority.

[192] *WTO Agreement* article IV:2.

[193] Qureshi, above n 188; *DSU* article 17; Mark Huber and Greg Terposky, 'The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism' (2017) 32(3) *ICSID Review* 545, 546; *Nairobi Ministerial Declaration* WTO Doc WT/MIN (15)/Dec (21 December 2015) (adopted on 19 December 2015) para 13; *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (dispute settlement understanding) (hereinafter referred to as *DSU*) article 4; Edwini Kessie, 'The "Early Harvest Negotiations" in 2003' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement 1995–2003* (Kluwer Law International, 2004) Vol 18, 114, 115; *DSU*; Gordon, above n 80, 92.

[194] *DSU* article 3(2).

an aggrieved member State can lodge an appeal with the Appellate Body.[195] The DSU does not have jurisdiction to hear FDI-related disputes as these disputes arise usually between investors and host States. The WTO is intended to provide a uniform system of trade rules for member States;[196] however, this system does not include a uniform set of rules for FDI. The WTO cannot ignore investment, which is a central element contributing to global economic growth for sustainable development.[197] A CIIA paves the way to more investment for a country; in this way, it will have a direct bearing on economic development which is the WTO's underlying objective.[198]

The structure and principles laid down under the WTO have permitted contracting member States to deviate from its principles under specific circumstances where State interests override international obligations for political economy concerns.[199] This thesis claims that balancing the liberalisation of trade and the welfare of people to the extent of protecting human life or health can be considered as the political economy of trade.[200] In contrast, investment law does not consider the specific circumstances of a host State to deviate from its obligations in making rules for political economy.

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[195] *DSU* articles 6 and 17.

[196] *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) article II (I).

[197] Burcak Polat, 'Determinant of FDI into Central and Eastern European Countries: Pull or Push Effect?' (2015) 3(4) *Eurasian Journal of Economics and Finance* 39, 39; Peter J Lloyd, 'The Architecture of the WTO' (2001) 17 (2) *European Journal of Political Economy* 327, 329, 342; Debra P Steger, 'Redesigning the World Trade Organization for the Twenty-First Century' available at <http://www.idrc.ca/openbooks/455-0/> accessed on 24 June 2017, 16; Dirk Willem te Velde, 'Foreign Direct Investment for Development Policy Challenges for Sub-Saharan African Countries' (2002) Overseas Development Institute 1, 3; *UNCTAD, Trade and Development Report 2019. Financing A Global Green New Deal* (United Nations Publication, Geneva, 2019) 50.

[198] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 157, 79; *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017: Follow up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017* available at <www.unohrills.org> accessed on 24 August 2017, 20.

[199] The functions of the WTO are to propagate liberal trade policies, reduce State interference with regard to trade, establish a level playing field, improve the living standards of citizens of its member States and ensure the expected growth of real income, thereby developing the world's resources. Preamble to *Marrakesh Agreement Establishing the WTO, the Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Text* (1994); Appellate Body Report, *United States Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [17]; Anne Van Aaken and Jurgen Kurtz, 'Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism' (2019) 22 (4) *Journal of International Economic Law* 601, 603.

[199] *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) article II (I).

[200] For example, in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, the Appellate Body accepted the States' authority to derogate the obligations undertaken

The WTO agreements provide rules for transparency, due process, free access to markets, fair competition and a dispute settlement mechanism. Indeed, trade liberalisation has led to an exponential 'growth in international' trade and investment.[201] Accordingly, the WTO system has produced a more organised international trading system.[202] Despite this, WTO member States have failed to create an effective and organised international investment treaty regime.[203] The main driving force for economic growth is FDI, with FDI even facilitating increased trade volume.[204] It is also considered that FDI is a *sine qua non*[205] to the economic development of countries.[206] Regrettably, the WTO has failed to establish a CIIA, which is genuinely needed because such an agreement would establish a set of uniform rules, bring predictability to investment law,[207] and facilitate the task of ascertaining

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under covered agreements to protect human life or health under the GATT Article XX. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001) [115].

[201] Surya P Subedi**,** 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' (2006) 53(2) *Netherlands International Law Review* 273, 275; Aurangzeb and Anwar Ul Haq, 'Impact of Investment Activities on Economic Growth of Pakistan' (2012) 2(1) *Business and Management Review* 92, 92; Anthony P Thirlwall, 'Trade, Trade Liberalization and Economic Growth: Theory and Evidence (The African Development Bank Economic Research Papers No. 63, 2000) 1.5; Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' above n 13, 136.

[202] Lamy, above n 188, 972; *Nairobi Ministerial Declaration* WTO Doc WT/MIN (15)/Dec (21 December 2015) (adopted on 19 December 2015) para 2.

[203] WTO, *Trade and Investment: Technical Information of Agreement on Trade-Related Investment Measures*, <https://www.wto.org/english/tratop_e/invest_e/invest_info.e.htm> accessed on 21 May 2018, 2; Simon Lester, 'Reforming the International Investment Law System' (2015) 30 *Maryland Journal of International Law* 70, 71.

[204] *G20 Guiding Principles for Global Investment Policymaking* (G20 China, 14 September 2016) available at <http://www.g20chn.org?english/Documents/Current/201609/t20160914_3464.html> accessed on 9 August 2017, principle I; OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Cost* (OECD Publication, 2002) 9.

[205] Without which a thing cannot be (An essential condition**)** Black's Law Dictionary (6th edition, West Publishing Company,1999)

[206] Sanjaya Lall and Rajneesh Narula, 'Foreign Direct Investment and Its Role in Economic Development: Do We Need a New Agenda?' (2004) 16(3) *The European Journal of Development Research* 447, 461; WTO, *Trade and Investment are Increasingly Important Development Issues*, WTO News: Speeches: D G Roberto Azevedo (20 March 2017) available at <https://www.wto.org/english/news_e/spra_e/spra162_e.htm> accessed on 14 September 2017.

[207] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 157, 80; Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33(1) *Berkeley Journal of International Law* 1, 58; WTO, *Trade and Investment: Technical Information of Agreement on Trade-Related Investment Measures*, <https://www.wto.org/english/tratop_e/invest_e/invest_info.e.htm> accessed on 01 October.2020,1; WTO News: 1996 Press Releases, *Trade and Foreign Direct Investment*, WTO Doc. Press/57 (9 October 1996) <https://www.wto.org/english/news_e/press96_/pr057_e.htm>accessed on 01 October 2020; Martin Khor, 'The "Singapore Issues" in the WTO: Implications and Recent Developments'

the law that is applicable to investment, all of which are currently lacking in the world.[208] Although the literature stresses the importance of a comprehensive investment dispute settlement mechanism, it does not suggest a CIIA under the WTO as a covered agreement. Therefore, this thesis drafts the framework for an investment agreement and suggests the desirability of establishing a legal aid centre similar to the WTO legal aid centre for LICs and for small enterprises, as the cost of litigation is a burden for LICs and small enterprises.[209]

In its Sustainable Development Goals (SDGs),[210] and the 2015 Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development, the UN stressed the importance of a 'global partnership' for economic development.[211] The Millennium Declaration emphasised the interconnection between trade, transparency, good governance and development, stressing the importance of all of these factors when seeking to alleviate poverty.[212] The WTO has sought to follow this pathway via the Doha Declaration which urges member States to consider the needs of developing countries.[213]

(Third World Network [TWN], November 2004) 1, 2; Tomer Broude, 'Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law' (2013) 9(1) *Jerusalem Review of Legal Studies* 24, 25.

[208] Jack Beatson FBA, 'International Arbitration, Public Policy Considerations, and Conflict of Law: The Perspectives of Reviewing and Enforcing Courts' (2017) 33(2) *Arbitration International* 175, 196.

[209] *Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Advisory Centre* 38th session UN Doc. A/CN.9/WGIII/WP.168 (25 July 2019) paras 4, 5and 6.

[210] United Nations General Assembly, *Resolution Adopted by the General Assembly–United Nations Millennium Declaration*, A/RES/55/2 (18 September 2000) available at <http://www.un.org/millennium/declaration/ares552e.htm> accessed on 10 October 2018, para 6; United Nations General Assembly, *Road Map Towards the Implementation of the United Nations Millennium Declaration*: *Report of the Secretary-General*, A/56/326 (6 September 2001);
United Nations Millennium Project, *MDGs: Goals, Targets and Indicators* (2002-2006) available at <ucbiotech.org/biotech_info/PDFs/UN_Millennium> Goal 7 accessed on 01 October 2020.

[211] United Nations, *The Millennium Development Goal Report 2015*, Goal 8; *United Nations Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development* UN Doc GA A/RES/70/1 17th Session (adopted 25 September 2015) Preamble.

[212] United Nations General Assembly, *United Nations Millennium Declaration*, A/RES/55/2 (18 September 2000) available at <http://www.un.org/millennium/declaration/ares552e.htm> accessed on 10 October 2018 para 13.

[213] *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1/DEC/1 (20 November 2001) (adopted on 14 November 2001).

The Doha Declaration highlights the importance of the 'SDT',[214] 'technical cooperation',[215] 'capacity building'[216] and the important relationship with trade and 'cross-border investment', and has largely ignored FDI as an important topic.[217] Despite the development focused provisions in the Doha Declaration, the WTO failed to achieve an investment agreement for sustainable economic development, mainly because developed countries were unable to consider the concerns of developing countries on development and sovereignty.[218] The Doha negotiations have continued to drag on, remaining contentious throughout.[219] The ongoing lack of progress in Doha may jeopardise the WTO's future.[220] In any event, one thing remains clear: substantive reforms with regard to the definition of LICs, agriculture, SDT, GSP, inclusion of FDI and introduction of a CIIA into the WTO will all be required if the WTO is to maintain its organisational legitimacy into the future.[221]

1.7 Objectives of Study

1.7.1 Primary Objectives

1. To examine how FDI improves the economic development of LICs.
2. To analyse the importance of a comprehensive investment treaty regime under the WTO and to create such a model agreement drawing upon the DSU, NAFTA, BITs and MAI.
3. To examine the complexity of the current investment dispute settlement mechanism in the world, which involves arbitrability, forum difficulties, the

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[214] Ibid para 44.
[215] Ibid para 38.
[216] Ibid para 41.
[217] Ibid paras 20 and 30; see also *Nairobi Ministerial Declaration* WTO Doc WT/MIN (15)/Dec (21 December 2015) (adopted on 19 December 2015).
[218] WTO, Trade Negotiation Committee: Informal Meeting, 'Members Support Lamy's Three-Speed Search for Doha Outcome in December', WTO Doc 2011 News Items (31 May 2011) available at <http://www.wto.org/english_e/news11_e/tnc_infstat_31_may11-e.htm> accessed on 20 October 2018; *ACP Declaration on the Sixth WTO Ministerial Conference* WTO Doc. African, Caribbean and Pacific (ACP) Group of States (ACP/61/047/05Rev.3 (29 November 2005) para 9.
[219] WTO, Trade Negotiation Committee: Informal Meeting, 'Members Confront Doha Round Deadlock with Pledge to Seek Meaningful Way Out', WTO Doc. 2011 News Items (29 April 2011) available at <http://www.wto.org/english/news_e/news11_e/tnc_dg_infstat_29apr11_e.htm> accessed on 20 October 2018.
[220] Ibid.
[221] See Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 25, 27; Robert Hudec, 'The Adequacy of WTO Dispute Settlement Remedies' in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO:A Handbook* (The World Bank 1st ed, 2002) 81, 86; Chad P Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19(2) *The World Bank Economic Review* 287; see Chen, above n 78, 129.

choice of law, the applicable law, regulatory tension between investors and States, and the difficulty of enforcing awards in investment cases, in order to establish the necessity of having a CIIA to remedy the current difficulties.

4. To introduce an IIDSU under the WTO.

1.7.2 Supportive Objectives of Study

1. To identify countries that can be grouped as LICs.
2. To explore the relationship between LICs' trade incapacity and FDI vis-à-vis their lack of bargaining capacity in the WTO.
3. To examine the GSP and GSP+ schemes to demonstrate the ambiguity and discretionary nature of the GSP program.
4. To demonstrate the ambiguity of Article XVIII of the General Agreement on Tariffs and Trade (GATT) and the Enabling Clause of 1979.
5. To examine the relevance of SDT, the MFN principle and the NT provisions in the context of FDI.

1.8 Research Question

What are the major challenges in incorporating a CIIA and an IIDSU within the present WTO system for sustainable economic development of low income countries?

1.9 Research Method

This research adopts a qualitative research methodology, undertaking comparative analysis to demonstrate the existing complexities of international investment law and the challenges to introducing investment into the WTO.[222] Furthermore, this research uses comparative methodology to demonstrate the similarities and differences of various BITs. The qualitative research method that compares research contexts is more suitable and practicable for the current study.[223] The research methodology adopted for this study involves a review of the existing literature. To achieve the research objectives, this study uses three types of material/ sources:

[222] Vernon Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4(2) *Global Jurist Frontiers* 1, 1.
[223] Geoffrey Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 163, 164.

1. WTO agreements, WTO background documents, international conventions and treaties, cases, WTO declarations and proposals made by various groups as primary sources.

2. Relevant journal articles, books, book chapters, working papers and reports as secondary sources.

3. The existing literature is inadequate in enabling one to draw compelling conclusions as to why LICs have not achieved economic development despite the SDT treatment provisions in the WTO agreements. Therefore, a survey of trade and FDI statistics of developing countries and LDCs from 2009–2019 through the WTO Country Profile Statistics is used to obtain qualitative data to demonstrate their inequitable status. A comparative analysis is conducted of the WTO and investment arbitration cases to establish a CIIA under the WTO.

4. A CIIA and the IIDSU have been drafted on the basis of the GATT, the WTO Covered agreements (TRIMs GATS and DSU), NAFTA, Draft MAI, NYC, ICSID and the existing FTA and BITs.

1.10 Significance

The study develops a conceptual framework for establishing a CIIA as a WTO covered agreement, within the WTO. The thesis provides a uniform rule-based system for FDI. It will then introduce a dispute settlement mechanism similar to the WTO DSU. In addition, the study argues that FDI improves LICs' economies. As the term 'developing countries' does not reflect the wide gap between countries placed under the same category, this study defines LICs by considering their share in international trade and FDI. This research fills a significant research gap in the existing literature, addressing some of the critically important issues in the trade and FDI related literature. This study drafts a model of a CIIA which will be an original contribution of the thesis.

1.11 Structure of Thesis

Chapter 1 first discusses the challenges of establishing a CIIA and the importance of converging investment and trade under the WTO. Then this chapter examines whether a multilateral investment agreement under the WTO would facilitate a proper,

functioning and sustainable global investment regime, with special reference to the economic development of LICs, along the lines with the WTO objectives. This chapter provides the background for and introduces the issues addressed in the remaining chapters.

Chapter 2 presents the historical evolution of the term 'developing countries' as it is applied by the WTO. It is argued that the concept of developing countries does not appropriately fit into the WTO framework of a level playing field. The chapter stresses the importance of identifying a distinct group of LICs, according to their trade capacity and FDI. The chapter discusses the term 'development' and proffers a conceptual framework for sustainable development. It also discusses the reasons for the WTO's consistent failure to introduce a comprehensive investment agreement.

Chapter 3 demonstrates that compliance with the GATT Article XVIII, the GSP Decision of 1971 and the Enabling Clause of 1979 are best-endeavour provisions, ambiguous and non-binding, and suggests amendments to these instruments for the implementation of SDT.

Chapter 4 discusses objectives and scope of TRIMs, GATS, NAFTA Chapter 11, and the draft MAI of the OECD. The chapter identifies that these agreements do not provide rules for a CIIA for FDI, and discusses the importance of a separate multilateral investment regime including the incorporation of an investment agreement within the WTO. The chapter reinforces the point that the WTO agreements do not currently cover a wide range of investment issues. This chapter includes a draft model of a multilateral investment agreement.

Chapter 5 demonstrates that the law governing investment arbitration is fragmented and lacks coherence. The current international investment arbitration process is complex and without binding jurisprudence. There is little confidence in its effectiveness as a global investment-dispute-settlement mechanism.

Chapter 6 discusses the difficulty of enforcement of arbitral awards under the New York Convention and the ICSID Convention. This chapter elaborates on the

shortcomings of the enforcement mechanism because of the public policy of States under the New York Convention and the State immunity under the ICSID Convention.

Chapter 7 demonstrates that the WTO's DSU has established an effective rules-based dispute settlement mechanism for trade-related disputes worldwide and identifies the need to develop a CIIA and IIDSU based on the DSU for investment-related disputes. This chapter addresses the overarching objective of the study, which is to contribute to future WTO negotiations, particularly as they relate to investment law.

Chapter 8 concludes the thesis with a recapitulation of each chapter, an acknowledgement of the study's shortcomings, and a suggestion for future research.

1.12 Ethical Issues

This research uses publicly available data and does not involve human participation. Therefore, no human research ethics approval was required.

1.13 Data Storage, Facilities and Resources

This research follows the data storage provisions of the Curtin University Research Data and Primary Materials Policy. Research data will be securely stored for seven years after publication of the thesis. Computer hardware and software required for this research are provided by the Curtin Faculty of Business and Law and Curtin University Graduate Research School (GRS).

1.14 Limits of the Study

The limits of this study are that it has not studied the TRIPs Agreement and anti-trust law. These two areas are essential for FDI but they warrant a separate study of their own due to the unique nature of the issues involved. In addition, the study has not worked out the grouping of LICs on the basis of economic metrics, which essentially involves economic criteria, such as the Economic Performance Index (EPI).[224]

[224] Vadim Khramov and John Ridings Lee, 'The Economic Performance Index: An Intuitive Indicator for Assessing a Country's Economic Performance Dynamics in an Historical Perspective' (IMF Working Paper, WP/13/214, 2013) 1, 3.

Chapter 2: Development as a Theoretical Underpinning for Convergence of Trade and Investment and Proposing the Category of Low-Income Countries

2.1 Introduction

The aim of Chapter 2 is to revisit the term 'development' and proffer a conceptual framework in the context of the objectives of the WTO. Special emphasis is placed on the fact that the notion of developing countries does not fit appropriately into the WTO framework of equitable trade liberalisation. This chapter stresses the importance of identifying a distinct group of countries as LICs according to their trade capacity and FDI. It is suggested that the WTO needs to replace the concepts of developing countries and LDCs with the concept of LICs that incorporates LDCs. The question of whether a country comes within this category needs to be determined by analysing the country's trade capacity and FDI for the purposes of the WTO and its agreements. It is not the extent of a country's economic development, but its trade capacity and FDI that determine its relative position in the economic sphere as the WTO is a trade organisation and this study suggests that investment should be incorporated within the WTO's ambit. This chapter identifies the gaps in the literature and establishes the converging contribution to comparative advantage theory, merging together trade and investment in the WTO.[1] Converging trade and investment into the WTO provides greater opportunity for sustainable economic development and investors and host States get mutual benefits such as profits and social welfare for people, protecting investment and recognizing regulatory autonomy of States.[2]

The WTO was established to promote free trade to achieve economic prosperity through the principle of non-discrimination irrespective of the difference in economic status of countries.[3] Through this dynamic, the WTO establishes a set of rules and regulations and member States agree to abide by these rules and regulations. The WTO Preamble emphasises sustainable development which lifts people's living standards, protects the environment and improves the real incomes of the citizens of member States and the

[1] See Fenghua Li, 'The Driving Forces of Convergence of WTO Dispute Settlement Mechanism and International Investment Arbitration' (2018) 52(3) *Journal of World Trade* 479, 484 and 486.

[2] Jurgen Kurtz, *The WTO and International Investment Law*: *Converging Systems* (Cambridge University Press, 2016) 17; *WTO Working Group on the Relationship between Trade and Investment, The Relationship between Trade and Foreign Direct Investment* (WT/WGTI/W/7 (18 September 1997) 4; Appellate Body Report, *Measures Affecting the Production and Sale of Clove Cigarettes* WTO Doc WT/DS406/AB/R (4 April 2012) [96, 108 and 109].

[3] See Gary P Sampson, *The WTO and Sustainable Development* (United Nations University Press, 2005) 2; Kalim Siddiqui, 'International Trade, WTO and Economic Development' (2016) 7(4) *World Review of Political Economy* 424, 424.

optimal use of the world's resources.[4] The WTO rules contribute to a trade regime and are part and parcel of regulating economic development among its member States worldwide.[5] The WTO has also created clear rules and regulations for the multilateral trading system through its covered agreements [6] and the DSU has created a rules-based legal system.[7] A similar rule-based legal system should be established for investment under the WTO by converging trade and investment, which will then ensure the predictability of investment law and benefit both investors and host States to protect investors' rights and the regulatory autonomy of States.[8]

The Organisation for Economic Co-operation and Development (OECD) Cancun Declaration[9] and Doha Declaration highlighted the importance of further expanding international trade, services and cross-border investment.[10] Even though trade liberalisation is a key pillar of economic development, some member States are still unable to achieve economic prosperity through trade.[11] On the one hand, the even distribution of economic benefits has not reached a group of LICs.[12] The question that arises is whether unilateral trade liberalisation *per se* provides opportunities for poor countries. On the other hand, the nomenclature of 'developing countries' within the WTO has made it difficult to identify a

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[4] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (hereinafter referred to as the *WTO Agreement*) Preamble; *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) para 6.

[5] Ramesh Adhikari and Prema-chandra Athukoala, *Developing Countries in the World Trading System: The Uruguay Round and Beyond* (Edward Elgar Publishing Limited, 2002) 4.

[6] *WTO Agreement* article II (2); John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed, MIT Press, 1997) 3; Michael F Williams, 'Charming Betsy, Chevron, and the World Trade Organization: Thoughts on the Interpretative Effect of International Law' (2001) 32(3) *Law and Policy in International Business* 677, 679.

[7] Julio Larcarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal Dispute Settlement System: A View from the Bench' (2000) 3(3) *Journal of International Economic Law* 395, 401; WTO *Annual Report 2017*, 112, 115.

[8] Li, 'The Driving Forces of Convergence of WTO Dispute Settlement Mechanism and International Investment Arbitration' above n 1, 485; Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law'(2014) 36 (1*) University of Pennsylvania Journal of International Business* Law 1, 67 and 68; Alford Roger P. 'The Convergence of International Trade and Investment Arbitration' (2013) 12(1) *Santa Clara Journal of International Law* 35, 39.

[9] OECD *Ministerial Declaration on the Digital Economy, Innovation, Growth and Social Prosperity* (21-23 June 2016) (Cancun Declaration) Preamble.

[10] *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) paras 15, 20; Draft Cancun Ministerial Text (24 August 2003) paras 13, 14.

[11] *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017; Follow up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017* available at <www.unohrills.org> accessed on 24 August 2017, 1.

[12] *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017: Follow up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017* available at <www.unohrills.org> accessed on 24 August 2017, 2.

group of countries that need special attention in the trade liberalisation process.[13] Free trade should also ensure fair trade and sustainable economic development. A LICs category should be identified to reduce the disparity among countries and provide for a level playing field in the WTO.[14]

The chapter begins by conceptualising the term 'development', and sustainable economic development and examines theories that have contributed to the definition of development. In addition, it demonstrates that, in its early stages, trade was associated with development and, subsequently, investment was used as a yardstick to describe economic development. The second part of the chapter addresses the importance of converging trade and investment in the context of the WTO's objectives. The chapter establishes that both trade and investment are means to achieve economic development and converging advantages of both trade and investment. The third part of the chapter demonstrates that the term 'developing country' is inequitable, that no level playing field exists for LICs due to the low level of trade capacity and FDI.[15] Therefore, consideration must be given to classify a group of countries as LICs based on trade and FDI.

2.2 Definition of Development

Economic inequalities have existed among people and countries from time immemorial. In practice, disparity existed in the past and still exists among people, countries and regions:[16] some have resources while others do not. The term 'development' attempted to explain this disparity. During the early Greco-Roman era, economic progress was considered as development, with the term 'development' later transformed into millennialism, modernisation and industrialisation with the advent of the Industrial Revolution.[17] The term

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[13] Jianfu Chen, 'S&D Treatment for Developing Countries in the WTO Trade Regime: A False Solution on a Wrong Footing for LDCs' in Jianfu Chen and Gordon Walker (eds), *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Federation Press 2004) 109, 111.

[14] *WTO Agreement*, Preamble; Robert Maseland and Albert De Val, 'How Fair is Fair Trade'(2002) 150 (3) *De Economist* 251, 251; Susan Tiefenbrun 'Free Trade and Protectionism: the Semiotics of Seattle' (2000) 17(2) *Arizona Journal of International and Comparative Law* 257, 268; Caoimhin Mac Maolain, Éthical Food Labelling: The Role of European Union Free Trade in Facilitating International Fairtrade (2002) 39 (2) *Common Market Law Review* 295, 297.

[15] WTO, *World Trade Statistical Review 2019, available* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01.01.2020, 14, 62; *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 13.

[16] See Deepak Nayyar, 'Globalization and Development Strategies' in John Toye (ed), *Trade and Development Direction for the 21st Century* (Edward Elgar Publishing Limited, 2003) 35, 37.

[17] Jacobus A Du Pisani, 'Sustainable Development: Historical Roots of the Concept' (2006) 3(2) *Environmental Sciences* 83, 84 available at <http://www.tandfonline.com/loi/nens19> accessed on 26 July 2017; Marie-Claire Cordonier Segger, 'Commitments to Sustainable Development through International Law and Policy' in Marie-Claire Cordonier Segger with H E Judge and C G Weeramantry (eds), *Principles in the Decisions of International Courts and Tribunals 1992-2012* (Routledge, 2017) 29, 31.

'development' is difficult to define. The concept encompasses not only economic gains at the national level but also social development, environmental protection and preserving the dignity of human beings. The concept of 'development' incorporates economic growth as well as poverty reduction.[18] The Human Development Index (HDI) attempts to define development through life expectancy, literacy, standard of living conditions, and education, instead of depending on economic growth.[19] The HDI and the Declaration on the Right to Development (DRD) place much emphasis on the quality of life.[20]

At the 1969 UN Declaration on Social Progress and Development, member States undertook to implement joint and separate actions to promote better living standards for their people through economic and social development.[21] The Preamble to the 1986 DRD defines development as 'a comprehensive economic, social and cultural process which aims at the constant improvement and well-being of the entire population'.[22] The term 'development' is an ever-evolving and ever-stretching concept due to its nebulous characteristics.[23] For instance, the gap between developed countries and LICs has widened. Therefore, the term 'development' cannot be confined to one specific formula due to the heterogeneity of countries and the world's unbalanced resource distribution.

Even though the meaning of 'development' is a relative term, the UN Charter Article 55 offers some insight by stating development to include: 'higher standards of living, full employment and conditions of economic and social progress'. Economic, social and health considerations also form part of the picture.[24] However, these perspectives ignore the *real-politik* of trade and investment that are crucial to the development of any country – particularly LICs.[25]

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[18] Lisa Claire Toohey, *Rule of Law Discourse and the Accession of Transitional Economics to the World Trade Organization* (PhD thesis, The University of Queensland, 2009) 10.

[19] The Human Development Report indicates disparity among people and it provides for suggestions to attain human development, such as eradication of poverty, improvement of the health conditions of people and access to pure water and sanitation. *United Nations Human Development Report 2016: Human Development for Every One* (United Nations, New York, 2016) 3.

[20] *United Nations Declaration on the Right to Development*, UN Doc. GA A/RES/41/128, 97th Plenary Meeting (4 December 1986).

[21] *Declaration on Social Progress and Development*, UN GA Res 2542 (11 December 1962) GAOR 24th Session UN Doc A/RES/24/2542 Preamble.

[22] *United Nations Declaration on the Right to Development*, UN Doc. GA A/RES/41/128, 97th Plenary Meeting (4 December 1986).

[23] See Hector Gros Espiell, 'The Right of Development as a Human Right' (1981) 16(2) *Texas International Law Journal* 189, 202.

[24] *Charter of the United Nations* article 51.

[25] See *United Nations Conference on Trade and Development, Structural Transformation for Inclusive and Sustained Growth Report 2016* (United Nations, New York and Geneva, 2016) 100.

The level of a country's economic development is determined by using a statistical index, such as gross national income (GNI), purchasing power parity (PPP) or the share of manufactured goods and services in the measure of gross domestic product (GDP);[26] however, less importance is given to the share of international investment. The evolution of the concept of 'development' has been associated with trade – not with investment.

In the early days of trade, one country started trading with other countries, while people traded with other people, in the form of the exchange of goods without currency. The earliest method of trade involved people leaving some goods in a particular location and not remaining with them. Somebody else would then come to the location, pick up the goods and leave behind something equal in value to the goods.[27] This system is called the 'barter system'.[28] Subsequently, a form of currency was used in selling and buying goods.[29] As time went on, trade came to involve, and evolve with, the exchange of gold and money for the goods, with trade contributing to the origination of money.[30] Over time, the trading bustle began to increase in terms of size and volume, eventually being shaped on an international scale.[31] This transaction pattern, at that time, was usually defined as 'development'.

The role of the law was to ensure that those involved in trade treated each other fairly and equally. Subsequently, 'fair play' evolved into the notion of a level playing field for

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[26] See *World Bank National Accounts Data, and OECD National Accounts Data Files*, <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD>; Seung Wha Chang, 'WTO Trade and Development Post-Doha' (2007) 10(3) *Journal of International Economic Law* 553, 565; Costas Azariadis, and Allan Drazen, 'Threshold Externalities in Economic Development' (1990) 105(2) *The Quarterly Journal of Economics* 501, 501; Segger, 'Commitments to Sustainable Development through International Law and Policy' in Marie-Claire Cordonier Segger with H E Judge and C G Weeramantry (eds), *Principles in the Decisions of International Courts and Tribunals 1992-2012* above n 17, 31.

[27] G Winham, 'Lessons from History' in Robert Howse (ed), *The World Trading System: Critical Perspectives on the World Economy* (Routledge, London and New York, 1998) Vol 1, 10, 11; Friedrich August Hayek and William Warren Bartley III (eds), *The Fatal Conceit: The Errors of Socialism* (University of Chicago Press, 1989) Vol. I, 39.

[28] Surya P Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' (2006) 53(2) *Netherlands International Law Review* 273, 277.

[29] Douglas A Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton University Press, 1996) 12.

[30] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 277.

[31] Hayek and Bartley III above n 27; Surya P Subedi, 'A Shift in Paradigm in International Economic Law: From State-centric Principles to People-centred Policies' (2013) 10(3) *Manchester Journal of International Economic Law* 314, 318.

international trade,[32] resulting in the advent of international institutions for trade and monetary matters creating a rule of law for international trade.[33] As the world developed, countries considered trade to be the driving force of development. Chenery and Taylor defined development as 'production, domestic use, international trade and resource allocation in [a] sector'.[34]

The concept of development has now widened to achieve a plethora of objectives,[35] such as human progress that focuses on basic needs,[36] human rights,[37] freedom,[38] education, improvement of literacy,[39] sustainable environmental and social goals,[40] equitable distribution of resources and access to clean drinking water, as well as improvement of

[32] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 276; Irwin, *Against the Tide: An Intellectual History of Free Trade* above n 29, 15.
[33] Michael D Bordo and Harold James, 'The International Monetary Fund: Its Present Role in Historical Perspective' (NBER Working Paper No. 7724, June 2000) 13; Sonia E Rolland, *Development at the World Trade Organization* (1st ed, Oxford University Press, 2012) 48; James Bacchus, 'Groping Toward Grotius: The WTO and the International Rule of Law' (2003) 44(2) *Harvard International Law Journal* 533, 539; Yong K. Kim, 'The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints' (1996) 17 (4) *Michigan Journal of International Law* 967, 971.
[34] Hollis B Chenery and Lance Taylor, 'Development Patterns: Among Countries and Over Time' (1968) 1(4) *The Review of Economics and Statistics* 391, 391.
[35] See *International Convention for the Regulation of Whaling* (open for signature 2 December 1946) 161 UNTS, available at <http://uk.whales.org/issues/in-depth/international-convention-for-regulation-of-whaling-icrw> accessed on 23 July 2017; *The Rio+20 Declaration*, available at <https://intlawroundtable.org/2012/06/20/final-text-of-the-rio20-declaration> accessed on 5 July 2017, article 4; Joanna Boehnert, 'The Green Economy: Reconceptualising the Natural Commons as Natural Capital' (2016) 10(4) *Environmental Communication* 395, 398; IUCN [International Union for Conservation of Nature and Natural Resources], UNEP [United Nations Environment Programme] and WWF [World Wildlife Fund], *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980) para 3; United Nations Conference on Environment and Development (UNCED): *The Rio Declaration on the Environment* (1992); *Johannesburg Declaration on Sustainable Development: From Our Origins to the Future* (4 September 2002) para 11.
[36] *World Bank Development Report, The Challenge of Development 1991*, 36; *International Covenant on Economic, Social and Cultural Rights* (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966) (entered into force 23 January 1976) articles 1 and 3.
[37] Frances Stewart, 'Basic Needs Strategies, Human Rights, and the Right to Development' (1989) 11(3*) Human Rights Quarterly* 347, 349.
[38] Amartya Kumar Sen, *Development as Freedom* (1st ed, Anchor Books, 2000) 15; Bhupinder Chimni, 'The Sen Conception of Development and Contemporary International Discourse: Some Parallels' (2008) 1(1) *The Law and Development Review* 1, 4.
[39] Costas Azariadis and Allan Drazen, 'Threshold Externalities in Economic Development' (1990) 105(2) *The Quarterly Journal of Economics* 501, 525.
[40] Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004) 47; Steven Freeland and Julie Drysdale, 'Co-operation or Chaos? Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission' (2005) 2 *Macquarie Journal of International and Comparative Environmental Law* 1, 30; Duncan French, '1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change' (1998) 10(2) *Journal of Environmental Law* 227, 236; Fernanda de Paiva Duarte, 'The Environment and Development Debate: Paradoxes, Polemics and Panaceas' (1999) 8(2) *Griffith Law Review* 258, 264.

labour standards, capacity building,[41] cultural and political development,[42] and sustainable development apart from economic development.[43] Despite the number of objectives associated with the concept of development, the literature has not placed significant attention on investment and converging of trade and investment. Investment is the principal driving force for development, whether it is economic development or sustainable development.[44] In fact, investment is necessary to sustain development and is co-related to development. Monetary investment has numerous end results: it contributes to reducing poverty in the world, manages natural resources, maintains ecological stability, improves social and economic development, provides better education.[45]

The concept of sustainable development is also linked with FDI given it helps to achieve environmental preservation.[46] The term 'development' cannot be confined only to the above. For instance, developing an institutional framework for a CIIA under the WTO is also an institutional development that promotes sustainable development worldwide. Sustainable economic development goals have to be achieved recognizing the concept of right to development.

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[41] Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24(4) *Human Rights Quarterly* 837, 848.
[42] Stewart, above n 37.
[43] *The Rio+20 Declaration*, available at <https://intlawroundtable.org/2012/06/20/final-text-of-the-rio20-declaration> accessed on 5 July 2017; Sharmin Jahan Tania, 'Is There a Linkage between Sustainable Development and Market Access of LDCs?' (2013) 6(1) *The Law and Development Review* 143, 152.
[44] Zdenek Drabek, 'A Multilateral Agreement on Investment: Convincing the Sceptics' (WTO Economic Research and Analysis Division Working Paper, ERAD-98-05, June 1988) 4; OECD, WTO and UNCTAD, *Report on G20 Trade and Investment Measures* (30 June 2017); *G20 Guiding Principles for Global Investment Policymaking* (G20 China, 14 September 2016) available at <http://www.g20chn.org?english/Documents/Current/201609/t20160914_3464.html> accessed on 9 August 2017, Principle V.
[45] 'To achieve a low-carbon path requires population stabilization, limited consumption, and major investments in environmental protection and social priorities such as public health, nutrition, and education'. Jonathan M. Harris, Ecological Macroeconomics: Consumption, Investment, and Climate Change (Global Development and Environment Institute Working Paper No. 08-02, July 2008) 1, 1 available at https://rrojasdatbank.info/08-02EcologyMacroEcoJuly08.pdf.> accessed on 13.06.2019; 'The investments on environmental protection accounted for 4.1 percent of the total gross fixed investment made by industrial enterprises; the environmental investments per persons employed were equal to 373 euros'. Investments on Environment Protection Industry (Istituto Nazionale di Statistica) (18 December 2017); 'Several countries identified the environment as a key area for fostering growth and jobs and attempting to improve the complementary relationship between growth and environmental protection'. Eniko Artim, Ellen Baltzar, Joanna Fiedler, Dusan Sevic and Ruslan Zhechkov, Investing in the Environment as a Way to Stimulate Economic Growth and Employment. How Environmental Projects Contribute to Achieving Lisbon Agenda Goals (Regional Environmental Center Document, March 2008) 1, 15.
[46] Philippe Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (2007) 37(2-3) *Environmental Policy and Law* 66, 68; Philippe Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law: The Policy Framework for Investment: The Social and Environmental Dimensions' (OECD Global Forum on International Investment, 27-28 March 2008) 5, available at <www.oecd.org/investment/gfi-7> accessed on 29 July 2017; Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge: Cambridge University Press, 2012) 42.

2.2.1 Sustainable Development

In ancient times, people were mindful of the environment, utilising resources with the greatest responsibility and also preserving them for future generations.[47] Long ago, people considered the environment as a God and they even worshipped it (not having the scientific development to understand the environmental changes).[48] In the past, people thought that development was not only about achieving economic goals, but also about preserving fauna and flora.[49] This view can be seen in the ICJ case of the *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* in which it was held that early civilisation protected the environment and used natural resources with concern for future generations.[50] Ancient civilisations, while achieving development, protected the environment. People at that time gave due recognition to the notion of sustainable development and they zealously guarded it. This means that early civilisations considered development to be a concept that was an intersection of environmental, social, moral and economic development.

A new interpretation and the significance of the concept of sustainable development surfaced when modern humans, with the advent of science, tried to exploit world resources for their optimal use by maximising profits, without considering adverse effects on the environment and without managing and preserving resources for future generations. As a result, different sets of laws have been introduced to safeguard the environment by curbing destruction carried out in the name of development.

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[47] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, para 45.

[48] Sumudu Atapattu, 'Sustainable Development, Myth or Reality?: A Survey of Sustainable Development under International Law and Sri Lankan Law (2002) 14(2) *Georgetown International Environmental Law Review* 265, 286; *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, separate opinion of Justice Weeramantry para 79; Irwin, *Against the Tide: An Intellectual History of Free Trade*, above n 29, 11.

[49] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, separate opinion of Justice Weeramantry para 76.

[50] 'There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia — in fact, the whole world'. *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, para 45.

Today, the concept of development has been expanded to include other associated rights.[51] Sustainable development, however, is not a new phenomenon and is inextricably linked with development. The existing literature on the origins of sustainable development is not settled. Weeramantry argues that sustainable development originated and was practised for thousands of years by various societies across the world,[52] while Sands traces its history back to the 18th century and identifies elements of sustainable development in fisheries and environmental conservation agreements.[53]

The UN Charter did not originally include the term 'sustainable development'. However, in later developments in international environmental law, sustainable development was regarded as a UN objective and thereafter, sustainable development was considered a UN touchstone objective.[54] The 1972 Stockholm Conference on the Human Environment was exclusively devoted to the subject of preserving the environment while pursuing economic development.[55] The basis for this conference was two UN Resolutions on the Human Environment, 2398 (XXII)[56] and 2581 (XXIV).[57] The Stockholm Declaration is not couched in legally binding language (with ambiguous principles and guidelines)[58] due to the divergence of opinion among States. A positive outcome of the Stockholm Declaration was that it provided the impetus to adopt the Convention on International Trade in Endangered Species (CITES).[59] The Stockholm Declaration also provided inspiration to

[51] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, para 140; Alan Boyle 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) *Fordham Environmental Law Review* 471, 510.

[52] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97>accessed on 30 June 2017, separate opinion of Justice Weeramantry, para 82.

[53] Philippe Sands, 'International Environmental Litigation and its Future' (1999) 32(5) *University of Richmond Law Review* 1619, 1619.

[54] *United Nations General Assembly, Report of the World Commission on Environment and Development*, UN Doc 42/187 96th Plenary Meeting (11 December 1987) (Brundtland Report); *Kyoto Protocol to the United Nations Framework Convention on Climate Change* article 2(3).

[55] *Report of the United Nations Conference on the Human Environment* UN Doc A/CONFE.48/14/Rev 1, *Declaration on the United Nations Conference on the Human Environment* (*Stockholm Declaration*) 21st Plenary Meeting (16 June 1972) articles 1, 2; *United Nations Conference on the Human Environment of 1972*, Stockholm Declaration of 11 ILM1416 (1972) (adopted on 16 June 1972).

[56] *Problems of the Human Environment* GA Resolution 2398 (XXIII) (adopted 3 December 1968).

[57] *Conference on the Human Environment* GA Resolution 2581 (XXIV) (adopted 15 December 1969).

[58] Gunther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' United Nations Audiovisual Library of International Law (2012) available at <www.un.org/lawavl> accessed on 27 July 2017, 2.

[59] *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (adopted 3 March 1973) (amended on 22 June 1979 and 30 April 1983) UN Doc 993 UNTS 243, 12 ILM 1085, Preamble.

the Brundtland Report,[60] which defined the term 'sustainable development'.[61] The Brundtland Report states that 'sustainable development' means and includes 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'.[62] This connotes the concept of development that uplifts the living standards of people and preserves resources for generations yet to be born.[63] Economic law, in its early stages, was depicted as not providing a legal framework to protect the environment, but a norm to preserve the environment did exist.[64] The Brundtland Report was adopted by the World Commission on Environment and Development (WCED), emphasising and ensuring the importance of balancing economic and environmental activities.[65]

The Rio Declaration, while reiterating the commitment to the Stockholm Declaration, extended the concept of sustainable development one step further, and incorporated it as a non-binding international legal principle.[66] The Rio Declaration conceptualises sustainable development as the cornerstone and provided a foundation for States to create laws to domestically balance the social, environmental and economic dynamic.[67] However, it did not create legally binding obligations for States to protect the environment.

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[60] *United Nations General Assembly, Report of the World Commission on Environment and Development* UN Doc 42/187 96th Plenary Meeting (11 December 1987) (Brundtland Report).

[61] Markus Gehring and Alexandre Genest, 'Disputes on Sustainable Development in the WTO Regime' in Marie-Claire Cordonier Segger with H E Judge and Christopher Gregory Weeramantry (eds) *Principles in the Decisions of International Courts and Tribunals 1992-2012* (Routledge, 2017) 357, 357; Tania, 'Is There a Linkage between Sustainable Development and Market Access of LDCs' above n 43, 148.

[62] *United Nations General Assembly, Report of the World Commission on Environment and Development* UN Doc 42/187 96th Plenary Meeting (11 December 1987) (Brundtland Report).

[63] Aaron Cosbey, 'Sustainable China Trade: A Conceptual Framework' (IISD Working Paper, April 2009) 2, available at <www.iisd.org> accessed on 1 July 2017.

[64] Subedi, 'A Shift in Paradigm in International Economic Law: From State-Centric Principles to People-Centred Policies' above n 31, 332.

[65] United Nations, 'Our Common Future Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development' (adopted by the WCED Experts Group on Environmental Law) UN Doc A/42427 *Our Common Future: Report of the World Commission on Environment and Development*, available at <http://www.un-documents.net/ocf-a1.htm> accessed on 29 July 2017, article 7.

[66] *Rio Declaration on the Environment and Development* UN GAOR (1992) UN Doc A/CONF 151/26, principles 10 and 11; '*Agenda 21 (Annex 2)' in Report of the UN Conference on Environment and Developmen*t Vol. I (13 June 1992) UN Doc A/CONf 151/26; Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (The Netherlands: Martinus Nijhoof, 2008) 198.

[67] *Rio Declaration on Environment and Development* UN GAOR (1992) UN Doc A/CONF 151/26, principles 10, 11 and 12; Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *The European Journal of International Law* 377, 379; Dinah Shelton, 'What Happened in Rio to Human Rights?' (1992) 3(1) *Yearbook of International Environmental Law* 75, 82.

The 2002 Johannesburg Declaration on Sustainable Development emphasised the importance of the protection of environmental, social and economic development.[68] At the same time, it highlighted the collective commitment to advance and balance economic development, social development and environmental protection, while States were simultaneously engaged in reducing poverty.[69] Despite these lofty commitments in the Rio and Johannesburg Declarations, poverty within LICs went from bad to worse. Furthermore, the environment was being rapidly degraded at the time of the Johannesburg summit.[70] The summit also predicted a sustainable future and moved to take action to protect the environment.[71] When one looks at the Rio Declaration and the Johannesburg Declaration, they do not, however, have the binding force of law. In the absence of implementation mechanisms, the declarations merely emphasise the importance of establishing a balance between ecology and economic development, but fall short of providing a concrete legal framework to achieve sustainable development.

In the year 2015, the UN introduced a Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development.[72] This Declaration identified five key factors as indispensable requirements for achieving sustainable development: people, the planet, prosperity, peace and partnership.[73] The sustainable development goals and relevant targets of the 2030 Agenda are to strengthen peace, eradicate poverty, and preserve the environment.[74] This declaration went further than earlier declarations in articulating the concept of sustainable development. The 2030 Agenda replaced the Millennium Development Goals (SDGs).[75] The important feature of this Resolution is that it

[68] *United Nations World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development* UN Doc A/CONF.199/20 (4 September 2002) articles 3, 5; International Law Association (ILA), 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (2002) 2(2) *International Environmental Agreements: Politics, Law and Economics* 211, 216.
[69] *United Nations World Summit on Sustainable Development,* Johannesburg, UN Doc A/CONF.199/20 (4 September 2002) (*Johannesburg Declaration on Sustainable Development*) (WSSD) article 8.
[70] 'Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating, and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life'. *United Nations World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development* UN Doc A/CONF.199/20 (4 September 2002) article 13.
[71] *United Nations World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development* UN Doc A/CONF.199/20 (4 September 2002) article 6.
[72] *United Nations Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development* UN Doc GA A/RES/70/1 17th Session (adopted 25 September 2015).
[73] *United Nations Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development* UN Doc GA A/RES/70/1 17th Session (adopted 25 September 2015), Preamble.
[74] Ibid.
[75] Ibid.
[75] WTO News, De Azevedo and UNSG Guterres Discuss Ongoing Cooperation to Deliver SDGs (6 December 2018).

emphasized the importance of a plan of action to protect the planet and bring prosperity to people. The Stockholm, Johannesburg and Rio Declarations only addressed the topics of humans, economics, social rights and the environment (ecological). The Declaration on Transforming Our World: the 2030 Agenda focuses on peace, the planet and partnership. Therefore, it can be argued that sustainable development is anything and everything that protects living beings and the planet. This Declaration has placed much emphasis on eradicating poverty throughout the world and tried to strengthen peace and freedom for mankind. It paved the way to recognise the regulatory autonomy of host States vis-a-vis investors.

Segger and Khalfan endeavour to categorise sustainable development as a branch of legal principles in the intersections of environmental, social and economic laws.[76] Their argument is that sustainable development is justiciable. Barral defines sustainable development as a concept that penetrates most human activities encompassing the environmental, social and economic, as well as the political and cultural fabric.[77] Barral's proposition on sustainable development spreads into different branches of law as he is trying to define sustainable development in relation to human activities. When one looks closely at the concept of sustainable development across the broad spectrum, it drives economic development, conserves the planet, and plays a crucial role in improving trade and investment and is associated with economic, social and environmental development.[78]

Some further discussion of the concept of development is necessary hear because developing and developed countries have differing views with regard to the concept of development, to establish the conceptual framework of this thesis, and to stress the importance of preserving regulatory autonomy of host States in a CIIA. Developing countries initially considered sustainable development as a disguised evil imposed on them by developed countries to obstruct their development as they were in the early stages of

[76] Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* above n 40, 46.
[77] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *The European Journal of International Law* 377, 377.
[78] *United Nations Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development* UN Doc GA A/RES/70/1 17th Session (adopted 25 September 2015) paras 20, 30; UNCTAD, *The World Investment Forum 2016 Review* (UN Publication, Nairobi, Kenya, 17-21 July 2016) 5; The concept of sustainable development has become a binding force under customary international law as a lot of countries introduced municipal laws for sustainable economic goals. *United Nations Framework Convention on Climate Change* UN Doc.FCCC/INFORMAL/84 GE.05-62220 (E) 200705 (1992) article 3.4; Attapattu, above n 48, 269.

development and were trying to achieve higher economic growth.[79] Developing countries argued that developed countries exploited resources without considering future generations, and that they also tried to impede developing countries' economic development by bringing the sustainable development theme to the forefront.[80] However, both developed and developing countries want to achieve economic development while preserving the environment under the UN.[81]

The WTO also agreed to achieve SDGs and tried to cooperate with the UN.[82] The WTO plays an important role fostering sustainable economic development by bringing it forward as its objective.[83] While promoting trade for development, it recognises exceptions under the GATT Article XX for sustainable economic development purposes.[84] The GATT Article XX states that under the pretext of environmental protection, member countries should not introduce unjustifiable and disguised restrictions to international trade. This means the GATT Article XX prohibits discriminatory trade measures of States. However, the GATT Article XX (b and g) provides for general exceptions to safeguard the environment, public morals, health, as well as cultural activities and living beings, in order to protect the regulatory autonomy of States.[85] The GATS Article XIV (b) (and XIV bis) provides exceptions like those of the GATT, and the GATS further prevents fraudulent practices in relation to services and security interests. A question then arises of how to determine whether a specific measure is justifiable or unjustifiable. There is no yardstick. It is dependent upon the facts of a case.

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[79] Dongsheng Zang, 'From Environment to Energy: China's Reconceptualization of Climate Change' (2009) 27(3) *Wisconsin International Law Journal* 543, 546.

[80] Rolland, *Development at the World Trade Organization* above n 33, 28.

[81] *United Nations Declaration on Transforming Our World: the 2030 Agenda for Sustainable Development* UN Doc GA A/RES/70/1 17th Session (adopted 25 September 2015).

[82] WTO News, De Azevedo and UNSG Guterres Discuss Ongoing Cooperation to Deliver SDGs (6 December 2018); *United Nations Conference on Environment and Development*: *The Rio Declaration on the Environment* (1992) Principle 12; UN General Assembly Resolution 1707 (XVI) *International Trade as the Primary Instrument for Economic Developmen*t UN Doc A/RES/1707(XVI) (19 December 1961); UN General Assembly Resolution 1710 (XVI) *United Nations Development Decade: A Programme for International Economic Co-operation* UN Doc A/RES/1710 (XVI) 19 December 1961).

[83] See *WTO Agreement*, Preamble.

[84] Gisele Kapterian, 'Á Critique of the WTO Jurisprudence on 'Necessity'' (2010) 59(1) International *and Comparative Law Quarterly* 89, 97.

[85] Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TTP, CETA, and TTIP' (2016) 19(1) *Journal of International Economic Law* 27, 47; Michael Ming Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' (2011) 14(3) *Journal of International Economic Law* 639, 654; Donald H. Regan, 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: the Myth of Cost-Benefit Balancing' (2007) 6(3) *World Trade Review* 347, 366.

Preserving the environment is a fundamental requirement to achieve sustainable economic development. This is evident from the *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US-Shrimp*) case.[86] The Appellate Body held that the WTO had established the Committee on Trade and Environment (CTE) in 1995[87] and, therefore, that it was the duty of the Appellate Body to interpret Article XX of the GATT by considering its ordinary meaning and whether the US had violated the chapeau of the GATT, Article XX.[88] The Appellate Body emphasised the Rio Declaration and Agenda 21 and stated that the 'right to development' is subject to the protection and preservation of the environment.[89] The ruling of the Appellate Body in *US - Shrimp* was that in order to achieve sustainable development, it is necessary to protect environment, and environment is *sina qua non* (absolutely necessary*)* for development. It held that countries should preserve the environment to achieve sustainable economic goals when interpreting article XX of the GATT.[90]

BITs also provide exceptions for environmental protection. This is evident from the Free Trade Agreement between China and Australia (the Preamble provides for investments).[91] The ICSID Convention in its Preamble also states *inter alia* '… the need for international cooperation for economic development …' which is important in interpreting an investment contract and bringing an argument that host States have rights for regulatory measures for sustainable economic development.[92] This thesis argues that the common objectives of

[86] Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998).
[87] Richard G Tarasofsky, 'The WTO Committee on Trade and Environment: Is It Making A Difference?' (1999) 3 *Max Planck Yearbook of United Nations Law* 471, 471.
[88] Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [155].
[89] Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [12], footnotes 147, 148; John H Knox, 'The Judicial Resolution of Conflicts between Trade and Environment (2004) 28(1) *Harvard Environmental Law Review* 1, 4; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS/AB/R (29 April 1996) 30.
[90] Appellate Body, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [12]; *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade*, hereinafter referred to as GATT 1994); Elisa Baroncini and Claire Brunel, 'A WTO Safe Harbour for the Dolphins. The Second Compliance Proceedings in the US–Tuna II (Mexico) case' (2020) 19(2**)** *World Trade Review* 196, 197; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. Recourse to Article 21.5 of the DSU by the United States. United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. Second Recourse to Article 21.5 of the DSU by Mexico* WTO Doc WT/DS381/AB/RW/USA, WT/DS381/AB/RW2 (14 December 2018) [6.17].
[91] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (adopted 24 October 2003) (entered into force 20 December 2015) article 9.8.1 and 2.
[92] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) Preamble; *Report of the Executive Directors on*

sustainable economic development can be achieved if the trade law and investment law are regulated under the WTO.

From the above discussion, sustainable economic development can be defined as a concept that balances and maximises socio-economic development that lifts the living standards of people as well as preserving the vitality and diversity of the planet through converging FDI and trade. With this background, it is necessary to examine whether the term 'development' has created a legal right as rule of law because the objective of the WTO is to achieve sustainable economic development,[93] and its enforceability as a legal right to protect regulatory autonomy.

2.2.2 Right to Development and Its Enforceability as a Rule of Law

That sustainable development has legal status is doubtful. Sharachchandra describes sustainable development as 'sustained growth, sustained change and successful development', but he does not specifically state whether sustainable development has legal status.[94] Cosby defines sustainable development as 'economic, environmental and social' development and argues that there is no definite meaning attributed to it.[95] What Cosby attempts to clarify that the concept of sustainable development is difficult to enforce as a legal principle. The definitions of Sharachchandra and Cosby foster the ingrained norm of development as economic growth.

The 1944 Declaration of Philadelphia provided only a 'rough idea' about the right to development. It recognised the 'material' and 'spiritual well-being' of people as the right to development.[96] The Philadelphia Declaration did not create any legal rights, but through this declaration development became a bipolar concept as it brought together the concepts of material and spiritual development. Material development here refers to economic development, while spiritual development is the contentment that one can attain as a human being. In international law, the notion of development has its roots in the 'right to

the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para 9.

[93] *WTO Agreement*, Preamble; *GATT 1994* article XX (b and g).

[94] Sharachchandra M Lele, 'Sustainable Development: A Critical Review' (1991) 19(6) *World Development* 607, 608.

[95] Cosby, above n 63.

[96] *ILO Declaration of Philadelphia: Declaration Concerning the Aims and Purposes of the International Labour Organization Constitution* article II (a).

development' which was introduced by the United Nations (UN).[97] The Declaration on the Right to Development, Article 1 states that '[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development …'.[98]

The UN Declaration on the Right to Development, Article 1 is a bundle of rights associated with a process of development which aims at the realisation of human rights.[99] The Universal Declaration of Human Rights states that all people of the world are entitled to 'the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.[100] The International Covenant on Civil and Political Rights, Preamble and Article I also recognise the freedom to achieve economic development.[101] The Vienna Declaration on Human Rights, Article 11 states that the right to development is the balance between environmental and developmental needs not only for the present generation but also for future generations.[102] Rawls contends that everyone in the world should be entitled to meet their basic needs.[103]

The concept of the 'right to development' is questionable, regardless of whether it is enforced as law, due to its amorphous nature. It is vague and it can be anything and everything. The 'right to development' is a moral duty and cannot be enforced as a distinct branch of law.[104] The 'right to development' is considered as a normative principle rather

[97] *United Nations Declaration on the Right to Development* UN Doc. GA A/RES/41/128, 97th Plenary Meeting (4 December 1986); see also *Philadelphia Declaration ILO Declaration of Philadelphia: Declaration Concerning the Aims and Purposes of the International Labour Organization* article IV.
[98] *United Nations Declaration on the Right to Development* UN Doc GA A/RES/41/128, 97th Plenary Meeting (4 December 1986) article 1; *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7 available at <http://opil.ouplaw.com/view/10.1093/law.icgj/66icj97.case.1/law-icgj-66icj97> accessed on 30 June 2017, separate opinion of Justice Weeramantry, para 19.
[99] See Sengupta, above n 41, 846.
[100] *Universal Declaration of Human Rights* (adopted 10 December 1948) GA Res. 217A (III) Article 22.
[101] *International Covenant on Civil and Political Rights* (adopted and opened for signature) Ratification and Accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) in accordance with Article 49.
[102] *Vienna Declaration and Programme of Action* (adopted by the World Conference on Human Rights in Vienna on 25 June 1993).
[103] John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1971) 62; The basic needs for the people can be given only, host States are empowered to make laws for regulatory autonomy and the laws should be created to balance the interests of the host States and investors. Marco Antonio Oliveira de Azevedo, 'Rights as Entitlements and Rights as Claim' (2010) 55(1) *Veritas* (Jan/Abr)164, 171.
[104] Roland Y Rich, 'The Right to Development as an Emerging Human Right' (1983) 23(2) *Virginia Journal of International Law* 287, 289.

than a binding principle.[105] Stewart argues that, for the 'right to development' to become a binding force, three requisites should be fulfilled. First, according to him, it is necessary to have a 'precise definition [for the concept of] development'.[106] Second, he states that it is necessary to have international or domestic enforcement mechanisms.[107] Finally, he argues that incentives ('trade and finance') should be granted to implement enforcement.[108] Chinkin is not certain whether the 'right to development' is 'a legally binding norm or not'; however, she goes on to state that the term 'right to development' is interpreted to achieve different objectives such as improvement of human rights and protection of environment.[109]

The 'right to development' is segregated into several branches of law, such as environmental law (including conservation agreements) and human rights.[110] The UN Declaration of the Right to Development emphasises that it is the duty of States to provide a legal framework nationally and internationally to fully realise the 'right to development'.[111] Human rights and environmental laws have been introduced in municipal laws in most countries; for example, the Sri Lankan Constitution's chapter on Directive Principles of State Policy and Fundamental Duties emphasises the importance of protecting the environment.[112] In such instances, these laws can be enforced to that extent.

The 'right to development' cannot be enforced in international law as the rule of law when destruction is caused to the environment. However, if countries recognise mass destruction of the environment as a serious threat to living beings, and it threatens the economic development of people, as is the case under human rights (genocide) or *jus cogens*, it should be actionable[113] and States should be able to take regulatory measures to preserve the environment irrespective of the agreement entered with investors. A question then arises

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[105] Attapattu, above n 48, 279; Felix Kirchmeier, 'The Right to Development – Where Do We Stand?' (Friedrich Ebert Stiftung, No 23, July 2006) 11.
[106] Frances Stewart, 'Basic Needs Strategies, Human Rights, and the Right to Development' above n 37, 350 (emphasis added).
[107] Ibid.
[108] Ibid.
[109] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law (1989) 38(4) *The International and Comparative Law Quarterly* 850, 853 and 865.
[110] Dominic McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45(4) *The International and Comparative Law Quarterly* 796, 799; R N Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development' (1988) 35(3) *Netherlands International Law Review* 257, 261; Louis B Sohn 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32(1) *The American University Law Review* 1, 53.
[111] *United Nations Declaration on the Right to Development* UN Doc. GA A/RES/41/128, 97th Plenary Meeting (4 December 1986) Preamble; Isabella D Bunn, 'The Right to Development: Implication for International Economic Law' (2000) 15(6) *American University International Law Review* 1425, 1428.
[112] *Constitution of the Democratic Socialist Republic of Sri Lanka* article 27 (14).
[113] McGoldrick, above n 110, 818.

as to whether any correlation exists between human rights and development. Trubek questions the political economy behind the relationship between the rule of law and development. He states that no theory supports an idea that improving human rights, in turn, promotes development and discusses the concept of the 'new development state' for economic development.[114] Sen considers development as freedom of the people, and states that if the people are economically better off, they are contented.[115] However, Sen did not consider that people have unlimited needs to fulfil and that resources are not enough to meet the demands of people. In fact, some developed countries use human rights as a tool to interfere with the internal affairs of LICs and this again hampers development.[116]

The UN in its Millennium Declaration[117] and Millennium Development Goals[118] stressed the importance of engaging the WTO in the global partnership for economic development.[119] The Millennium Declaration emphasised the interconnection between trade and investment, transparency, good governance and development. In the Declaration, all these factors were viewed as important when seeking to alleviate poverty,[120] but the UN did not emphasise the interconnection between trade and investment. Even though the UN recognised the 'right to development' as a human right, the WTO, in its Preamble, did not recognise it as a fundamental right. With this background, the theories behind development need to be discussed to examine whether they have any relevance to human beings, the environment, or trade and investment issues. In this context, development theories are discussed below to demonstrate that the comparative advantage theory can still be

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[114] David M Trubek, 'The Political Economy of the Rule of Law: The Challenge of the New Development State' (2009) 1(1) *Hague Journal on the Rule of Law* 28, 31; John K M Ohnesorge, 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience' (2007) 28(2) *University of Pennsylvania Journal of International Economic Law* 219, 308.

[115] Sen, *Development as Freedom* above n 38, 15; Chimni, above n 38.

[116] GSP+ and Sri Lanka (Democracy Reporting International (June 2016) available at<http://democracy-reporting.org> 5; Kevin C Kennedy 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preferences' (2012) 20(3) *Michigan State International Law Review* 521, 525.

[117] *United Nations General Assembly, Resolution adopted by the General Assembly – United Nations Millennium Declaration*, UN Doc A/RES/55/2 (18 September 2000) available at <http://www.un.org/millennium/declaration/ares552e.htm>, para 30.

[118] *United Nations General Assembly, Road Map Towards the Implementation of the United Nations Millennium Declaration*: Report of the Secretary-General, UN Doc A/56/326 (6 September 2001); United Nations Development Group Millennium Project, *MDGs: Goals, Targets and Indicators*, <www.unmillenniumproject.org/goals/gti.htm>.

[119] United Nations Development Group Millennium Project, *MDGs: Goals, Targets and Indicators*, <www.unmillenniumproject.org/goals/gti.htm> Goal 8.

[120] *United Nations General Assembly, United Nations Millennium Declaration*, A/RES/55/2 (18 September 2000) available at <http://www.un.org/millennium/declaration/ares552e.htm>, para13.

interpreted to define development in a new way, and to establish that regulation of host States is not encompassed in the theories of development.

2.3 Pathology of Theories of Trade for Development

The modern international trade law framework began to emerge in the mid-1800s when England and France developed the Cobden–Chevalier Treaty of 1860.[121] Economic theories on international trade policies were based on the principles of non-tariff discrimination.[122] Modern theories of free trade were said to have originated from the *laissez-faire* theory,[123] the underlying principle being that the commercial activities of people should not be hindered by the intervention of States.[124]

Traders of different trading nations began trading without restrictions.[125] States endeavoured to export more and more to increase profits to develop their countries.[126] As a result, competition ensued among countries in their bid to increase their trade and investment activities. A trade surplus was sold to other countries and the profits from trade transactions were used for investment which increased the wealth of countries.[127] This provided the foundation for expanding and maximising exports while imposing restrictions on imports, and the mercantile era commenced with this dynamic.[128]

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[121] A A Iliasu, 'The Cobden–Chevalier Commercial Treaty of 1860' (1971) 14(1) *The Historical Journal* 67, 67.

[122] Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: the WTO and Beyond* (Oxford University Press, 3rd edition, 2009) 7.

[123] Salvatore Pitruzzello, 'Trade Globalization, Economic Performance, and Social Protection: Nineteenth-Century British Laissez-Faire and Post-World War II US-Embedded Liberalism' (2004) 58(4) *International Organization* 705, 709; Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 277; Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (London, Routledge, 3rd ed, 2005) 1; Raj Bhala, *International Trade Law: Theory and Practice* (Lexis Publishing, 2nd ed, 2001) 1; Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2nd ed, 2008) 23; Winham, above n 27, 11; Hayek and Bartley III, above n 27.

[124] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 277.

[125] Ibid, 276; Clair Wilcox, *A Charter for World Trade* (Arno Press, 1972) 4; Hayek and Bartley III, above n 27.

[126] Bhala, *International Trade Law: Theory and Practice* above n 123; Lowenfeld, above n 123.

[127] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (J F Dove, St John's Square, 1826) 28 and 55; Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 77.

[128] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 276; Bhala, *International Trade Law: Theory and Practice* above n 123, 1; Lowenfeld, above n 123; John H Jackson, William J Davey and Alan O Sykes Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations* (West Group, 4th ed, 2002) 4.

When the world began to modernise, development was measured through trade theories. The earliest theory of economic development is considered to be mercantilism.[129] The *lex mercatoria* was an attempt to provide a basic code of conduct for traders who were engaging in international trade.[130] Countries had encouraged their institutions and individuals to export more than they imported,[131] and competed with other nations to increase their trade activities. This is called 'mercantilism'.[132] Mercantilist theory encouraged exports and discouraged imports.[133] *Lex mercatoria* ('Law of merchant') regulated international trade through customs.[134]

Adam Smith, in his economic theory, *The Wealth of Nations*, published in 1776, criticised mercantilism, stating that the wealth of a country should be measured by its people's living standards and not by the amount of currency that the country had hoarded in its banks or assets.[135] Adam Smith did not accept that mercantilism, as an economic theory, brought development to countries.[136] He noted that a country should produce products that it could produce in a more cost-efficient way: this theory is known as 'absolute advantage'.[137] The reason is that the value of goods is determined according to the labour involved (the product is sold for more than its production cost).[138]

Smith maintained that free trade provides a distinct advantage to a country, even if other countries follow protectionist trade policies.[139] According to 'the theory of absolute

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[129] Douglas A Irwin, *A Brief History of International Trade Policy* (26 November 2001) Library of Economics and Liberty, available at <http://www.econlib.org/library/columns/irwintrade.html> accessed on17 July 2017, 1.
[130] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 28, 277; C P Kindleberger, 'The Rise of Free Trade in Western Europe, 1820-1875' (1975) 35(1) *The Journal of Economic History* 20, 25; Ralf Michaels, 'The True Lex Mercatoria: Law Beyond the Sea' (2007) 14(2) *Indian Journal of Global Legal Studies* 447, 448.
[131] Bhala, *International Trade Law: Theory and Practice* above n 123.
[132] Ibid.
[133] Jackson, Davey and Sykes Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transitional Economic Relations* above n 128.
[134] Hans van Houtte, *The Law of International Trade* (Sweet and Maxwell Limited, 2nd ed, 2002) 25.
[135] Adam Smith (J R McCulloch) (ed), *An Inquiry into the Nature and Causes of the Wealth of Nations* (Adam and Charles Black Publishers, 1863) 196; Jan Wouters and Bart De Meester, *The World Trade Organization, A Legal and Institutional Analysis* (Intersentia Antwerpen-Oxford, 2007) 2, 2; R H Campbell and A S Skinner (eds), *Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford Clarendon Press, 1976) Vol 1, 450; Bhala, *International Trade Law: Theory and Practice* above n 123.
[136] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (J F Dove , St. John's Square, 1826) 14; Adam Smith (J R McCulloch, ed), *An Inquiry into the Nature and Causes of the Wealth of Nations* above n 135; Jan Wouters and Bart De Meester, above n 135,2; Adam Smith (R H Campbell and A S Skinner, eds), *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford Clarendon Press, 1976) 450.
[137] Wouters and De Meester, above n 135.
[138] Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* above n 135, 55.
[139] Douglas A Irwin, *Free Trade under Fire* (2nd ed, Princeton University Press, 2005) 26; Wouters and De Meester, above n 135.

advantage'[140] the wealth of a nation (i.e. State) increases if each State specialises in producing and exporting the goods and services that can be produced the most efficiently and effectively by that State.[141] The fundamental flaw in Smith's theory was that it did not adequately address the situation where a country had no absolute advantage in producing raw materials or did not have adequate resources. However, Smith's absolute advantage theory provided the basis for the *laissez faire* theory[142] and the modern concept of free trade.[143] According to the *laissez faire* theory, a State does not intervene in the commercial activities of its people.[144]

Ricardo in *Political Economy* introduced in 1817 the notion of 'comparative advantage', building on the absolute advantage theory.[145] Ricardo's economic theory relates to specialised products that give a comparative advantage to a country at a lower opportunity value.[146] Ricardo argued that even if a country could produce all products, such a country should produce what is comparatively best for that country.[147] Absolute advantage does not support the view that reciprocal trade activities bring benefits to a country, whereas comparative advantage provides the basis for free trade and encourages the specialisation in products that are comparatively advantageous to a country. The WTO adopted this economic theory for the reason that its fundamental objective is to achieve economic development of its member States irrespective of their different levels of economic status.[148]

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[140] Wouters and De Meester, above n 135; Michael E Porter, *The Competitive Advantage of Nations with a New Introduction* (1st ed, Macmillan Press Ltd, 1990) 11.
[141] Smith (J R McCulloch) (ed), *An Inquiry into the Nature and Causes of the Wealth of Nations* above n 135; R H Campbell and A S Skinner (eds), *Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford Clarendon Press, 1976) Vol 1, 450, 472; Wouters and De Meester, above n 135, 2; See Piero Sraffa and M H Dobb (eds), 'On the Principles of Political Economy and Taxation', in *The Works and Correspondence of David Ricardo* (Cambridge University Press, 1981) Vol 1, 128, 129.
[142] Rolland, *Development at the World Trade Organization* above n 33, 16.
[143] Pitruzzello, above n 123; Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 32, 277; Trebilcock and Howse, *The Regulation of International Trade* above n 123 ; Bhala, *International Trade Law: Theory and Practice* above n 123, 1; Lowenfeld, *International Economic Law* above n 123, 23; G Winham,'Lessons from History' in Robert Howse (ed), *The World Trading System: Critical Perspectives on the World Economy* above n 27, 10, 11; F A Hayek and W W Bartley III (eds), *The Fatal Conceit: The Errors of Socialism* (University of Chicago Press, 1989) Vol I, 39; C P Kindleberger, 'The Rise of Free Trade in Western Europe, 1820-1875' (1975) 35(1) *The Journal of Economic History* 20, 23.
[144] Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 32, 277.
[145] David Ricardo, *On Principles of Political Economy, and Taxtation* (John Murray, Albemarle Street, 1817) 263; Arnaud Costinot and Dave Donaldson, 'Ricardo's Theory of Comparative Advantage: Old Idea, New Evidence' (2012) 102(3) *American Economic Review: Papers and Proceedings* 453, 453.
[146] Muhammad Rafiqul Islam, *International Trade Law of the WTO* (Oxford University Press, 2006) 6.
[147] Herdegen Matthias, *Principles of International Economic Law* (OUP: Oxford, 2016) 15.
[148] *WTO Agreement*, Preamble.

In Ricardo's explanation of the theory of comparative advantage, he argues that States are becoming more developed, both individually and collectively, under a policy of free trade than a restrictive economic policy.[149] The WTO's objectives and its agreements have accepted comparative advantage theory as the underlying theory of trade liberalisation achieving economic development for all, irrespective of a country's status. Comparative advantage theory provides for a country to produce goods and services at a lower opportunity cost than that of other countries, meaning that a country can provide goods and services at cheaper prices.

Comparative advantage theory does not take into account human capital, the environment, FDI, services, population density and purchasing power parity (PPP).[150] World prices for commodities more often tend to increase and production conditions are changeable. Comparative advantage theory also does not take into account world oil prices and the strategies adopted by developed countries to protect their economies for regulatory purposes. Furthermore, if LICs specialise in the production of only one or a selected number of commodities, their economies would often be at risk and the world economy would negatively and drastically impact on that country's balance of payments and foreign reserves.[151] Cost of production does not change according to the theory of comparative advantage, because the doctrine does not take into consideration the unpredictable cost of production and the reduction in production overblown by weather conditions and prolonged cultivation; nor does not take into account the share of foreign value-added (FVA) which is important in assessing economic development.[152] Comparative advantage theory is valid to a greater extent in the context of developed countries but, in relation to LICs, it is

[149] See Sraffa and Dobb (eds), 'On the Principles of Political Economy and Taxation', in *The Works and Correspondence of David Ricardo* above 141, 128, 129; D Ricardo, 'Ricardo on Population' (1988) 14(2) *Population and Development Review* 339, 343.
[150] See Wouters and De Meester, above n 135, 3, footnote 7; Chen, above n 13, 113; K R Gupta, *A Study of General Agreement on Tariffs and Trade* (S Chand & Co., 1967) 26; Lowenfeld, *International Economic Law* above n 123, 7; Michael E Porter, *The Competitive Advantage of Nations with a New Introduction* (1st ed, Macmillan Press Ltd, 1990) 11.
[151] See Fan Cui, 'Who are the Developing Countries in the WTO?' (2008) 1(1) *Law and Development Review* 123, 128.
[152] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22.

questionable whether this theory is at all valid,[153] owing to their lack of resources, lack of industrialisation, dearth of FDI and smaller markets.[154]

The theory of comparative advantage was based on the existence of a market in which countries could export goods to other countries without the imposition of tariffs or trade barriers, based on England as the model.[155] In reality, countries impose tariffs and trade restrictions, both overtly and covertly, to protect their industries, and introduce rules for the protection of the environment, and of the welfare and health of their citizens.[156] The theory of comparative advantage does not fit all countries since most LICs are in a disadvantageous position when it comes to competing with developed and larger developing countries in the international economic arena.[157] LICs can obtain benefits from comparative advantage in cheap labour, however there is concern about labour exploitation.

The theory of comparative advantage can however be used to bring investment into the WTO since when a country receives more investment, this helps to develop that country. Therefore, when investment converges into the WTO, it brings a converging contribution to comparative advantage because it increases market access of LICs, reduces the balance of payment gap and ensures the predictability to the investment law.

As the world modernized, development was measured through economic theories. Karl Marx considered development as emancipation from slavery, feudalism and capitalism.[158] Marx also gained inspiration from labour theory and human behaviour as actions of the expansion of trade.[159] According to Karl Marx, human labour is the wealth of a nation and it can be used to enhance the production of a country.[160] Moreover, human labour can be

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[153] Wouters and De Meester, above n 135, 3-6; Chantal Thomas, 'Poverty Reduction, Trade and Rights' (2003) 18(6) *American University of International Law Review* 1399, 1405.
[154] S Olofin, 'Trade and Competitiveness of African Economies in the 21st Century' (2002) 14(2) *African Development Review* 298, 318.
[155] Wouters and De Meester, above n 135, 4.
[156] Ruth Gordon, 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime' (2006) 8(1) *Berkeley Journal of African and American Law and Policy* 79, 83.
[157] Bhala, *International Trade Law: Theory and Practice* above n 123, 83; Olofin, above n 154, 318; Lowenfeld, *International Economic Law* above n 123, 7; see *Doha WTO Ministerial Declaration* WTO Doc WT/MIN/1) (20 November 2001) (adopted on 14 November 2001) para 38.
[158] Karl Marx, *Capital: A Critique of Political Economy Vol. I Book One: The Process of Production of Capital* (Progress Publishers, 1887) 525.
[159] W W Rostow, 'The Stages of Economic Growth' (1959) 12(1) *The Economic History Review* 1, 14; Thorstein Veblen, 'The Socialist Economics of Karl Marx and His Followers (1906) 20(4) *The Quarterly Journal of Economics* 575, 591.
[160] Marx, *Capital: A Critique of Political Economy Vol. I Book One: The Process of Production of Capital* above n 158, 29.

used to improve the quality of the production.[161] Marx's theory of economic development mainly focused on social welfare. The main weakness of his theory was that for countries to achieve development, they should abandon the policy of liberalising economies.[162] His theory gave less prominence to competitiveness. Competitiveness provides consumers with greater opportunities to purchase goods at reasonable prices with better choices and helps to improve the quality of products.

Wallerstein expounded the theory of the world-systems.[163] He allocated countries throughout the world into three categories: 'core', 'semi-peripheral' and 'peripheral'. He argued that peripheral countries were in a disadvantaged position as they lacked resources and had not achieved economic development in comparison to 'core' (developed) countries. The term 'semi-peripheral' was used to describe larger developing countries.[164] According to him, there were no 'underdeveloped' nations, only 'peripheral capitalist' nations.[165] Wallerstein's division of economies is the capitalist economic system.[166] The fundamental weakness of this theory is that no country in the world provides a model for the pure capitalist system. Capitalist countries, for example, Australia, also view development as meaningful, if a State intervenes in a limited way to provide welfare for its people. Wallerstein has given less emphasis to the regulatory autonomy of States. On the positive side of Wallerstein's theory, he did admit that 'direct investment across frontiers' improves economic growth.[167]

Rostow recognised that if a country wants to achieve economic development, that country has to pass five stages: 'the traditional society; the precondition for take-off; take-off; the drive to maturity [and] the age of high mass consumption'.[168] 'The traditional society' that Rostow referred to here is the fluctuation of trade, agriculture, technological know-how, population and income in a country. What he referred to here is the scarcity of resources;

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[161] Ibid.
[162] Rolland, *Development at the World Trade Organization* above n 13, 18.
[163] Immanual Wallerstein, 'Dependence in an Interdependent World: The Limited Possibilities of Transformation within the Capitalist World' (1974) 17(1) *African Studies Review* 1, 2.
[164] Ibid 1, 8.
[165] Ibid 1, 2.
[166] '… the core and the periphery of the world economy were not two separate "economies" with two separate "laws" but one capitalist economic system with different sectors performing different functions'. Immanual Wallerstein, 'Dependence in an Interdependent World: The Limited Possibilities of Transformation within the Capitalist World' (1974) 17(1) *African Studies Review* 1, 8.
[167] Wallerstein, 'Dependence in an Interdependent World: The Limited Possibilities of Transformation within the Capitalist World' above n 163, 1, 13.
[168] Rostow, above n 159, 1.

in this society, people struggle for resources at the expense of others.[169] 'The precondition for take-off' stage, according to him, comprised the emergence of industrialisation and the expansion of European territory that, together, provided a widening of markets and increased production.[170] In other words, this stage refers to colonisation.

The third stage to which Rostow referred is the rapid growth in industrial products, with the salient feature of his argument being that '… to permit the economy to suffer structural shocks', it is necessary to 'redispose its investment resources; and to resume growth'.[171] This is a good starting point to demonstrate the notion that trade alone boosts development is countered by Rostow.[172] He identified the 'drive to maturity' as the stage where 'modern technology [is utilised] to [the] bulk of its resources'.[173] He took England, the US, Germany, France, Sweden, Japan, Russia and Canada as models to argue his theory. Rostow did not consider the disparity among countries to formulate his argument. 'One system fits all' cannot be used to determine development in all countries. The final stage of Rostow's theory referred to consumerism. This is closer to neoliberalism as he advocated a system where a pattern of consumerism indicates development and less emphasis on political economy and regulatory autonomy for States to achieve sustainable economic goals.

Conversely, Prebisch and Lewis rejected theories in which 'one size fits all' countries.[174] They introduced an economic theory to consider the special circumstances of developing countries and suggested that structural changes should be made to have a more vibrant, equitable, economic and social development order. They stressed the importance of trade diversification and regional economic integration among LICs. Lewis identified investment as an incentive to drive economic growth. He stated that, although it was not the only factor contributing to growth, 'it [was] highly correlated to growth'.[175] This inspired the

[169] Ibid 1, 4.
[170] Ibid.
[171] Ibid 1, 7.
[172] Ibid 1, 2 and 7.
[173] Ibid 1, 8 (emphasized is added).
[174] Raul Prebisch, *Towards a New Trade Policy for Development: Report by the Secretary General of the United Nations Conference on Trade and Development*, E/CONF.4613 (1964) 67; Raul Prebisch, 'The Economic Development of Latin America' in Ricardo Bielschowsky, *ECLAC Thinking Selected Text (1948 to 1988)* (United Nations, 2016) 45, 47 ;John Brolin, *The Bias of the World: Theories of Unequal Exchange in History* (Lund University, 2006) 7; Ayse Ozden Birkan, 'A Brief Overview of the Theory of Unequal Exchange and its Critiques' (2015) 4(1) *International Journal of Humanities and Social Science* 155, 157; W Arthur Lewis, *The Theory of Economic Growth* (Routledge, 2003) 204.
[175] W Arthur Lewis, 'The State of Development Theory' (1984) 74(1) *The American Economic Review* 1, 7.

implementation of the New International Economic Order (NIEO).[176] Developed countries rejected NIEO. After the NIEO became unsuccessful, the concept of sustainable development gained prominence and tried to unify developed and developing countries. Subsequently, the UN held the Conference on Trade and Development (UNCTAD), from which 'the right to development' concept emerged within the United Nations (UN). According to Prebisch and Lewis, development means rejection of the old Bretton Woods system and the 'reduction of world poverty', 'better control of multilateral corporations' and greater concentration of investment.[177]

Sachs considered development to be globalisation through privatisation.[178] According to him, States could not, on their own, promote development. The private sector should play a crucial role in economic development. He identified that multilateral companies, through FDI, play a significant role in enhancing international trade which helps to achieve economic development.[179] Sachs' theory influenced the rapid increase in the growth of FDI in the world from 1970–2000.[180] Worldwide investment escalated to 38%, according to the UNCTAD *World Investment Report 2016*, and FDI inward flows to Africa in 2018 were forecast as US$50 billion.[181] The growth of FDI worldwide is expected to increase in 2018 to US$1.8 trillion.[182] Since 2009, more than 2,900 BITs have been established in the world.[183] The UNCTAD and OECD *17th Report on G20 Investment Measures* stated that, as of 15 May 2017, 2,958 BITs and 369 international investment agreements (IIAs) had been established throughout the world.[184] However, Sachs' theory on development fails to

[176] H W Singer, 'The New International Economic Order: An Overview' (1978) 16(4) *The Journal of Modern African Studies* 539, 541.
[177] Ibid 539, 542, 543, 545.
[178] Jeffrey Sachs, 'International Economics: Unlocking the Mysteries of Globalization' (1998) 110 Foreign Policy 97, 110.
[179] Ibid 98.
[180] Zachary Elkins, Andrew T Guzman and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2008) 1 *University of Illinois Law Review* 265, 266; Natasha Marusja Saputo, 'Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment' (2014) 41(1) *Ohio Northern University Law Review* 121, 121.
[181] UNCTAD, *World Investment Report 2018, Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 214.
[182] UNCTAD, *World Investment Report 2016, Investor Nationality: Policy Challenges* (UN Publication, Geneva 2016) 3.
[183] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd ed, Cambridge University Press, 2010) 3; Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12(1) *University of California Davis* 157, 157; Serge Brunner and David Folly, 'The Way to a Multilateral Investment Agreement' (NCCR [National Centre of Competence in Research] Trade Working Paper No. 2007/24, May 2007) 1, 1.
[184] OECD and UNCTAD, *Seventeenth Report on G20 Investment Measures* (30 June 2017) 3; Roger P Alford, 'The Convergence of International Trade and Investment Arbitration' (2013) 12(1) *Santa Clara Journal of International Law* 35, 38; Ricardo Melendez-Ortiz, 'China's G20 Presidency: Proposals for the Global Trade and Investment Regime in the 21st Century' in *G20 Hangzhou Summit 2016, Proposals for Trade, Investment,*

consider that the increased presence of multilateral corporations and the handling of economies by the private sector in LICs would generate benefits to all segments of society in a country and his theory has not placed much emphasis on the macro economy, which is a fundamental requirement of economic development.

The notion is that multilateral corporations would boost the economies of host States as these corporations would increase investment activities.[185] Stiglitz observed, however, that multilateral corporations would not be useful for economic development as most of these corporations mainly concentrate on profits and it would not be possible to develop the infrastructure that was lacking in LICs, thus producing the fear of exploitation of workers.[186] His theory was concerned with the development of developing countries, and he emphasised the necessity of imposing a higher level of rules to restrict the withdrawal of capital outflows.[187] Stiglitz's argument is that foreign borrowings do not bring economic growth.[188]

According to Dyal-Chand, economic development is the development of 'home-grown entrepreneurship'.[189] When one looks at her arguments, the view that 'home-grown entrepreneurship' alone boosts economic development can be seen to be a fallacy as developing countries, and especially LICs, need to have FDI injected into their economies to achieve development.[190]

Porter defined development as modernising 'existing industries and developing the capability to compete successfully in new, high productivity segments and industries'.[191] The gist of his argument was that industrial competition between countries brings a country

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Sustainable Development Outcomes (ICTSD [International Centre for Trade and Sustainable Development], July 2017) 11, 15.

[185] UNCTAD, *World Investment Report 2018, Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 16.

[186] Joseph E Stiglitz, 'Capital Market Liberalization and Exchange Rate Regimes: Risk without Reward' (2002) 579 *The Annals of the American Academy* 219, 238; see also R Hal Mason, 'Level of Economic Development and Performance of United States Direct Investments Abroad' (1968) 50(4) *The Review of Economics and Statistics* 498, 500.

[187] Stiglitz, 'Capital Market Liberalization and Exchange Rate Regimes: Risk without Reward' above n 186, 233.

[188] Ibid 219, 233.

[189] R Dyal-Chand, 'Reflection in a Distant Mirror: Why the West Misperceived the Grameen Bank's Vision of Microcredit' (2005) 41(2) *Stanford Journal of International Law* 217, 304.

[190] United Nations Conference on Trade and Development, *World Investment Report 2016, Investor Nationality: Policy Challenges* (UN, Geneva, 2016) 42.

[191] Michael E Porter, *The Competitive Advantage of Nations with a New Introduction* (1st ed, Macmillan Press Ltd, 1990) 544.

competitive advantage. According to Porter, development is reached in four stages: 'factor-driven', 'investment-driven', innovation-driven' and 'wealth-driven'.[192] In the factor-driven stage, Porter stated that the basic resources of a country are needed to increase production.[193] He indicated that the primary stage of an economy is that of transforming industry through competition between local industries. At the investment-driven stage, Porter referred to the development of large-scale technological know-how through intensive investment by States and firms.[194] Innovation-driven development, the third stage of development, is the growing competitiveness between firms in a country which would increase the sophistication of and upgrade the country's economy.[195] New innovations would be introduced to industries and the service sector would be improved. As a result, according to Porter, the wealth of a nation would increase. Finally, the wealth-driven stage is where a State has achieved development or wealth, and that State stagnates instead of undertaking further development due to the lack of resolute will of 'investors, managers and individuals' that '… undermine[s] sustained investment and innovations ...'.[196]

An investigation of Porter's economic theory on development shows that it is greatly reliant on competition. The view that competition among nations alone enhances development is difficult to accept on two grounds. First, competition is just one factor associated with development. Developed and developing countries introduce protectionist measures to protect their industries. Moreover, Porter's arguments rely heavily on industrial development to achieve economic development. Industrial development or tertiary economic development, though, can be achieved after passing the primary (agricultural development) and secondary (agricultural and industrial development) stages of an economy. Second, his arguments were based on developed countries,[197] which he himself admitted; therefore, his work does not provide an exhaustive definition of the term 'development'. The salient feature of his argument was also based on home-grown investment, but he ignored the significance of FDI's contribution to an economy's development and failed to consider the converging advantage.[198] It is not only competitive advantage but also converging advantage that are essential for achieving sustainable economic development. The convergence and cross-fertilisation of trade and investment

[192] Ibid 544–558.
[193] Ibid 547.
[194] Ibid 548.
[195] Ibid 553.
[196] Ibid 556.
[197] Ibid 675.
[198] Ibid 548, 670.

are very important for sustainable economic development and this objective can be achieved from the WTO.[199]

2.4 WTO Agreement and Development Objectives

The Preamble to the WTO Agreement emphasises the optimum use of the world's resources and embodies the comparative advantage of international trade.[200] The WTO has brought development forward as the central theme by incorporating it into the WTO objectives. These objectives are to: liberalise trade; minimise the amount of State intervention in trade in services; establish a level playing field in international trade; increase the living standards of citizens of its member States, and maximise the growth of real income and the effective demand of member States while preserving the environment.[201]

The WTO Agreement is aimed not only at removing restrictions on international trade but also at improving the real income of its member States and providing for sustainable development.[202] Even though economic development is the fundamental *raison d'être* of the WTO and its predecessor, the GATT, the WTO agreements also articulate sustainable development as an objective.[203]

The objective of the WTO/GATT is to remove tariff barriers[204] and to promote reciprocity in order to achieve economic prosperity for its member States, irrespective of each country's economic status.[205] Free trade is the engine of the growth envisioned by the WTO.[206] According to the GATT Preamble, the main pillars of the MFN doctrine are non-discrimination and reciprocity among its member States,[207] irrespective of their economic

[199] Tomer Broude, 'Towards an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law' (2014) 9(1) *Jerusalem Review of Legal Studies* 24, 31; Li, above n 1, 483.
[200] Appellate Body, Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [129].
[201] *WTO Agreement,* Preamble.
[202] See *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (WTO Agreement) Preamble; *Doha WTO Ministerial Declaration* WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) para. 6.
[203] See Chantal Thomas, 'Poverty Reduction, Trade and Rights' above n 153, 1419.
[204] *GATT 1994*, article II.
[205] 'Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'. *GATT 1994*, Preamble.
[206] See OECD, WTO and UNCTAD, *Report on G20 Trade and Investment Measures* (22 November 2018) 29.
[207] *GATT 1994,* Preamble.

status.[208] The MFN doctrine provides rules for non-discrimination in trade, for like products and at the border, while the NT principle provides rules for non-discrimination at the national level.[209] The core element of the MFN doctrine is the presence of like products.[210] The MFN doctrine requires that, if country Y gives certain concessions to country D, the same concessions should be given immediately and unconditionally to country F for like products,[211] while the NT provision (GATT, Article III) extends this to similar, competitive or substituted products.[212] The MFN and NT doctrines are intended to guarantee equal treatment for like, competitive and similar products, regardless of the country of origin.

Reciprocity also promotes equality among member States. This is known as formal equality in WTO agreements.[213] The principles of non-discrimination and reciprocity are based on the notion of 'formal equality'.[214] Any country given a benefit without making a reciprocal offer is described as a 'free rider'.[215]

The concept of development has been incorporated in the GATT 1994 and other WTO Agreements through SDT provisions. The SDT provisions contained within the WTO can be categorised into five groups. According to a Note by the WTO Secretariat they are 'aimed at increasing trade opportunities through market access'; 'safeguard[ing] the interest of developing countries'; '[providing] flexibility to developing countries in [the] rules and disciplines governing trade measures'; '[fostering] longer transitional periods'; and '[establishing] provisions for technical assistance'.[216]

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[208] The *GATT*, Article I deals with non-discriminatory tariffs at the border level for like products and Article III deals with non-discriminatory tariffs for like products at the national level (similar and substitute products). *GATT 1994*, articles I & III.

[209] *GATT 1994*, articles I and III; Sergio Puig, 'The Merging of International Trade and Investment Law', 2015 33(1) *Berkeley Journal of International Law* 1, 8.

[210] *GATT* Panel Report, *Spain – Tariff Treatment of Unroasted Coffee, GATT* Doc L/5135 (adopted on 11 June 1981) BISD 28S/102.

[211] See *Report of the Working Party on Border Tax Adjustments, GATT* Doc L/3464 (adopted on 2 December 1970) [18].

[212] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996); *GATT 1994* article III: 2 first sentence and second sentence; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (adopted on 5 April 2001).

[213] Gillian Moon, 'Trade and Equality: A Relationship to Discover' (2009) 12(3) *Journal of International Economic Law* 617, 620.

[214] Ibid 621.

[215] Ibid.

[216] *Committee on Trade and Development, Implementation of Special and Differential Treatment for Least Developed Countries* WTO Doc WT/COMITD/W135 (5 October 2004) (Note by Secretariat) [1]; *Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc WT/COMTD/W/77 (25 October 2000); *Background Document to the High Level Symposium on Trade and Development*, Geneva (1–18 March 1999) prepared by the Development Division of the WTO <http://www.wto.org,5> 16.

As reflected in the WTO Preamble, the WTO's aspiration is sustainable development through trade. The study, described in this thesis, argues that the core objective of the WTO is to focus not only on trade but also on investment. The notion that trade alone brings development is an outdated concept. The WTO is marching into the 21st century. It is now high time for WTO member States to include FDI under the WTO, as it generates economic development among these member States.

FDI can be divided into 'horizontal, vertical and distribution'.[217] 'Horizontal' FDI is invested to manufacture the same products in different countries to avoid transport costs and to overcome high tariffs.[218] At times, this type of investment is used to export products to neighbouring countries.[219] 'Vertical' investment is utilised to manufacture a part of the production process where raw materials are abundant and cheap.[220] Different countries can manufacture various parts of a final product. The aim of this kind of investment is to reduce production cost. 'Distribution' FDI is a type of investment involved in the services and marketing sectors.[221]

Investment agreements are scattered all over the world; thus, investment laws cannot be easily ascertained. One of the characteristics of law is that law should be easily ascertained, but this is lacking in investment law worldwide. The WTO seeks to provide a uniform system of trade rules for member States,[222] but this objective has not encompassed a uniform system of rules for FDI-related investments. The WTO cannot ignore investment as it is one of the key pillars in the engine of global economic growth.[223] Roberto Azevedo, the former Director General of the WTO, stated that to achieve the Sustainable Development Goals (SDGs) in 2030, developing countries required an investment of US$2.5 trillion annually.[224] In 2017, he said that countries should look afresh at the

[217] Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' (2003) 24(1) *Michigan State University College of Law* 77, 79.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) article II, 1.
[223] Burcak Polat, 'Determinant of FDI into Central and Eastern European Countries; Pull or Push Effect?' (2015) 3(4) *Eurasian Journal of Economics and Finance* 39, 39; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 217, 79.
[224] WTO, 'Trade and Investment are Increasingly Important Development Issues', WTO News: Speeches – Director General Roberto Azevedo (20 March 2017) available at <https://www.wto.org/english/news_e/spra_e/spra162_e.htm> accessed on 14 September 2017; WTO,

relationship between trade and investment as the world economy largely depends on them both.[225] Sustainable economic development can be used as a conceptual framework for the convergence and cross-fertilisation of trade and investment.[226] Therefore, this thesis presents development as the conceptual framework for bringing investment into the WTO.

2.5 Converging Advantages of Trade and Investment for Development

Convergence means the merging or integrating of two or more things (fields) with a view to pursuing development.[227] It is now apparent that no single definition or model is suitable to define development. Against this background, for the purpose of this study, development is however defined as a concept that reduces economic disparity among nations through trade and investment. This not only provides predictability to the rules-based trade regime, but also brings predictability to investment and establishes a rules-based institutional framework for investment under the WTO by converging investment.

Comparative advantage theory forms the basis for international trade. Comparative advantage theory has formulated a strong theoretical foundation to appeal (even in the modern context) that promotes free trade and investment.[228] Jackson argued that comparative advantage theory provides people with better opportunities to choose products at competitive prices.[229] This theory's positive aspect is that it can be used as a tool to interpret development through the converging benefits of trade and investment into one institutional framework (this can be considered as a converging advantage). A converging advantage will occur when investment is converged into trade (under the WTO) bringing economic and institutional benefits to all countries, especially LICs. Converging the benefits of trade and investment will help to achieve sustainable economic development and bring predictability in investment. Converging trade and investment establish

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Public Forum 2009, Global Problems, Global Solutions: Towards Better Global Governance (WTO Secretariat, 2010) available at <http://onlinebookshop.wto.org> accessed on 15 October 2017.

[225] WTO, 'Trade and Investment are Increasingly Important Development Issues', *WTO News*: Speeches: Director General Roberto Azevedo (20 March 2017) available at <https://www.wto.org/english/news_e/spra_e/spra162_e.htm> accessed on 14 September 2017; see also Todd S Shenkin, 'Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty' (1994) 55(2) *University of Pittsburgh Law Review* 541, 543.

[226] Li, above n 1, 483.

[227] Puig, 'The Merging of International Trade and Investment Law' above n 209, 58.

[228] Rolland, *Development at the World Trade Organization* above n 33, 16; Andrea K Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not Working' (2007) 59(2) *Hastings Law Journal* 241, 242.

[229] John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997) 17.

international investment and trade rules, thereby creating a legal regime for trade and investment.

Investment is rapidly crossing the frontiers of countries and has become a decisive factor in sustainable economic development.[230] Investors or multinational companies cannot be considered as irrelevant in the 21st century agenda of countries' sustainable development as they play a major role in shaping the world economic order.[231] If the WTO is to go forward and develop its present structure, it needs to introduce investment into its ambit and converge investment into the WTO framework.[232]

Trade cannot be sustained without investment, and investment can even replace trade,[233] but these two concepts have developed along separate tracks.[234] The end purpose of trade and investment is profits and benefits that, in other words, represent development. A question then arises: how do these two concepts come together or converge? Comparative advantage theory continues to be an important theory for bringing trade and investment together. This theory also advances product specialisation and, ultimately, brings economic benefits. When a country receives more investment, it can increase competitiveness, infrastructure development, transfer of technological know-how and capacity building,[235] as well as enhancing the labour standard, increasing employment opportunities and, finally, fostering competitiveness among industries and countries.[236] Therefore, it is necessary to

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[230] G20 Hangzhou Summit 2016, Proposals for Trade, Investment and Sustainable Development Outcomes (International Centre for Trade and Sustainable Developmet (ICTSD) July 2016, 16.

[231] James Zhan and Moritz Obst, 'UNCTAD's 2017 High-level IIA Conference: Moving Forward on Addressing Older-Generation International Investment Agreements' (2017) 8(4) *Online Quarterly Journal on Investment Law and Policy from a Sustainable Development Perspective* available at <www.iisd.org/itn> accessed on 22 January 2018, 7, 7.

[232] See Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 2, 282.

[233] UNCTAD, *World Investment Report 2016, Investor Nationality: Policy Challenges* (UN Publication, Geneva 2016) 22; Zdenek Drabek, 'A Multilateral Agreement on Investment: Convincing the Sceptics' (WTO Economic Research and Analysis Division Working Paper, ERAD-98-05, June 1988) 4; OECD, 'Open Markets Matter: The Benefits of Trade and Investment Liberalisation' (*Policy Brief*, October 1999) 7; Ari Afilalo, 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights' (Jean Monnet Working Paper Series, JMWP 01/13, The Jean Monnet Centre for International and Regional Economic Law & Justice, 2013) available at <www.JeanMonnetProgram.org> accessed on 15 August 2017, 18.

[234] Tomer Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law' (International Law Forum, The Hebrew University of Jerusalem, No. 10-11 Research Paper, November 2011) 8; Puig, 'The Merging of International Trade and Investment Law' above n 209, 8.

[235] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 217, 80; OECD, 'Open Markets Matter: The Benefits of Trade and Investment Liberalisation' (*Policy Brief*, October 1999) 4; *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) para 20.

[236] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 217, 80; Michael Mortimore and Sebastian Vergara, 'Targeting Winners: Can Foreign Direct Investment Policy Help Developing Countries Industrialise?' (2004) 16(3) *The European Journal of Development Research* 499, 500;

have a rules-based system to govern investment, avoiding fragmentation of investment law.[237] This position was succinctly summarised in an *OECD Brief* in 1999:

> International Rules have much to contribute to the stability of the multilateral system by helping avoid distortions to production and trade and in promoting more stable investment flows, higher quality investments and a better distribution of their benefits. Adherence to rules may be especially valuable to countries whose share of international investment falls short of their needs, as well as to small and medium-size enterprises that might otherwise hesitate to invest outside familiar territory. Rules offer transparency and predictability for investors, and a vehicle for international co-operation and dispute resolution.[238]

Development cannot be confined only to economic development. For example, converging trade and investment under the WTO would provide two grounds for development. First, it would improve the economic conditions of countries, especially LICs. Second, it would bring transparency, predictability and certainty to investment, thereby creating an investment regime and rules-based system for investment worldwide. The municipal laws of countries do not provide adequate legal remedies to protect FDI. Foreign investors need to have a legal framework within which to conduct their businesses. A CIIA would thus provide investors with the assurance that the national investment laws could not be amended by host States, according to their whims, which would be detrimental to investors.

Politicians from LICs may ask for inducements in exchange for the offer of investment opportunities. This regular feature is more often found in LICs and has adverse effects on host States' economies and investors. In most host States, protracted trials and unpredictable outcomes hamper investment opportunities. As a result, investors decline to invest, especially in LICs: these countries eventually become mere onlookers to development as they are left out of the benefits of FDI inflows. A CIIA would prevent complexity and diversity, that is, the 'spaghetti bowl' effect of bilateral and regional investment agreements.[239] With a CIIA, the above scenario can be thwarted. The WTO Secretariat, with the OECD and the UNCTAD, in the *Joint Summary on G20 Trade and*

Mary A Marchant, Dyana N Cornell, and Won Koo, 'International Trade and Foreign Direct Investment: Substitutes or Complements? (2002) 34(2) *Journal of Agricultural and Applied Economics* 289, 300.

[237] Bjorklund, above n 228, 306.

[238] OECD 'Open Markets Matter: The Benefits of Trade and Investment Liberalisation' (*Policy Brief*, October 1999) 7.

[239] Zdenek Drabek, above n 44, 5.

Investment Measures stressed the significance of a CIIA:[240] in fact, the commonalities of trade and investment support their merger.

2.6 Commonality for Convergence

Trade and investment share common characteristics, such as the free flow of investment and trade which is necessary to establish a world economic order to achieve sustainable economic development goals.[241] The Havana Charter also tried to unite investment and trade, as far back as in 1947 considering the importance of converging the two systems for development purposes.[242] The objective of trade and investment is economic integration through non-discrimination.[243] The former is concerned with States, the latter with States and individuals.

The concept of investment has been introduced to the WTO under TRIMs, GATS and the Trade-Related Intellectual Property Rights Agreement (TRIPS Agreement).[244] Therefore, to the WTO, investment is not a new concept.[245] These agreements have, in a limited way, introduced rules for investment. For instance, if an investor manufactures a product in a host State, and the host State stipulates that investors should use local materials, that a certain percentage of the production should be exported, and investors must fulfil the domestic requirements, the measures imposed by the host State violate the non-discrimination principle.[246] However, in the given situation, for regulatory purposes the MFN and NT principles can be restricted to ensure economic sovereignty of host States and to uplift the sustainable economic development. The GATT NT principle has been designed to prevent discrimination and at the same time it protects the regulatory flexibility of States to make laws for sustainable economic development.

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[240] OECD, WTO and UNCTAD, *Report on G20 Trade and Investment Measures* (30 June 2017); *G20 Guiding Principles for Global Investment Policymaking* (G20 China, 14 September 2016) available at <http://www.g20chn.org?english/Documents/Current/201609/t20160914_3464.html> accessed on 09 August 2017, Principle V.

[241] Puig, 'The Merging of International Trade and Investment Law' above n 209, 11; Jurgen Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 2, 11.

[242] *Final Act of the United Nations Conference on Trade and Employment*: Havana Charter for an International Organisation, 24 March 1948 (*Havana Charter)* article 12.

[243] Puig, 'The Merging of International Trade and Investment Law' above n 209, 11.

[244] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*'); *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) 22; Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *The American Journal of International Law* 48, 50.

[245] Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law' above n 234, 10.

[246] See also *US Model Bilateral Investment Treaty* (2012) article 8(1).

Non-discrimination is a common principle that has been used to structure trade and investment treaties.[247] Both GATT 1994 and Investment Agreements have incorporated MFN and NT principles.[248] This is evident from the US Model Bilateral Treaty under Articles 3 and 4.[249] The NAFTA Chapter 11 is also based on the MFN and NT principles under Articles 1101 and 1102[250] and the minimum standards of treatment.[251] Therefore, trade and investment both provide similar rules for competition through non-discrimination.[252] However, there is a textual difference between the NT in investment treaties and the WTO agreements. The text of the GATT Article III allows like products to be interpreted in different circumstances. It does this by considering the purpose and the relativeness of a measure in order to decide whether the measure is a violation of NT which is lacking in investment law when like circumstances are interpreted.[253] Even then, arbitrators try to follow WTO principles, seeking guidance from WTO jurisprudence when interpreting the NT obligation, proportionality, 'like' products and similar circumstances.[254] This can be found, for example, in the *Occidental Exploration and Production Co v Ecuador* case[255] and the *Methanex Corporation v US* case.[256] These two cases applied the NT principle; however, the NT was interpreted narrowly in investment cases. *Occidental*

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[247] Roger P Alford, above n 8, 40.

[248] Most-Favoured Nation Treatment in International Investment Law (OECD Working Papers on International Investment, 2004/2, September 2004) available at <https://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf,> accessed on 20.06.2019, 3.

[249] Celine Levesque, 'Influences on the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond' (2006) 44 *Canadian Yearbook of International Law* 249, 249.

[250] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force on 1 January 1994) (Chapter 11, Investment) articles 1102, 1103; Celine Levesque above n 249, 269.

[251] Ari Afilalo**,** 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights' (Jean Monnet Working Paper Series, JMWP 01/13, The Jean Monnet Centre for International and Regional Economic Law & Justice, 2013) available at <www.JeanMonnetProgram.org> accessed on 15 August 2017, 1, 16.

[252] See Andrew D Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment* (Edward Elgar Publishing, 2016) 2; Sergio Puig, 'International Regime Complexity and Economic Law Enforcement' (2014) 17(3) *Journal of International Economic Law* 491, 495.

[253] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 21and 27; Donald H. Regan, 'Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec' (2003) 37(4) Journal of World Trade 737, 750; see also *Methanex Corporation vs US* (Final Award) (UNCITRAL) Pt IV Chapter B (15 January 2001) [29]; Federico Ortino, 'Treaty Interpretation and the WTO Appellant Body Report in *US-Gambling*: A Critique' (2006) 9(1) *Journal of International Economic Law* 117, 125.

[254] *Total SA v Argentine Republic* (Decision on Liability) (ICSID) Case No. ARB/04/01 (27 December 2010) [123 and 201]; Jurgen Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 2, 18; *Enron Corporation Ponderosa Assets, LP v Argentine Republic* (Award) (ICSID) Case No. ARB/01/3 (22 May 2007) [317 and 331].

[255] *Occidental Exploration and Production Co. v Ecuador* (Final Award) (UNCITRAL) Case No. UN 3467(1 July 2004) [174, 175, 176].

[256] *Methanex Corporation v US* (Final Award) (UNCITRAL) Pt IV Chapter B (15 January 2001) [14, 15, 26, 28].

and *Methanex* applied the 'identical comparator test', comparing foreign and domestic investors by taking their physical similarities into consideration to determine the likeness in order to strike a balance between investors and host States.[257]

Arbitrators, while adopting the NT principle enshrined in WTO law, have misunderstood the NT interpretation considered under WTO jurisprudence and differ in interpreting and applying the NT in investment cases. Physical similarities is one of the tests that the WTO Appellate Body uses to interpret NT, while others, such as end-user, health risk and regulatory autonomy, to name a few, are not considered by arbitrators.[258] Even though commonality exists between trade and investment law, the application, scope and interpretation of the co-principle of NT is different, causing difficulties for host States in making laws for sustainable economic development. The States can interfere on behalf of their citizens under GATT Article III and GATTT XX to control the domestic market to redistribute the wealth to provide better living conditions. The regulatory autonomy is a major concern of host States and rules relating to certain exceptions have now been introduced in BITs.[259] Articles III and XX of the GATT have successfully balanced the States' regulatory autonomy, and the WTO Appellate Body has recognized the regulatory autonomy of States when there is a trade dispute.

Cross-harmonisation of WTO law and the investor State arbitration is further revealed in the *Continental Casualty Co. v Argentine Republic* case[260] and the WTO case of the *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*.[261] In the *Continental Casualty Co. v Argentine Republic*, arbitrators stressed the importance of interpreting BITs in line with the GATT Article XX exceptions to balance the investors'

[257] Ibid; Jurgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20(3) *The European Journal of International Law* 749, 766; Surya P Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40(1) *The International Lawyer* 121, 140.

[258] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 27; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (adopted on 5 April 2001)[88].

[259] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (adopted 24 October 2003) (entered into force 20 December 2015) article 9.8.

[260] *Continental Casualty Co v Argentine Republic* (Award) (ICSID) Case No. ARB/03/9 (5 September 2008) [85 and 187]; *S D Myers Inc. v Canada* (Partial Award) (UNCITRAL) (13 November 2000) [244, 250].

[261] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008).

rights and regulatory autonomy of host States.[262] In the latter case, the Appellate Body recognised the value of the arbitral tribunal's decisions for the harmonisation of investment law in the WTO.[263] In *Saipem S.P.A. vs The People's Republic of Bangladesh* case it was held that investment law also should be interpreted in harmonization and development of international law to protect legitimate expectations of host states.[264] The Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement provides SDT for newly-joined members.[265] The WTO DSU, under Article 25, also provides an arbitration mechanism if the parties agree.

Kurtz, Kennedy and Afilalo argued that parallel and overlapping jurisdiction exists under the NAFTA and WTO agreements[266] but that, notwithstanding this, the WTO disputes should be heard by the WTO DSU and it has exclusive jurisdiction under Article 23 of the DSU. This does not mean that issues relating to the WTO agreements can be heard under the NAFTA and by investor arbitration tribunals. The NAFTA Articles 2005:1 and 2005:3 state that disputes can be settled either by NAFTA bi-national panels or the WTO. For example, if Canada imposes 10% higher taxes for foreign liquor to protect its liquor producers, this is a discriminatory measure vis-à-vis foreign liquor producers. If the US wants to challenge such a discriminatory measure, can it go to the NAFTA under Chapter 19? This violation falls under GATT Article III. Again, if Canada imposes discriminatory anti-dumping measures, can Mexico and the US file a case in the NAFTA? The answer is no. In the *United States – Anti-Dumping Duties on Gray Portland Cement and Clinker Cement from Mexico* case, the panel held that the exhaustion of local remedies rule did not apply to GATT disputes.[267]

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[262] *Continental Casualty Co v Argentine Republic* (Award) (ICSID) Case No. ARB/03/9 (5 September 2008) [193].

[263] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [160, footnote 313].

[264] *Saipem S.P.A. vs The People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures) (21 March 2007) ICSID Case No. ARB/05/07, 1, 20 para 67. 'It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.

[265] *ASEAN Comprehensive Investment Agreement* (ACIA) signed 26 February 2009 (entered into force 29 March 2012) article 23.

[266] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 2, 13; Kevin C Kennedy 'Parallel Proceedings at the WTO and NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reforms' (2007) 39(1) *The George Washington International Law Review* 47, 52, 53; Afilalo 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights' above n 251, 14, 15.

[267] GATT Panel Report, *United States – Anti-Dumping Duties on Gray Portland Cement and Clinker Cement from Mexico* GATT Doc ADP/82 (7 September 1992, unadopted) [5.9]; *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into

The jurisprudence of the WTO and investor dispute settlements demonstrate their intersection and cross-fertilisation. This is evident from the *Total SA v Argentine Republic* case.[268] In this case, arbitrators applied the WTO principle of legitimate expectations[269] and the GATS, Article VI. The latter provides for member States administering 'domestic regulations' for trade in services 'in a reasonably, objectively and impartial manner' as a yardstick to determine the fairness of a host State's domestic regulations in relation to investment.[270] In this determination, the arbitrator stated that Argentina and France had both signed the GATS. Therefore, the arbitrator applied the principles of the GATS, Article VI to determine the issue before him, thus bringing investment law closure to the WTO objective.[271] Even though the WTO and the investment law have common characteristics, the WTO has failed to classify LICs on trade and FDI capacity. If the WTO considers FDI is important for sustainable development, classifying LICs to reduce the disparity among countries is inevitable.

2.7 Proposed Classification of Low-Income Countries for a Trade and Investment Regime

2.7.1 The Existing Classification

The WTO does not provide rules for the classification of developing countries and LICs, with member States able to elect to be defined as developing countries to join the WTO. Hence, no clear criteria are available for identifying LICs in accordance with their true level

force on 1 January 1994) (Chapter 11, Investment) article 1106 (6); Panel Report, *United States – Tax Treatment for 'Foreign Sales Corporations'* WTO Doc WT/DS 108/R (8 October 1999) (adopted 20 March 2000) [7.17].

[268] *Total SA v Argentine Republic* (Decision on Liability) (ICSID Case No. ARB/04/1 (27 December 2010) [121, 122, 123].

[269] Legitimate expectation of investment means that the host States should not frustrate investment of the investors as expected at the time the investment was made. It is interpreted in investment law to protect the investors' rights and prevent arbitrary frustrating of the expectation of investment. Arbitrators apply a good faith test to determine whether the host States have violated the NT and fair and equitable treatment (EQT). *Tecnicas Medioambieentales Tecmed S.A. v The United Mexican States* (Award) (ICSID Case No. ARB (AF)/00/2) (29 May 2003) [154]; Stephen Fietta, 'Expropriation and the "Fair and Equitable" Standard the Developing Role of Investors'. "Expectations" in International Investment Arbitration' (2006) 23(5) *Journal of International Arbitration* 375, 385. Legitimate expectation of Trade law is that the panel and the Appellate Body should interpret the WTO covered agreements (with the objective and purpose test) by considering the intention of the members at the time the agreements were signed in consistent manner to safeguard the regulatory autonomy of States and to bring predictability to the multilateral trading system by following the adopted Appellate Body Reports. Appellate Body Report, European Communities – Customs Classification of Certain Computer Equipment WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R,WT/DS68/AB/R (05 June 1998) [13 and 15].

[270] *Total SA v Argentine Republic* (Decision on Liability) (ICSID Case No. ARB/04/1) (27 December 2010) [123].

[271] Ibid.

of economic disparity.[272] LICs have been described as a group of countries that are referred to as 'those contracting parties the economies of which can only support low standards of living and are in the early stages of development'.[273] These countries have also been described as 'less developed countries',[274] 'under-developed primary producing countries'[275] and 'Third World countries'.[276] The 'Global South' has also been adopted as a term to describe LICs.[277]

The UNCTAD referred to some LICs as vulnerable economies and small and weak countries.[278] Since 1971, the Committee for Development Planning (CDP) under the General Assembly of the UN has identified LDCs on the basis of: (1) gross national product (GNP) per capita income of not more than US$100 per annum; (2) share of manufacturing as a total percentage of GNP of not more than 10%; and (3) a literacy rate of not more than 20% of the population older than 15 years of age.[279] The *UN 2018 Development Policy Report* identifies LDCs based on per capita income of US$1,025 per annum, the Human Assets Index (HAI) and the Economic Vulnerability Index (EVI).[280] The UN list of least

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[272] See Chen, above n 13, 131; Seung Wha Chang, 'WTO Trade and Development Post-Doha' (2007) 10(3) *Journal of International Economic Law* 553, 565.

[273] *GATT 1994*, art XVIII 2; UNCTAD, *Economic Development in Africa: Debt Dynamics and Development Finance in Africa Report*, UN (2016) 10; Kevin C Kennedy, 'Special and Differential Treatment of Developing Countries', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) 1523, 1525.

[274] Jackson, *The World Trading System: Law and Policy of International Economic Relations* above n 229; Sidney Golt**,** *The GATT Negotiations, 1973–75: A Guide to the Issues* (British–North American Committee, 1974) 45.

[275] Kennedy, 'Special and Differential Treatment of Developing Countries', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* above n 273, 1525; GATT, *Trends in International Trade*, Geneva, October 1958 (Haberler Report 1958) 11, 12; K R Gupta, *A Study of General Agreement on Tariffs and Trade* (S Chand & Co, 1967) 148.

[276] Trebilcock and Howse, *The Regulation of International Trade* above n 123, 483; Golt, above n 274; Ruth Gordon, above n 156, 91; Gerard Chaliand, 'Third World: Definition and Descriptions, Third World Traveler' available at <http://www.thirdworldtraveler.com/General/ThirdWorld_def.html>, accessed on 5 May 2018, 3; Ruth E Gordon and Jon H Sylvester, 'Deconstructing Development' (School of Law Working Paper, Series No 4, Villanova University School of Law, 2004) 23.

[277] Frank J Garcia, 'Beyond Special and Differential Treatment' (2004) 27(2) *Boston College International & Comparative Law Review* 291, 297.

[278] See *UNCTAD* "Structurally weak, vulnerable and small economies": Who are they? What can UNCTAD do for them? (Background Note) Trade and Development Board, Fifty-fourth Session (TD/B/54/CRP.4) (11October 2007); *Doha WTO Ministerial Declaration*, WTO Doc WT/MIN/1)/DEC/1 (20 November 2001) (adopted on 14 November 2001) para 41; see Fazil Ismail, 'How Can Least-developed Countries and Other Small, Weak and Vulnerable Economies Also Gain From the Doha Development Agenda on the Road to Hong Kong?' (2006) 40(1) *Journal of World Trade* 37, 42.

[279] *Report of the Committee for Development Planning, 7th Session, Official Records of the Economic and Social Council*, E/4990, Supp. 7 (22 March 1971–1 April 1971) [47]; *The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) XII.

[280] United Nations Committee for Development (UNCD), *Policy Report on the 20th Session*, Supp No 13, E/2018/33 (12–16 March 2018) 11, 15; UNCD, *Policy Report on the 11th Session* (9–13 March 2009) Supp No 13, 21; UNCTAD *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22.

developed countries is based on income and population and it does not take into consideration trade capacity and FDI.

The UN has prepared a list of all LDCs with the list reviewed every three years by the Committee for Development Policy under the mandate of the UN Economic and Social Council.[281] The UN list of LDCs is based on income and does not take into consideration FVA, FDI and trade competitiveness.[282] The HAI and EVI do not depict the true economic development without considering trade and FDI capacity of a country.

The International Monetary Fund (IMF) classified LICs into two groups: larger developing countries and smaller developing countries.[283] Some larger developing countries are the BRIC countries (Brazil, Russia, India and China, although Russia is not a developing country). Others are referred to as high-income, middle-income and low-income developing countries.[284] Some landlocked countries are also referred to as LICs, while some LICs are referred to as 'net consumers'[285] and net food exporters.[286] On the other hand, the least-developed countries (LDCs) are considered the poorest among the LICs.[287] Some of the LDCs are sub-Saharan countries[288] and the African, Caribbean and Pacific (ACP) Group of States.[289] Others are described as small economies.[290]

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[281] UNCD, *Policy Report on the 20th Session,* Supp. No 13, E/2018/33 (12–16 March 2018; UNCD, *Report on the 8th Session, Official Records of the Economic and Social Council*, Supp No 13 (March 2006).
[282] See T Ademola Oyejide, 'Special and Differential Treatment' in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO: A Handbook* (World Bank, 2002) 504, 507.
[283] Proposed New Grouping in WEO Country Classifications: Low Income Developing Countries (IMF Policy Paper, 03 June 2014) available at <http://www.imf.org/external/pp/ppindex.aspx> accessed on 02 May 2020.
[284] *World Bank Country and Lending Group Data, New Country Classifications by Income Level 2018-2019* (01 July 2018) available at < https://bolgs.worldbank.org/openda/new-country-classifications-income-level-2018-2019> accessed 30 June 2019.
[285] Siddiqui, above n 3, 435.
[286] UNCTAD, *World Economic Situation and Prospects 2016* (United Nations, 2016) 69.
[287] See WTO website <http://www.wto.org/english/thwwto_e/whatis_e/tif_e/org7_e.htm>; William B Sorabella, 'Less Developed Country as Start-Up Corporation: Adopting the Venture Capital Model for Development in the Light of Global Capital Market Realities' (2000) 31(2) *Law and Policy in International Business* 517, 517.
[288] Gordon**,** above n 156, 79**.**
[289] Geographically LDCs are classified as African LDCs, South Asian LDCs, ACP LDC, Island and Pacific LDCs. See *The Market Access for Products and Services of Export Interest to Least Developed Countries, Note By the Secretariat* WTO Doc WT/COMTD/LDC/W/65/Rev. 1 (24 October 2017) available at <https://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> accessed on 01 July 2019; *ACP Declaration on the Sixth WTO Ministerial Conference*, ACP/61 047/05 Rev 3 (29 Nov ber 2005) [61]; *ACP Declaration on the Fourth Ministerial Conference,* WTO Doc. WT/L/430 (9 November 2001).
[290] *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) para 35.

Different classification of developing countries exists. For instance, the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) attempted to categorise developing countries for the purpose of granting subsidies.[291] The SCM Agreement classifies developing countries into three categories: (1) the 20 countries listed in Annex VII whose per capita income is less than US$1,000 per annum;[292] (2) countries that have transformed themselves into a market economy under Article 29 of the SCM Agreement;[293] and (3) the other developing countries that do not come under the first or second categories. According to the SCM Agreement, countries within these three categories, apart from LDCs, are qualified for SDT provisions, but their transitional periods differ.

In the Doha Round, the International Food and Agricultural Trade Policy Council (IPC) proposed a method for classifying developing countries for SDT provisions in the area of agricultural trade.[294] According to the proposal, developing countries were to be divided into: (1) LDCs with GNI per capita below US$900 per annum; (2) lower middle-income developing countries with GNI per capita between US$901 and US$3,035 per annum; and (3) upper middle-income developing countries with GNI per capita between US$3,035 and US$9,385 per annum.[295] According to the IPC proposal, countries which did not meet the above criteria should be phased out over several years. Neither the IPC proposal nor the SCM Agreement considered trade and FDI capacity as a method of identifying LICs.

The World Bank classifies countries into four groups on the basis of GNI: (1) low-income economies ($1,025 or less); (2) lower-middle income economies (GNI per capita between $1.026 and $3.995); (3) upper-income economies (GNI per capita between $3.996 and $12,375); and (4) high income economies (GNI per capita is 12,376 or more).[296] When one examines the WTO rule of self-selection as a developing country, and compares it with the rules of the World Bank country classification method, some confusing results can be seen. According to the World Bank country classification system, China, Brazil and Sri Lanka

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[291] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) Annex 1 A ('*Agreement on Subsidies and Countervailing Measures*') article 27 (2)(a).
[292] *Agreement on Subsidies and Countervailing Measures.*
[293] *Agreement on Subsidies and Countervailing Measures* article 29.
[294] International Food and Agricultural Trade Policy Council, 'A New Approach to Special and Differential Treatment' (15 September 2004) 2.
[295] Ibid.
[296] *World Bank Country and Lending Groups, Country Classification, New Country Classifications by Income Level 2018-2019* (World Bank Data Team, 01 July 2018) available at <https://blogs.worldbank.org/.../new-country-classifications-income-level-2018-2019> accessed on 08 August 2019.

are classified as upper-middle income countries, and India and Bangladesh are classified as low-middle income countries. The World Bank classification of developing countries, the UN listing of least developed countries, and the WTO self-selection of developing countries depict the various levels of development, but they do not depict the true economic status of a country without considering trade capacity and FDI.

2.7.2 Weakness of the Existing Classification

The term 'developing country' is confusing and deficient when used to determine the economic status of a country. Developing countries are at different levels of economic development.[297] When compared to the larger developing countries, LICs have slow economic development.[298] Some have higher economic status when compared to others in terms of their economic strength and degree of development as well as their degree of indebtedness, and negligible share of FDI and international trade.[299] Disparity is evident among member States of the WTO in terms of their levels of integration into FDI and international trade.[300] According to the *2019 WTO Trade Statistical Report*, although the exports and imports of goods by developing countries accounted for 44% of international trade, most were attributable to only a few larger developing countries such as China, India and Brazil.[301] According to the *UNCTAD World Investment Report 2016*, the G20, Transatlantic Trade and Investment Partnership, Asia-Pacific Economic Cooperation, Trans-Pacific Partnership, Regional Comprehensive Economic Partnership and the BRIC

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[297] See Jackson, William J Davey and Alan O Sykes Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations* above n 128, 1167.

[298] Arvind Subramanian and Shang-Jin Wei, 'The WTO Promotes Trade, Strongly but Unevenly' (2007) 72 *Journal of International Economics* 151, 173.

[299] See UNCTAD, *Trade and Development Report 2018; Power, Platforms and the Free Trade Delusion* (UN Publication, Geneva) 81; UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 7; UNCTAD, *Least Developed Countries Report* (UN, 2009) 2; Trebilcock and Howse, *The Regulation of International Trade* above n 123, 471; World Economic Outlook, *An Update of the Key WEO Projections*, Washington, DC (WEO Update, 19 July 2016) 4; Nabil M D Dabour, 'The Role of Foreign Direct Investment in Development and Growth: OIC Member Countries' (2000) 21(3) *Journal of Economic Cooperation* 27, 29; Era Dabla Norris, Jiro Honda, Amina Lahreche and Genevieve Verdier, 'FDI Flows to Low Income Countries: Global Drives and Implication Growth' (International Monetary Fund [IMF] Working Paper, WP/16/132, 2010) 5; Debapriya Bhattacharya and Mia Mikić, 'Least Developed Countries and Trade Challenges of Implementing the Bali Package' Economic and Social Commission for Asia and the Pacific (ESCAP) Studies in Trade and Investment 83 (UN, 2015) 12.

[300] WTO International Trade, *Statistics 2016*, available at <https://www.wto.org/english/res../its2015.../itspdf> accessed on 5 January 2019; UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 68.

[301] WTO, *World Trade Statistical Review 2019*, available at <thttps://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm>, accessed on 01 January 2020, 14; WTO, *World Trade Statistical Review 2018*, 13, 24, available at <https://www.wto.org/english/res e/wts2018 e/wts2018e.pdf> accessed on 4 March 2019; WTO, *International Trade Statistics 2015*, available at <https://www.wto.org/english/res../its2015../itspdf> accessed on 5 January 2019, 10; see UNCTAD, *Handbook of Statistics* (2008, 2015); Gillian Moon, 'Trade and Equality: A Relationship to Discover' (2009) 12(3) *Journal of International Economic Law* 617, 618.

accounted for 63% of the share of world FDI inflows within the group.[302] According to the *WTO Statistical Review Report 2019*, 52% of the international trade of merchandised goods belongs to 10 countries; thus, they account for the lion's share of international trade.[303] China, the Republic of Korea and Hong Kong[304] were the leading exporters in merchandised trade in 2018 among developing countries, while China, India and Singapore were the leading suppliers of commercial services in 2017.[305]

India, China, Malaysia, Singapore, Brazil and Thailand are all developing countries, despite the differences in their trade capacities and investment inflows[306] from those of LICs such as Sri Lanka, Bangladesh, the Maldives and most sub-Saharan countries.[307] India, China, Malaysia, Singapore, Brazil and Thailand are classified as large developing countries owing to their respective shares of trade and FDI capacities.[308] India, at the Cancun Meeting, was of the view that its demands and interests were different to those of LICs.[309]According to the WTO Annual Reports of 2016 and 2018, China had become the world's largest exporter and the second largest importer.[310]

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[302] UNCTAD, *World Investment Report 2016, Investor Nationality: Policy Challenges* (UN Publication, Geneva 2016) 22.

[303] WTO, *World Trade Statistical Review 2019, available at* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 14; WTO, *World Trade Statistical Review 2018*, 24; WTO, *World Trade Statistical Review* (2016) 14; UNCTAD, *Least Developed Countries Report* (UN, Geneva, 2009) 7; Moon, above n 301, 617.

[304] Hong Kong is recognised as a member separately to China for the purpose of WTO membership.

[305] WTO, *World Trade Statistical Review 2019, available at* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 48; WTO, *World Trade Statistical Review 2018,* available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 13.

[306] See *Gross Domestic Product 2016*, PPP, World Bank Development Indicators Database (World Bank, 17 April 2017) available at <http://data.worldbank.org/data-catalog/world-development-indicators> accessed on 23 August 2017; World Bank Foreign Direct Investment, Net Inflows (BOP, current US$), available at <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD> accessed on 23 August 2017; WTO, *World Trade Statistical Review 2018*, 13.

[307] UNCTAD Report, Chapter One, 'The Impact of the Global Crisis and the Short-Term Policy Response' (UN, 2009), 3; see Chen, above n 13,111; UNCTAD, *Emergence of a New South and South–South Trade as a Vehicle for Regional and Interregional Integration for Development*, 12th session, Note by the UNCTAD Secretariat, TD/425 (11 February 2008) 3.

[308] WTO, *Trade Profiles* available at <http://stat.org/countryprofile/wsdbcountrypfview.aspx?language=e&countr> accessed on 5 March 2018.

[309] 'Our problems and challenges are so manifold and our socio-economic contexts so diverse, that no single, harmonised development strategy can be adopted'. Kamal Nath, *Statement at the Sixth Session of the Hong Kong Ministerial Conference*, WTO Doc WT/MIN (05)/ST/17 (14 December 2005).

[310] WTO, *World Trade Statistical Review 2019, available at* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 48; WTO, *World Trade Report 2016*, 64 <www.wto.org/english/res_e/publications_e/wtr11_htm> accessed on 2 July 2016; WTO, *World Trade Statistical Review 2018*, 12.

China, Brazil and India have emerged as developed countries in world trade.[311] The National Intelligence Council has indicated that, by 2020, the economic status of each of China, India, Indonesia and Brazil will bypass that of the individual countries of the European Union (EU).[312] In addition, in 2018, China was ranked as one of the world's largest three commercial services exporters[313] and it had become the world's fifth highest ranked country in the services sector.[314]

The *2020 UNCTAD World Investment Report* stated that the major recipients of FDI were China, India and Indonesia.[315] According to the *UNCTAD 2018 Investment Report*, the share among LDCs of foreign value-added (FVA) exports was 9% due to their lower participation in the growth of the global value-added chain (GVD), with these countries lacking natural resources and being unable to provide input into exports of other countries.[316] Gross exports can be divided into domestic value-added (DVA) and FVA to determine economic development.[317] DVA is determined by using locally manufactured goods and services that were exported in a given period of time (in other words, goods and services exported by a country).[318] FVA depicts gross exports of a country and it represents foreign goods and services that are used as intermediate to manufacture goods and to provide services.[319] This depicts the trade and service capacity of a country. Therefore, growing FVA is a key factor that contributes to economic growth.

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[311] WTO, 'World Trade 2010', 'Prospects for 2011' (Press Releases/628, 7 April 2011) 9 <www.wto.org/english/news_e/press11_epr628_e.htm> accessed on 10 September 2011; Gordon**,** above n 156, 82.

[312] National Intelligence Council, 'Mapping the Global Future, Report of the National Intelligence Council', (13 December 2004) <http://www.cia.gov./nic/NIC_globaltrend2020.html> accessed on 10 November 2010.

[313] WTO, *World Trade Statistical Review 2018,* available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 16; WTO, *International Trade Statistics Country Profile 2016*, <https://www.wto.org/english/res../its2015.../itspdf>, accessed on 2 July 2016.

[314] WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[315] UNCTAD, *World Investment Report 2020*: *International Production Beyond the Pandemic (*UN Publication, Geneva 2020)12*; UNCTAD*, *World Investment Report 2017: Investment and the Digital Economy* (UN Publication**,** Geneva, 2017) 3**.**

[316] UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22, 23.

[317] Ibid 22.

[318] Marko Javorsek and Ignacia Camacho, Trade in Value Added: Conceptes, Estimation and Analysis (Asia-Pacific Research and Training Network on Trade Working Paper, No 150/2015) 8.

[319] Ibid.

The LDCs' share of world services export and share of world trade in 2018 was negligible at below 1%[320] due to: the lower level of income, scarcity of resources, a smaller market, insufficient infrastructure development, unskilled labour, and a lack of industrial development, capital goods and FDI.[321] Many LICs are lacking in skilled labour, infrastructure development and capital, as well as not having a high enough level of technological know-how, FDI, equipment and expertise to be able to effectively compete and participate as equal partners in international trade.[322] In addition, LICs do not have the trade and FDI capacity for fair play with larger developing countries and developed countries in international trade and investment, especially as their share of global trade in manufactured goods and FDI are, to a greater extent, negligible.[323] This has resulted in under-development, connected with low levels of education, poor health, low life

[320] WTO, *World Trade Statistical Review 2018*, available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 5, 21.

[321] WTO, *World Trade Statistical Review 2018*, available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 5, 21; UNCTAD, *Trade and Development Report 2019; Financing A Global Green New Deal* (United Nations Publication, Geneva, 2019) 21; *Doha WTO Ministerial Declaration and Implementation – Related Issues and Concerns*, WTO Doc WT/MIN(01) 17 (20 November 2001) (Decision of 14 November 2001), <http:www.wto.org/English/thewto_e/minist01_e/mindecl_implementation_e.htm>, accessed on 4 August 2018; *African, Caribbean and Pacific Group of States (ACP) Declaration*, ACP/61/047/05 (Brussels, 29 November 2005) on the Sixth WTO Ministerial Conference, Sustainable Economic Development Department, *Fourth LDC Trade Ministers' Meeting*, WTO Doc LDC/IV/2005/4 (26 June 2005) [7]; *Dhaka Declaration, Second LDC Trade Ministers' Meeting,* WTO Doc LDC-II/2003/L.1/Rev1 (2 June 2003) [15]; Richard L Bernal, 'Special and Differential Treatment for Small Developing Countries' (revised edition of a paper for the *Conference on Special and Differential Treatment for Small Developing Economies: Thinking Outside the Box*, Inter-American Development Bank, Montego Bay, Jamaica, 28–29 June 2005) 2; William B Sorabella, 'Less Developed Country as Start-Up Corporation: Adopting the Venture Capital Model for Development in the Light of Global Capital Market Realities' (2000) 31(2) *Law and Policy in International Business* 517, 520; Amartya Kumar Sen, *Choice of Techniques: An Aspect of the Theory of Planned Economic Development* (3rd ed, Augustus M Kelley Publishers, 1968) 58; Joseph E Stiglitz, 'Capital Market Liberalization and Exchange Rate Regimes: Risk without Reward' above n 186, 243; *African Energy Ministers Conference, Johannesburg Declaration* article 19.

[322] See WTO Secretariat, *Technical Assistance and Training* (WTO Building Trade Capacity) <http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm 1>; Garcia, 'Beyond Special and Differential Treatment', above n 277, 309; Constantine Michalopoulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries' (Working Draft, 28 February 2000) 17; Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of International Economic Law* 861, 863; *Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade*, Tenth WTO Ministerial Declaration, Nairobi (19 December 2015) WTO Doc WT/MIN(15)/48WT/L/982; *UNCTAD Foreign Direct Investment in LDCs: Lessons Learned from the Decade 2001-2010 and the Way Forward* (2011) 4.

[323] UNCTAD *World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 13; UNCTAD *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 68; WTO, *World Trade Statistical Review 2018*, 83; see Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure' (2008) 7(4) *World Trade Review* 587, 594; Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Country Strategies' (Resource Paper No 5, International Centre for Trade and Sustainable Development, March 2003) 6; Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) *Journal of International Economic Law* 427, 429; see Chen, above n 13, 129; *ACP Group Declaration on the Tenth WTO Ministerial Conference* (19-21 October 2015) para 17.

expectancy and limited access to clean drinking water; as well as environmental hazards, political instability, corruption and balance of payment difficulties.[324]

The Dhaka Declaration identified that the gap between developed and larger developing countries on the one hand, and LDCs on the other, is widening rapidly despite trade liberalisation.[325] This problem is partly due to the lack of appropriate classification for developing countries and LICs in the WTO.[326] As a result, LICs and LDCs are pushed to the edges of the WTO system.

The WTO needs to take into consideration the economic development among WTO member States on a more equitable and competitive basis. LICs have small volumes of trade and FDI inflows. On the one hand, as a result, these countries rarely invoke the DSU.[327] On the other hand, economic assistance by way of the GSP cannot be given to the needy LICs as they are hidden within the unjustifiable concepts of developing countries and least-developed countries LDCs.[328]

The concept of the unjustifiable nomenclature of developing countries complicates decision- making for the panel, the arbitrators and the Appellate Body. They find it difficult to determine which interests of LICs they must consider, and whether they should be considering larger or smaller developing countries or only LDCs or developing countries in general, when it comes to the interpretation of provisions in the covered agreement.[329] Therefore, it is important to determine a category of countries as LICs based on the volumes of international trade and FDI of developed, developing, LICs and LDCs for the WTO for the intended CIIA.[330]

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[324] See Committee for Development Policy, *Economic and Social Council Report on the Twentieth Session* Supp No. 13, E/2018/33 (12–16 March 2018) 11; Yong-Shik Lee, 'Theoretical Basis and Regulatory Framework for Microtrade: Combining Volunteerism with International Trade Towards Poverty Elimination' (2009) 2(1) *The Law and Development Review* 367, 370; Amartya Kumar Sen, *Development as Freedom* above n 38.

[325] *Dhaka Declaration, Second LDC Trade Ministers' Meeting* WTO Doc LDC-II/2003/L1/Rev1 (2 June 2003) para 4.

[326] See Chen, above n 13, 110; UNCTAD, *Least Developed Countries Report 2016* (UN, 2016) 18.

[327] Chad P Bown, 'Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?' (2005) 34(2) *Journal of Legal Studies* 515, 551.

[328] See Chang, above n 272, 557.

[329] Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5(3) *World Trade Review* 445, 454.

[330] See Oyejide, above n 282; Malik Khola Gul and Imran Naseem, 'Impact of Foreign Direct Investment on Economic Growth of Pakistan' *American Journal of Business and Management* (2015) 4(4) 190, 192; Ross Buckley, 'Debt-for-Development Exchanges: The Origins of a Financial Technique' (2009) 2(1) *The Law and Development Review* 53, 57.

Economic strength is determined according to the respective FDI capacities and trade of countries. The volumes of trade and FDI are important concepts vis-à-vis the respective ability of each country to produce a certain amount of goods and services and then that these goods can be exported and services rendered to other countries.[331] The LICs category can then be defined in terms of the relative trade and FDI capacity of a cross-sample of developing countries and LDCs, so a more realistic profile of LICs' export capacity and FDI can be established in relation to their real FVA in FDI and trade.[332] On this basis, LICs can be identified as countries in which international trade and FDI have a low FVA concentration. The most important factor is the shares of trade and FDI that are not necessarily the per capita level of a country or of its GDP, but rather share of FDI in GDP.[333] Per capita income does not depict real economic development or a country's economic disparity because with per capita income being derived by dividing a country's total population into its entire income, a very large population will have a direct effect on per capita income.

2.7.3 Trade and Investment Capacity for Development

A country's trade capacity is determined based on its volume of trade, infrastructure, FDI, FVA, DVA, and human and institutional capacity.[334] The FVA and DVA are important for determining trade capacity and FDI which decide the level of the country's economic development.[335]

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[331] UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22, 23.

[332] See UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22; *World Trade Organization Trade Profile 2016.*

[333] Debashis Chakraboty, Julien Chaisse and Jaydeep Mukherjee, 'Deconstructing Service and Investment Negotiating Stance: A Case Study of India at WTO GATS and Investment Fora' (2013) 14 *The Journal of World Investment & Trade*, 44, 48.

[334] David F Luke, 'Trade-related Capacity Building for Enhanced African Participation in the Global Economy', in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO: A Handbook* (World Bank, 2002) 509, 509; World Economic Outlook, *An Update of the Key WEO Projections*, in Washington, DC (WEO Update) (19 July 2016) 4; Badar Alam Iqbal, Munir Hassan & Bhawana Rawat, 'FDI in Retail Sector in South Asia: A Case of India' (2012) 13 *The Journal of World Investment & Trade* 951, 953; UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22, 23.

[335] See UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 22; *The DAC-DCD Guidelines, 'Strengthening Trade Capacity for Development'* (OECD Paper, October 2001) ('*DAC Guidelines*') 13.

The *WTO Trade Statistical Reviews of 2018* and *2019* indicate that the share of world trade and services held by the LDCs remained negligible.[336] According to the *UNCTAD World Trade and Development Report 2016*, Africa's share of world trade exports was 2.1%.[337] The trade growth rate of sub-Saharan countries has been negative;[338] the per capita growth in LDCs declined to 1.5% in 2015;[339] and their share in global trade was less than 1%.[340] Table 2.1 further illustrates the disparity between large developing countries and LICs based on their international trade.

Table 2.1: Share of Regional and World Trade Flows in Merchandised Exports and Imports 2019

	Exports 2019 (%)	**Imports 2019 (%)**
World	100.0	100.0
North America	13.9	18.6
South and Central America and the Caribbean	3.2	3.3
Europe	37.7	36.5
Commonwealth of Independent States (CIS)	3.4	2.4
Africa	2.5	3.0
Middle East	5.3	4.0
Asia	34	32.2

Source: WTO, *World Trade Statistical Review* (2020), <https://www.wto.org/Spanish/res_s/wts2020_s/wts2020_s.pdf> accessed on 07 December 2020.

[336] WTO, *World Trade Statistical Review 2018*, available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 67, 83; WTO, *World Trade Statistical Review 2019, available at* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 5, 62 and 64 ; WTO, *International Trade Statistics 2015*, available at <https://www.wto.org/english/res../its2015../itspdf>, accessed on 20 August 2017, 28; WTO, *World Trade Statistical Review* (2016) 59, 60; WTO, *Annual Report 2017*, 124.

[337] UNCTAD, *Structural Transformation for Inclusive and Sustained Growth Report 2016* (UN, New York and Geneva, 2016) 9; see also WTO, 'World Trade 2010', 'Prospects for 2011' (Press Releases/628, 7 April 2011) 9 <www.wto.org/english/news_e/press11_epr628_e.htm>, accessed on 10 August 2017.

[338] UNCTAD, *Key Statistics and Trends in International Trade 2015*, <unctad.org/../../dc tab2015di-e->, accessed on 25 July 2015, 6; WTO, *World Trade Statistical Review* (2016) 21.

[339] UNCTAD, *Least Developed Countries Report 2016* (UN, 2016) 4.

[340] WTO, *World Trade Statistical Review 2018*, available at <https://www.wto.org/english/res e/wts2018 e/wts2018 e.pdf> accessed on 4 March 2019, 5.

Note: Commonwealth of Independent States (CIS) (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan)

Table 2.1 shows the disparity among developing countries, thus demonstrating the inappropriateness of grouping all LICs together owing to their respective shares of trade, and highlighting the reality that free trade does not benefit all WTO member States.

As shown in Table 2.1, Africa has the lowest share of merchandised trade. A salient feature of the table is that the merchandised exports and imports of Asia do not separately include the individual LICs of Asia, such as Sri Lanka, Pakistan, Bangladesh, Nepal and Maldives. Asia's share of the world's merchandised exports and imports is shown as 34% and 32.2%, respectively. What the table does not reveal are individual countries' rates of real economic growth in relation to their volumes of trade. However, when individual countries' volumes of trade are taken into consideration, the vast differences between the various levels of economic development in LICs, in terms of their respective trade volumes, can be identified. This is illustrated in Table 2.2.

Table 2.2 : Merchandised Exports and Imports of Selected Countries

	Exports 2018 US$ FOB million	**Imports 2018** US$ FOB million
Bangladesh	39252	61500
Brazil	239681	188718
Cabo Verde (Cape Verde)	76	816
Central African Republic	178	419
Chad	1900	3000
China	2487045	2135905
India	325562	510665
Indonesia	180215	188712
Malaysia	247365	217471
Maldives	350	2970
Nepal	840	13465
Pakistan	23485	60472
Philippines	67488	114738
Singapore	412629	370635
Sri Lanka	11990	22535
Swaziland (Eswatini)	1736	1883
Thailand	252106	249660
Zimbabwe	4514	4100

Source: WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019.

Note: FOB=Free on Board

China's merchandised exports for 2018 totalled US$2,487,045 Free on Board (FOB] million while India's merchandised exports for the same year totalled US$325,562 FOB

million.[341] By comparison, Sri Lanka's merchandised exports for 2018 totalled US$11,990 FOB million and Pakistan's merchandised exports for the same year totalled US$23,485 FOB million. Zimbabwe's merchandised exports for 2018 totalled US$4,514 FOB million. The merchandised exports for 2018 for the Maldives and Nepal totalled US$350 FOB million and US$840 FOB million, respectively. Bangladesh is a least-developed country (LDC) but its exports for 2018 totalled US$39,252 FOB million. When one compares Sri Lanka and Zimbabwe (on the one hand) to Bangladesh (on the other), Bangladesh's volume of export trade is higher than that of the combined Sri Lanka and Zimbabwe totals. China and India's combined volume of export trade is dramatically higher than that of Sri Lanka and Pakistan. It is therefore questionable whether, for the purposes of international trade, China, India, Sri Lanka and Pakistan can be considered developing countries. On the same basis, whether Sri Lanka, Zimbabwe and Bangladesh can be considered as developing and least developed countries (LDCs) is questionable. Developing country disparity is further demonstrated by Indonesia's large exports for 2018 and that Malaysia and Thailand are on the same footing.

Trade per capita and GNI do not reveal a country's true economic development status.[342] China's trade per capita for the period 2016–2018 was US$1,682 FOB million while India's trade per capita over the same period was US$396 FOB million.[343] Sri Lanka's trade per capita over that period was US$1028 FOB million which was higher than that of India over the same period.[344] Therefore, one could argue, by referring to the data regarding per capita income per trade, that China and India are still developing countries and that developing

[341] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; WTO, *Trade Profile 2018*, available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[342] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; UNCTAD, *STAT General Profile Data Centre* available at <https://unctadstat.unctad.org/countryprofile/GeneralProfile/en-GB/144/index.html> accessed on 7 March 2019; WTO, *Trade Profile 2015* <stat.wto.org>Resources>Statistics database> accessed on 20 August 2017; *ACP Group Declaration at the Tenth WTO Ministerial Conference* (21 October 2015) para 24.

[343] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; *WTO Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[344] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

countries do not need to be reclassified according to their respective trade capacities. However, the reason that they do need to be is that population has to be considered.[345] In 2017, Sri Lanka's population was 20,877 million; India's population was 1,339,180 million; and China's population was 1,409,517 million.[346]

The WTO classification of countries is also deceptive as trade and FDI are not taken into consideration. To appropriately classify the status of countries, their respective shares of international trade and FDI, in terms of their GDP, must be considered. According to the *WTO 2019 Trade Profile Report*, China is ranked first in the world for the export of merchandised goods, while its share of world trade is 12.77%.[347] India is ranked 19th for the export of merchandised goods and its share of world trade is 1.67%.[348] Singapore is ranked 15th in the world for the export of merchandised goods and its share of world trade is 2.12%.[349] Sri Lanka is ranked 82nd in the world and its share of world trade is 0.06%.[350] Zimbabwe is ranked 115th in the world for the export of merchandised goods and its share of world trade is 0.02%. Pakistan is ranked 68th in the world for the export of merchandised goods and its share of world trade is 0.12%.[351] Bangladesh is ranked 61st in the world for the export of merchandised goods and its share of world trade is 0.20%.[352] Central African

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[345] WTO, *Trade Profile* 2015 <stat.wto.org>Resources>Statistics database> accessed on 20 August 2017.

[346] UNCTAD, *STAT General Profile Data Centre* available at <https://unctadstat.unctad.org/countryprofile/GeneralProfile/en-GB/144/index.html> accessed on 7 March 2019; WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data) <https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019.

[347] *WTO, Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[348] WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[349] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data) <https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[350] WTO, *Trade Profile2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[351] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data) <https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

[352] WTO, *International Trade and Tariff Profile Data* (2019) (International Trade and Market Access Data) <https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm> accessed on 29 December 2019; WTO, *Trade Profile 2018* available at <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country> accessed on 7 March 2019.

Republic has no share of international trade. Furthermore, various levels of disparity among LICs and developing countries can be illustrated using statistics relating to GDP as set out in Table 2.3.

Table 2.3 : Gross Domestic Product (GDP) (2018)

	GDP in 2018 (US$ million)
Bangladesh	287,630
Brazil	1,868,184
China	13,407,398
India	2,716,746
Indonesia	1,022,454
Malaysia	354,348
Pakistan	312,570
Sri Lanka	88,223
Zimbabwe	26,127

Source: *WTO, International Trade and Tariff Profile Data (2019) (International Trade and Market Access Data)<https://www.wto.org/english/res_e/statis_e/merch_trade_stat_e.htm>* accessed on 29 December 2019.

Table 2.3 illustrates that the GDP of larger developing countries, such as Brazil, India, China and Malaysia, is higher than that of other smaller developing countries, such as Pakistan, Sri Lanka and Zimbabwe. Furthermore, Table 2.3 illustrates that Bangladesh, although being a LDC, has a GDP higher than that of smaller developing countries, such as Sri Lanka and Zimbabwe.

The data in Table 2.3 challenge the validity of the criteria used to designate a country as a developing or LDC based on international trade. A country's FVA in trade and investment is important when measuring its population size and natural resources which, in turn,

influence its market and trade capacity.[353] The size of the market (trade) and the amount of FDI are determining factors for the classification of countries for a trade and investment organisation.[354] It is also necessary to examine whether free trade has helped LICs and to what extent the term 'developing country' has affected them in the trade liberalisation process without FDI.

Therefore, it can be contended that without FDI and identifying a country category in the WTO as LICs, LICs cannot achieve economic prosperity.[355] For economic development to occur in a country, the important factors are internal political stability, resources, regional integration, FDI inflows and the improvement of trade capacity.[356] Furthermore, the *UNCTAD 2019 World Investment Report* indicated the inequitable state of LICs with regard to FDI inflows. Disparity among countries can be further corroborated as shown in Table 2.4 below.

Table 2.4 : FDI Inflows by Region, 2016–2018

	2016 (US$ million)	**2017** (US$ million)	**2018** (US$ million)
World	1918679	1497371	1297153
Developed Economies	1197735	759256	556892
Europe	611693	384023	171878
North America	507784	302090	291439
Developing Economies	656290	690576	706043
Africa	46482	41390	45902
Asia	473325	492713	511707

[353] See Alice H Amsden, *Asia's Next Giant: South Korea and Late Industrialisation* (Oxford University Press, 1989) 11.
[354] *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017; Follow-up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017*, available at <www.unohrills.org>, accessed on 24 August 2017, 20.
[355] '[The] idea that international trade is the engine of growth is very old, going back to the Adam Smiths'. Sebastian Edwards, 'Openness, Trade Liberalisation, and Growth in Developing Countries' (1993) 31(3) *Journal of Economic Literature* 1358, 1358; Hamza Cestepe, Ertugrul Yıldırım and Bersu Bahtiyar 'The Impact of Trade Liberalization on the Export of MENA Countries to OECD Trade Partners' (2015) 23 *Procedia Economics and Finance* 1440, 1441 and 1444.
[356] Thomas, 'Poverty Reduction, Trade and Rights' above n 153, 1407; *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017: Follow up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017*, 6.

East Asia	270271	267808	279522
South East Asia	116768	144177	148694
South Asia	54220	52345	54200
West Asia	32065	28383	29291
Latin America and the Caribbean	135349	155405	146720
Oceania	1133	1069	1713
Transition Economies	64654	47538	34218
LDCs	25769	20702	23833
LLDCs	22472	23147	22641
SIDSs	4632	4058	3663

Source: UNCTAD (2019) *Investment Report: Special Economic Zones* 212
Note: LDCs=least-developed countries; LLDCs=landlocked developing countries; SIDS=small island developing States

As shown in Table 2.4 above, Small Island Developing States (SIDSs) are recorded as having the lowest FDI inflows for 2016, 2017 and 2018. The second lowest FDI inflows are recorded in landlocked developing countries (LLDCs), that is, US$2,2641 million in 2018. In fact, the FDI inflows for these countries are gradually decreasing. As seen in the table, the FDI inflows are also low for transition economies and African countries. South Asian countries comprise Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. Their FDI inflows for 2016, 2017 and 2018 were US$54,220 million, US$52,345 million and US$54,200 million, respectively, which are also low. When India's individual FDI inflow is taken out of the South Asian equation, it is apparent that Sri Lanka, Bangladesh, Bhutan, Nepal and the Maldives are hit by the lowest FDI inflows and this decline further worsened due to COVID-19.[357]

[357] See *UNCTAD Trade and Development Report 2020: From Global Pandemic to Prosperity for All: Avoiding Lost Decade* (United Nations, 2020) 7 and 8.

Table 2.5 : FDI Inflows and Projections, by Group of Economies and Region, 2015–2017, and Projections, 2018 (US$ billion and percentage)

	2015	**2016**	**2017**	**2018**
World	1921	1868	1430	1450 to 1570
Developed Economies	1141	1133	712	740 to 800
Europe	595	565	334	-380
North America	511	494	300	-320
Developing Economies	744	670	671	640 to 690
Africa	57	53	42	-50
Asia	516	475	476	-470
Latin American and the Caribbean	169	140	151	-140
Transition Economies	36	64	47	50 to 60

Source: UNCTAD (2018), *World Investment Report: Investment and New Industrial Policies* pp. 14-15

Table 2.5 above indicates that Africa is the region that receives the lowest level of FDI inflows in the world. While Asia has recorded US$516 billion, US$475 billion and US$476 billion and a projected US$470 billion, this does not depict the true picture of FDI inflows to LIC countries because China and India receive the major share of FDI inflows to countries in Asia. This is shown in Table 2.6. This is further evident from the *UNCTAD Investment Report* for the year of 2019. This report projects FDI inflows US$ 530 for Asia and US$ 52 for Africa in 2019.[358]

[358] *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 14

Table 2.6 : Foreign Direct Investment (FDI) Inward 2018 (US$ million)

	FDI Inward 2018 US$ million
Bangladesh	3613
Brazil	61223
China	1627719
Cabo Verde (Cape Verde)	1989
Chad	6101
India	42286
Malaysia	152510
Maldives	552
Nepal	161
Pakistan	2352
Sri Lanka	1611

Source: *UNCTAD World Investment Report 2019 – Special Economic Zones*, 214, 216 and 217

Table 2.6 shows the fundamental defect in the 'developing country' category. Bangladesh's inward FDI is US$3,613 million, while Sri Lanka's inward FDI is US$1,611 million. India's inward FDI is US$42,286 million while China's inward FDI is US$1,627,719 million. Sri Lanka, India and China are developing countries, while Bangladesh is a least-developed country (LDC). Based on Table 2.6, can India, China and Sri Lanka be considered as developing countries? Under these circumstances, is the term 'developing country' a misnomer? Furthermore, the disparity shown above is depicted from the *UNCTAD 2018 Investment Report* which stated that FDI stock for 2018 in Bangladesh was US$14,557 million; in Sri Lanka it was US$11,070 million; and for India, it was US$377,683 million.[359] The *UNCTAD 2020 Investment Report* states that weak and vulnerable economies receive FDI of less than 2.5%.[360] This demonstrates the necessity of

[359] UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 190.

[360] UNCTAD, *World Investment Report 2020*: *International Production Beyond the Pandemic (*UN Publication, Geneva 2020) 13; *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) X and 12.

identifying LICs as a group of countries that have not benefited from trade liberalisation and that have been unable to obtain a considerable share of world trade despite the Generalized System of Preferences (GSP).[361] The level of poverty in LICs has increased.[362] This shows the global marginalisation of LICs in the multilateral trading system and from the table also does not make any significant changes in 2019. This position is further illustrated from the table 2.7.

Table 2.7 : Foreign Direct Investment (FDI) Flows by Region and Economy 2018
Millions of Dollars

FDI Inflows	**2018**
Bangladesh	3613
Brazil	61223
China	139043
Cabo Verde (Cape Verde)	100
Chad	662d
India	42286c
Malaysia	8091
Maldives	552c
Nepal	161
Pakistan	2352
Sri Lanka	1611

Source: *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 212, 213 and 214.

[361] See *Doha WTO Ministerial Declaration* WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) [2]; Caf Dowlah, 'The Generalized System of Preferences of the United States: Does It Promote Industrialization and Economic Growth in Least Developed Countries?' (2008) 1(1) *The Law and Development Review* 72, 84.

[362] *United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS), State of the Least Developed Countries 2017; Follow up of the Implementation of the Istanbul Programme of Action for the Least Developed Countries Report 2017* available at <www.unohrills.org> accessed on 24 August 2017, 10; UNCTAD, *Least Developed Countries Report* (UN, 2009) 2; WTO, *International Trade Statistics 2009*, <http://www.wto.org/english/res_e/its2009_e/its09_toc_e.htm> 2; Mike Moore, 'Implementation of the Programme of Action for LDCs and Combating Poverty' (Opening address delivered at WTO Ministerial Conference in Cotonou, Benin, 5 August 2002) <http://www.wto.org/english/news/_e/news02_e/speech_minist_conf_5august02_e.htm> accessed on 10 January 2010; Jianfu Chen, above n 13, 137.

According to the UNCTAD's *Least Developed Countries Report 2016*, the merchandised trade deficit of LDCs as a group is approximately US$65 billion[363] and it has increased to $80 billion in 2018.[364] The UNCTAD *Least Developed Countries 2019 Report* states that the debt service burden of LDCs has exceeded 6% of the value of the export goods and services.[365] The population living in poverty in LDCs have a daily income below US$1.25 a day.[366] The global extreme poverty rate is US$1.90 a day and 9 of 10 people from Africa will suffer from poverty in 2030.[367] Sub-Saharan African countries are more exposed to the trade liberalisation process and their export/GDP ratio is 34%.[368] The lowest productivity rate in the world is recorded in sub-Saharan African countries as 1% of GDP.[369] The contribution of LDCs to the world services sector is less than 1%.[370] The protected and high FDI inflow economies are the best performers (in terms of the economy) and have obtained economic prosperity, whereas countries that are less economically prudent have not been able to achieve substantial economic development.[371] Under these circumstances, one can argue that trade alone does not promote wealth, but that FDI is a key variable that promotes sustainable economic growth.[372] This is evident from the *UNCTAD 2016 Report on the*

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[363] UNCTAD, *Least Developed Countries Report 2016* (United Nations, New York and Geneva 2016) 9; *UNCTAD, Least Developed Countries Report on Rural Economic Development* (UN, New York and Geneva, 2015) 4.

[364] WTO, *World Trade Statistical Review 2019, available at*<*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 63.

[365] *The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) Overview 7.

[366] UNCTAD, *The Sustainable Development Goals Report 2019*, 22; United Nations Conference on Least Developed Countries, *Report on Growth with Structural Transformation: A Post-Development Agenda* (2014) 23; Irma Adelman, 'On the State of Development Economics' (1974) 1(1) *Journal of Development Economics* 3, 3.

[367] UNCTAD, *Human Development Report 2016* (UN, New York and Geneva, 2016) 26; UNDP, *Human Development Report 2019* (UNDP, New York, 2019) 67.

[368] UNCTAD, *Economic Development in Africa* (2008) *Export Preference Following Trade Liberalization: Some Patterns and Policy Perspectives*, 12 <http://www.unctad.org/en/docs/a/dcafrica2008_en.pdf>; UNCTAD *Economic Development in Africa: Debt Dynamics and Development Finance in Africa Report* (UN, 2016) 2; *WTO World Trade Statistical Review* 2019, 53; Chen, above n 13, 126; Pulapre Balakrishnan, 'Globalisation, Growth and Justice' (2003) *Economic and Political Weekly* 3166, 3169.

[369] UNCTAD, *Economic Development, Trade and Development Report, 2016: Structural Transformation for Inclusive and Sustained Growth* (UN, New York and Geneva, 2016) 75; UNCTAD, *Economic Development in Africa Report, 2019* (UN, New York, 2019) 19.

[370] WTO, *World Trade Statistical Review* 2018, available at <https://www.wto.org/english/res e/statis e/wts2018 e/wts2018 e.pdf> accessed on 24 January 2019, 21.

[371] UNDP, *Human Development Report*, 1999, available at <http://undp.org/reports/global/1999/en/> accessed on 18 August 2017, 2; Han Gyu Lheem and Sujian Guo, 'Political Economy of FDI and Economic Growth in China: A Longitudinal Test at Provincial Level' (2004) 9(1) *Journal of Chinese Political Science* 43, 57.

[372]UNCTAD, *Economic Development in Africa Report, 2019* (UN, New York, 2019) 16; Supachai Panitchpakdi, 'Reconstructing Economic Governance: An Agenda for Sustainable Growth and Development' (Exim Bank Commencement Day Annual Lecture 2010, Y B Chavan Centre, Mumbai, 18 March 2010); William L Casey Jr, 'Can FDI Serve as an Engine of Economic Growth for the Least Developed Countries?' (2015) 23 (1&2) *Journal of Competitiveness Studies* 73, 79.

Economic Development of Africa.[373] This report stated that African countries were seeking FDI to overcome their debt crisis.[374] The report further stated that, to achieve sustainable development for the African region, it was necessary to have investment between US$600 billion and US$1.2 trillion per year.[375] *The Least Developed Country Report 2019* states that LDCs need $40 billion investment annually to achieve sustainable economic growth in 2030.[376]

For the above-mentioned reasons, it is questionable whether trade liberalisation or trade diversification will provide a viable solution for LICs without FDI.[377] Therefore, LIC category should be created on the basis of a country's trade capacity being less than 1% of GDP and FDI of less than 1% of GDP. High income developing countries can be categorized as countries whose volume of trade and FDI ratio is above 2% of GDP.

2.8 Conclusion

It is clear from the above discussion that the classification of countries in the WTO fails to identify the true economic disparity that exists among its member States. The reason is that countries have been allowed to join the WTO as developing countries, irrespective of the economic disparity that exists between them and other developing countries and their respective FDI and trade capacity.

The WTO objective is to achieve development through the harmonisation of trade rules and to promote free trade around the world. However, it is questionable whether this can be achieved without giving due consideration to LICs as they have been affected by trade liberalisation. Aid as an incentive for liberal trade without FDI is not a viable solution as most LICs are already integrated into international trade. What LICs are seeking is FDI to improve their domestic products and to allow free access to the markets of developed and larger developing countries. Therefore, it is important to have a way out of the old international order by introducing FDI into the WTO for the economic development of LICs.

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[373] UNCTAD, *Economic Development in Africa Report 2016: Debt Dynamic and Development Finance in Africa* (UN, New York and Geneva, 2016) 26.
[374] UNCTAD, *Economic Development in Africa Report 2016: Debt Dynamic and Development Finance in Africa* (UN, New York and Geneva, 2016) 26.
[375] Ibid 5.
[376] *The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) Chapter 1, 7.
[377] UNCTAD, *Economic Development in Africa Report 2016: Debt Dynamic and Development Finance in Africa* (UN, New York and Geneva) 135; *UNCTAD World Investment Report 2019 – Special Economic Zones* (UN Publication, Geneva, 2019) 75.

When the Havana Charter was introduced, countries realised the validity of one single organisation for trade and investment to exist for economic development. However, it did not materialise. Subsequently, at trade negotiations, member States considered the importance of investment being incorporated into a trade organisation. This was not successful due to the heterogeneity of interests of developing and developed countries. At the Uruguay Round, member States failed to reach a compromise on the CIIA due to the diverse interests displayed during the negotiations, with developed countries, consequently, being unable to allay the fears of developing countries. Developing and developed countries both looked at a CIIA as a threat to their sovereignty and to policy matters concerning their country's defence, and LICs, especially, wanted to control and give preference to local investors. They wanted growth with equity to promote economic activities. LICs considered that the liberalisation of FDI would further marginalise them in the WTO system. These issues were also common to trade. Before the establishment of the WTO, these sentiments were strongly canvassed not only by developing countries but also by developed countries. In fact, countries needed outside help to develop their economies, with this an inevitable reality. Therefore, in the context of the current study, it is necessary to consider and balance the issues opposing the CIIA when this agreement is drafted.

The vision of the WTO is to achieve sustainable economic development and to increase real income for all of its member States. To realise this vision, it is necessary to bring FDI to the forefront, but unfortunately, FDI is not within the ambit of the WTO objective. The WTO member States have not identified that FDI plays a significant role in the world economy. The evolution of economic theories indicates that trade was used as a yardstick to explain development at an early stage and that, subsequently, investment surfaced to determine development. Furthermore, investment has been considered as the major driving force for sustainable development. The WTO has failed to take note of this reality. Therefore, the vision of the WTO is that, irrespective of a country's status and any disparity between it and other countries, all countries should benefit from international trade and investment. If the WTO fails to understand the converging advantage of merging investment into a trade organisation, it will become an outdated organisation.

This chapter contributes to the literature by suggesting a new classification of the LIC category based on trade and FDI capacity. It identifies the importance of uniform law (through a CIIA) in the WTO under the converging contribution to comparative advantage.

In this context, before discussing the existing investment agreement under the WTO and the NAFTA, the next chapter investigates the legal validity of the GATT, Article XVIII; the GSP Decision of 1971; and the Enabling Clause, as these provisions have been introduced to reduce the disparity among LICs.

Chapter 3: The Regulatory Framework of the Generalised System of Preferences in the GATT/WTO

3.2 Historical Development of Trade Law

'Free trade' is said to have emerged in the 16th century as a result of the debate by the parliament of the United Kingdom over control of foreign trade activities.[1] The English King at that time involved selected traders in international trade.[2] This introduced international trade in the world, albeit in a limited way. Free trade was advocated at that time on the notion of tariff reductions, subsidies and prohibition of certain products that were detrimental to England's economic activities. This concept was later expanded to include several western countries, as can be seen from the Anglo-French Cobden-Chevalier Treaty of 1860.[3] This Treaty provided the basis for free trade between the British and French.

During the 1920s and the 1930s, the main objective of States was to protect their domestic producers from competitive imports from other countries.[4] This position was revealed in the *Smoot-Hawley Tariff Act* (*United States Tariff ACT*),[5] which the United States (US) introduced in 1930 to increase tariffs on imports to the highest level to discourage importation.[6] The lack of unity among the international community in the sphere of trade relations, together with discriminatory tariff barriers, the imposition of import quotas, economic recessions, and political factors, led to global unrest that contributed to the sudden eruption of two world wars.[7] In the aftermath of the Second World War, political developments in the arena of international trade forced developed countries to focus their

[1] Christopher E.S. Warburton, 'International Trade Law and Trade Theory' (2010) 9(1) *Journal of International Trade Law and Policy* 64, 67; Kalim Siddiqui, 'International Trade, WTO and Economic Development' (2016) 7(4) *World Review of Political Economy* 424, 425.
[2] Warburton, 'International Trade Law and Trade Theory' above n 10.
[3] A. A. Iliasu, 'The Cobden-Chevalier Commercial Treaty of 1860' (1971) 14(1) *The Historical Journal* 67, 67; Warburton, 'International Trade Law and Trade Theory' above n 10, 65; see C.P. Kindleberger, 'The Rise of Free Trade in Western Europe, 1820-1875' (1975) 35(1) *The Journal of Economic History* 20, 23.
[4] *GATT Secretariat*, The General Agreement on Tariffs and Trade, What it is and What it Has Done GATT Doc MGT/160/55 (4th ed, January, 1956) 1.
[5] *United States Tariff ACT* (*Smoot-Hawley Tariff Act*) *(17 June 1930).*
[6] Douglas A Irwin, 'From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of US Trade Policy in the 1930s', in Michael D Bordo, Claudia Goldin and Eugene N White (eds), *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century* (University of Chicago Press, 1998) 325, 333; Thomas J. Bollyky and Petros C. Mavroidis, 'Trade, Social Preferences and Regulatory Cooperation The New WTO-Think' (2017) 20(1) *Journal of International Economic Law* 1, 1.
[7] 'The modern law of international trade may fairly be described as a product of World War II, or to be more precise, of the perceptions of the Allied Planners of the post-war world'. Lowenfeld, *International Economic Law* (Oxford University Press, 2nd ed, 2008) 23; *GATT Secretariat*, The General Agreement on Tariffs and Trade, What it is and What it Has Done GATT Doc MGT/160/55 (4th Edition, January, 1956) 1.

immediate attention on the factors encountered in inter-State trade relations in order to remedy the worsening economic crisis.[8] The development of international trade has not been a smooth process due to a wide range of events occurring throughout several centuries. Conflicting interests of different trading nations in the world have led to tariff concessions and trade rules being imposed for economic and political stability.[9] The international trade situation today is the outcome of collective efforts by States to establish a new world order for an effective and harmonised system of international trade.[10] The motivation for creating the multilateral trading system emerged due to the Great Depression in the 1930s which resulted in worldwide economic recession, a decline in international trade, increased poverty, and the lack of an investment environment in the world, all of which eroded the economic stability of States worldwide.[11]

The removal of trade barriers, the establishment of a legal foundation for commercial transactions, the elimination of quantitative restrictions, and the desire for equitable treatment in the world were recognised by the Atlantic Charter and League of Nations in its Covenant in 1919.[12] The Atlantic Charter,[13] considered to be the first international legal instrument, recognised the importance of international trade and also identified the importance of countries adhering to effective trade practices in order to establish peace and prosperity among nations.[14] The Atlantic Charter encouraged an environment of free trade, equal access to and opportunity for trade between nations for the first time in the history of

[8] Lowenfeld, *International Economic Law* above n 16, 24; Debra P. Steger, 'Redesigning the World Trade Organization for the Twenty-first Century', 5 <http://www.idrc.ca/openbooks/455-0/>, accessed on 15 May 2017; J Goldstein, 'Creating the GATT Rules: Politics, Institutions and American Policy' in Robert Howse (ed), *The World Trading System: Critical Perspectives on the World Economy* (Routledge, 1998) Vol 1, 22.
[9]Surya P Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' (2006) 53 *Netherlands International Law Review* 273, 277; Nicholas Crafts and Peter Fearon, *The Great Depression of the 1930s: Lessons for Today* (1st ed, Oxford University Press, 2013) 2; *GATT Secretariat*, The General Agreement on Tariffs and Trade, What it is and What it Has Done GATT Doc MGT/160/55 (4th ed, January, 1956) 1.
[10] Lowenfeld, *International Economic Law* above n 16, 24.
[11] Douglas A. Irwin, *Free Trade under Fire* (Princeton University Press, 2nd ed, 2005) 203; Susan Tiefenbrun 'Free Trade and Protectionism: the Semiotics of Seattle' (2000) 17(2) *Arizona Journal of International and Comparative Law* 257, 260.
[12] League of Nations, *Covenant of the League of Nations* (28 April 1919) art. 23 (e); *Atlantic Charter*, clause 4.
[13] President Roosevelt and Prime Minister Churchill signed the Atlantic Charter on 12 August 1941. The fifth clause states that '[t]hey [USA and UK] desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security'. *Atlantic Charter* clause *5*.
[14] The Charter states that '[the USA and UK]… will endeavour with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity'. *Atlantic Charter*, clause 4.

international trade. This Charter provided countries with equal opportunities to conduct trade activities irrespective of their economic status.

The US took the initiative to create a Multilateral Trade Agreement (MTA) after World War II (1945) to repair the world's economy that had been destroyed by war.[15] Thereafter, the USA and the United Kingdom took steps to create an organisation which would regulate the international economic order and remove international trade barriers.[16] The negotiators of the International Trade Organization (ITO) failed to establish the ITO to regulate international trade as the US Congress refused to approve the ITO and, as a result, the ITO could not become an international trade organisation as intended.[17]

3.1 Introduction

The objective of this chapter is to demonstrate that Article XVIII of the GATT, the GSP Decision of 1971 and the Enabling Clause of 1979 are voluntary, ambiguous and not binding. Therefore, this chapter suggests amendments to Article XVIII of GATT, the GSP Decision 1971 and the Enabling Clause for the introduction of FDI into the WTO for the sustainable economic development of LICs. This will help to converge investment and trade into one organization. Hence an integrated FDI along with GSP could pave the way to enhance the trade and investment opportunities for LICs.[18] FDI can also help in strengthening of supply-side constraints of LICs and this will substantiate the idea of incorporating investment into the WTO.[19]

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[15] Clair Wilcox, *A Charter for World* Trade (Arno Press, New York, 1972) 5.

[16] Lowenfeld, *International Economic Law* above n 16, 24; Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge, 3rd ed, 2005) 23; Richard Toye, 'Developing Multilateralism: the Havana Charter and the Fight for the International Trade Organization, 1947-1948' (2003) 25 (2) *The International History Review* 282, 286.

[17] John H Jackson states that the US did not sign the ITO Charter due to the normalcy that returned after the end of World War II and due to the US election resulting in congress comprising a majority from one party and the president coming from the other party. John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2nd ed, 1997) 38; Hudec states that one reason behind the US refusing to sign the Havana Charter was the fact that the US refused to grant exceptions for tariffs and quantitative restrictions as a new preference for developing countries. See Robert E. Hudec, *Developing Countries in the GATT/WTO Legal System* (Gower, 1987) 24; Trebilcock and Howse, *The Regulation of International Trade* above n 25; Debra P. Steger, 'Redesigning the World Trade Organization for the Twenty-first Century', 5 available at <http://www.idrc.ca/openbooks/455-0Steger> accessed on 20 February 2017; H.W. Singer 'Prospects for Development' in S. Mansoob Murshed and Kunibert Raffer (eds) *Trade, Transfers and Development Problems and Prospects for the Twenty-first Century* (Edward Elgar Publishing Company, 1993) 7, 9; M. Rafiqul Islam, *International Trade Law* (LBC Information Services, 1st ed, 1999) 5.

[18] Stefan de Vylder, Gunnel Axelsson Nycander and Marianne Laanatza, *The Least Developed Countries and World Trade* (Elanders Novum AR, Gothenburg, Sida Studies No 05, 2001) 51.

[19] Ibid 30.

The GATT provided rules and regulations to regulate international free trade. All members, including developed and developing countries, joined the GATT as equal partners.[20] Developing countries soon realised that they were unable to compete with developed countries as there was no mechanism to protect their infant industries and reduce their balance of payment difficulties.[21] Developing countries had to compete with developed countries as equal partners, but it was far from a level playing field for developing countries. Developing countries wanted to be exempted from the MFN which ensures that a country cannot discriminate against other countries under Article I.1 of the GATT.[22] After negotiations between developed and developing countries, GATT Article XVIII was amended. This amendment allowed quantitative restrictions to reduce the balance of payment difficulties.[23] Part IV was introduced to the GATT which provides for SDT.[24] The GSP Decision of 1971and the Enabling Clause were introduced as a result of continued negotiations between developed and developing countries. However, a question remains whether Article XVIII of the GATT, the 1971 GSP Decision and the Enabling Clause ensure a level playing field for LICs, allowing them to integrate into the multilateral trading system without FDI.

Article XVIII of the GATT does not specify the countries that are eligible for derogation of the GATT obligation for economic development.[25] The literature discusses the shortcomings of Article XVIII, the GSP of the GATT and the Enabling Clause, but does not suggest an adequate solution that will make these provisions legally binding.[26] The

[20] Robert E. Hudec, 'GATT and the Developing Countries' (1992) (1) *Columbia Business Law Review* 67, 68.
[21] Ibid 70; *Background Document to the High Level Symposium on Trade and Development*, Geneva, 17–18 March 1999, prepared by the Development Division of the WTO available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc > accessed on 24 March 2019, 11.
[22] For example, if country A gives concessions to country B, the same treatment should be given to country Z, unconditionally. Under Article I.1, exceptions to the GATT were not allowed unless it was to protect infant industries under GATT Article XVIII. See also Robert E. Hudec, 'GATT and the Developing Countries' above n 3.
[23] *Background Document to the High Level Symposium on Trade and Development*, Geneva, 17–18 March 1999, prepared by the Development Division of the WTO available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc > accessed on 24 March 2019, 11.
[24] Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization' (Policy Research Working Paper 2388 The World Bank Development Research Group Trade July 2010) 5.
[25] Raj Bhala, 'Mercy for the Third World through GATT Article XVIII' (2002) 6 (1) *Singapore Journal of International & Comparative Law* 498, 514.
[26] Robert Howse, 'Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences' (2003) 18 (6) *American University International Law Review* 1333, 1380; Abdulqawi A. Yusuf, 'Differential and More Favourable Treatment: the GATT Enabling Clause' (1980) 14(6) *Journal of World Trade Law* 488, 507.

first part of the chapter traces the historical development of the GSP rules in the GATT/ WTO. The second part deals with the ambiguity of the GSP, and the third part discusses the legal status and the reform of the GSP to enhance the GSP benefits for LICs.

3.3 The Havana Charter and LICs

The draft Havana Charter recognised that there should be special provisions for government assistance to establish, develop and improve infant industries of underdeveloped countries.[27] In the draft Charter, a special chapter was devoted to economic development and reconstruction.[28] The Charter states in article 10(3) that the ITO should cooperate with the UN and other international organisations on matters concerning 'industrial and general economic development', particularly in 'those countries which are still relatively underdeveloped [countries].'[29]

Articles 15 and 16(3) of the draft Havana Charter also recognised that special treatment should be given to primary products and that economic cooperation among less developed countries should be strengthened. Article 21 permits countries to impose restrictions to reduce the gap in the balance of payment.[30] The draft Havana Charter also recognised LICs' balance of payment difficulties and the need to protect infant industries.[31] The US 'Suggested Charter for International Trade Organization' in 1946 recognised the waivers under Article 55:2 with regard to tariff and customs obligations.[32] Waiver is a concept that is intended, in an emergency, to derogate from temporary suspension of obligations agreed to by members under Article I of the GATT.[33] The Havana Charter provided waivers under article 77:3 on exceptional circumstances to derogate from MFN. The same provision was incorporated in the GATT 1947 under GATT Article XXV.[34]

In contrast to the above progressive provisions for LICs in the draft Havana Charter, the original GATT did not have any provisions intended to improve the LICs' low level of economic development, except for an infant industry protection clause under Article

[27] *Final Act of the United Nations Conference on Trade and Employment*: *Havana Charter for an International Organisation*, 24 March 1948 (*Havana Charter) art. 8*-15.
[28] See George Bronz 'The International Trade Organization Charter' (1949) 62(7) *Harvard Law Review* 1089, 1110.
[29] *Havana Charter* 10(3).
[30] Wilcox, above n 24, 56.
[31] *Havana Chater* arts. 10 (3) and 15 (1).
[32] *Suggested Charter for International Trade Organization*, Publication No. 2598, Commercial Policy Series No. 98 (Washington: United States Department of State, 1946; Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge University Press, 2012) 58.
[33] Feichtner, above n 32, 58.
[34] *WTO, Analytical Index of the GATT*, vol.II 890; Feichtner, above n 32, 59.

XVIII.[35] The central objective of the GATT was that rights and obligations be applied to all members equally without considering their economic disparity as a single undertaking.[36] In other words, the GATT members must grant MFN[37] treatment to other members under Article I:1 of the GATT 'immediately and unconditionally' for identical and similar or substituted products[38] with respect to custom duties, imports charges, internal taxes and regulations.[39]

The GATT preamble emphasised the importance of non-discrimination and reciprocity underlining free trade for all countries without considering any economic imbalance.[40] The objective of the GATT is to provide rules for the removal of barriers to international trade with a view to increasing the economic development of its members, irrespective of their various stages of economic development.[41]

3.4 GATT and Historical Development of Waivers

Soon after the formation of the GATT, LICs identified that economic development was possible only through increased industrialisation[42] and LICs felt that they could not achieve

[35] *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO, 11 and annex I, ('*Background Document*') <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 11; Patricia Michelle Lenaghan 'Trade Negotiations or Trade Capitulations: An African Experience' (2006) 17 (1) *Berkeley La Raza Law Journal* 117, 118; Hudec, 'GATT and the Developing Countries' above n 3, 69; Bartram S Brown 'Developing Countries in the International Order' (1994) 14 *Northern Illinois University Law Review* 347, 359; *Note by Pakistan Delegation on Article XVIII, Working Party 2 on Article XVIII* GATT Doc WP. 2/W.9 (31 May 1949) 1.

[36] 'Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods'. *GATT 1947* Preamble.

[37] If country A gives concessions to country B the same concessions should be given to country C.

[38] Article I deals with non-discriminatory tariffs at the border level for like products and art III deals with non-discriminatory tariffs for like products at the national level (similar and substitute products). *GATT 1994*, arts I & III.

[39] GATT Panel Report, *Spain-Tariff Treatment of Unroasted Coffee,* GATT Doc L/5135 (adopted on 11 June 1981) BISD 28S/102; See *Report of the Working Party on Border Tax Adjustments*, GATT Doc L/3464 (adopted on 2 December 1970) [18]; See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996); *GATT 1994* art III: 2, first sentence and second sentence; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products,* WTO Doc WT/DS135/AB/R (adopted on 5 April 2001).

[40] *Relevance of the Articles and Instruments of GATT to the Process of Structural Adjustment* GATT Doc L/5156 (15 June 1981) (Note by the Secretariat); '… reciprocity refers to the "ideal" of mutual changes in trade policy that bring about equal changes in import volumes across trading partners'. Kyle Bagwell and Robert W. Staiger 'An Economic Theory of GATT' (1999) 89 (1) *The American Economic Review* 215, 224; Kenneth W. Dam, *The GATT Law and International Economic Organization* (University of Chicago Press, 1970) 58, 61, 87, 91.

[41] See Tigani E. Ibrahim, 'Developing Countries and the Tokyo Round' (1978) 1 *Journal of World Trade* 1, 1; Ruth Gordon, Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime' (2006) 8(1) *Berkeley Journal of African-American Law & Policy* 79, 83.

[42] Constantine Michalopulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries (Draft Working Paper, 28, February 2000) 1, 3.

this objective under an open economy.[43] In fact, LICs wanted to protect infant industries.[44] They found that they could not depend on their income being derived solely from primary products, as the protective methods adopted by developed countries resulted in a decrease in the export of LICs' primary products. Moreover, they wanted to reduce their balance of payment deficit which was a matter of urgency at that time.[45]

LICs wanted to improve the level of their domestic products and investments by producing consumer goods and machinery for their industries, and sourcing raw materials.[46] Developed countries imposed heavy tariffs to prevent cheap products coming from LICs.[47] Simultaneously, LICs wanted the GATT rules to be restructured to protect their industries. The infant industry protection argument was put forward by LICs on the basis that new industries did not generate comparative advantage unless such industries were saved from foreign competition.[48]

Furthermore, it was necessary for LICs to increase exports and reduce heavy dependence on imports in order to reduce balance of payment deficits as the exports of these countries were not rapidly growing.[49] Therefore, LICs wanted to introduce rules for trade restrictions in order to prevent further worsening of their economic crises. In short, to address the difficulties they faced, LICs wanted: (a) to capture market access of developed countries through preferences for their exports; (b) exceptions to protect their infant industries; and (c) to stabilise world commodity prices. In fact, primary products that were of special interest to the economic development of LICs were not on the agenda of developed countries in the trade liberalisation process.[50]

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[43] MD. Rizwanul Islam and Shawkat Alam 'Preferential Treatments and the Scope of GATT Article XXIV, GATT Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence' *Netherlands International Law Review (*2009) LVI 1, 24.

[44] *A Report by the Secretariat on Trade, Trade Barriers and the Activities of the Contracting Parties, International Trade in 1955* GATT Doc MGT/49/56 (Part III) 1 to 15.

[45] Collen Hamilton and John Whally, 'Introduction' in John Whally (ed) *Developing Countries and the Global Trading System* (The Macmillan Press Ltd, 1989) vol.1,3, 13; Chantal Thomas, 'Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order' (2000) 15 (6) *American University International Law Review* 1249, 1259.

[46] Indraprasad Gordhanbhai Patel, 'Trade and Payments Policy for a Developing Economy' in Roy Harrod and Douglas Hague (eds) *International Trade Theory in a Developing World* (Macmillan St. Martin's Press, 1963) 309, 314.

[47] Alfred Maizels, 'Recent Trends in World Trade' in Roy Harrod and Douglas Hague (eds) *International Trade Theory in a Developing World* (Macmillan St. Martin's Press, 1963) 31, 39.

[48] Jing Ma and Yuduo Lu, 'Free Trade or Protection: A literature Review on Trade Barriers' (2011) 2(1) *World Economy* 69, 72; Robert E. Baldwin 'The Case Against Infant-Industry Tariff Protection' (1969) 77(3) *Journal of Political Economy* 295, 295.

[49] Hudec, 'GATT and the Developing Countries'above n 3, 69.

[50] See Ibrahim, above n 41, 2.

3.5 GATT Article XVIII and Development Concern

The GATT did not have a rule-based legal system because often GATT panel reports were not adopted and implemented.[51] As a result, developed countries could impose restrictions on LICs' trade in agriculture, textiles and clothing,[52] and LICs found that, with their vulnerable economies, it was difficult for them to compete with developed countries as equal partners in international trade.[53] They therefore wanted to obtain relief under Article XVIII of the GATT. These difficulties faced by LICs were succinctly explained by Sirley Corea, the Sri Lankan (then Ceylonese) representative at the Plenary Session on 8th November 1954,[54] who summarised the difficulties face by LICs in integrating into the multilateral trading system as follows:

> It is nevertheless true to say that during the seven years that we have operated the General Agreement it has become increasingly clear that the Agreement as it now stands does not meet adequately the requirements of underdeveloped countries and those whose economies depend primarily on the export of raw materials and agricultural products.[55]

In the meantime, the GATT members wanted to establish a permanent trade organisation under the Organization for Trade Cooperation (OTC).[56] The United States Congress declined to accept this Charter as well because they did not want to grant exceptions under

[51] 'Any party to the dispute could at any stage block the process. There were no deadlines for the settlement process, for example on how long consultations should last. The binding nature of the rulings could be disputed and their quality was often considered inadequate'. Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 25, 26; Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Praeger Publishers, New York, 1975) 62 and 152; *Multilateral Trade Negotiations the Uruguay Round, Negotiating Group on Dispute Settlement*, Meeting of 6 April 1987 MTN.GNG/NG13/1 (10 April 1987) (Note by the Secretariat) [6]; *Negotiating Group on GATT Articles, Grandfather Clauses in the Protocol of Provisional Application and in Accession Protocols*, GATT Doc. MTN.GNG/NG7/W/71 (2 May 1990) (Note by Secretariat) [1].

[52] GATT Panel Report, *Uruguayan Recourse to Article XXIII* GATT Doc. L/1923-11S/95 (adopted on 16 November 1962) [20]; Subedi, 'The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?' above n 18, 279.

[53] Hunter Nottage 'Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment' (2003) 6(1) *Journal of International Economic Law* 23, 25.

[54] *GATT Press Release*, Speech by the Hon. Shirley Corea, MP Minister of Commerce, Trade and Fisheries (Ceylon) Ninth Session of the Contracting Parties GATT Doc GATT/177 (9 November 1954).

[55] *GATT Press Release*, Speech by the Hon. Shirley Corea, M.P Minister of Commerce, Trade and Fisheries (Ceylon) Ninth Session of the Contracting Parties GATT Doc GATT/177 (9 November 1954) 2

[56] Robert E. Hudec, *Developing Countries in the GATT/WTO Legal System* (Gower Publishing Company Limited, 1987) 33.

the GATT Article I.1.[57] However, in this Session, LICs were able to negotiate stronger legal rules for the protection of infant industries.[58]

In 1955, the first review session of the GATT (1954-55 GATT Review Session) amended Article XVIII of GATT to introduce Article XVIII:1,[59] which allowed developing countries to get exceptions from the MFN doctrine[60] on the grounds of balance of payment difficulties,[61] to introduce quantitative restrictions,[62] and to obtain 'government assistance to economic development and reconstruction'.[63] Furthermore, developing countries were allowed to have export subsidies for manufactured goods,[64] and rules for tariff protections.[65] The amended Article XVIII did not identify which developing countries were eligible to derogate the GATT Article I.1. This can be seen in the wording of Article XVIII which states:

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[57] Ibid; The Text of the OTC Agreement is Published in GATT Doc BISD Vol 1 (revised) (1955); *The Organization for Trade Cooperation Background* (March 1955) For Sale by the Superintendent of Documents, U.S. Government Printing Office Washington 25, D.C; GATT Analytical Index, Institutions *and Procedure*, 1086.

[58] Hudec, *Developing Countries in the GATT/WTO Legal System* above n 56, 3.

[59] *Review Session of GATT 1954*, 1955, BISD, 3rd Suppl. 1955, 179–89; *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO, and annex I, ('*Background Document*') <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 11; OECD Joint Group on Trade and Competition, 'The Role of "Special and Differential Treatment" at the Trade, Competition and Development Interface', COM/TD/DAFEE/CLP (2001) 21/Final, OECD Publication, available at <http://www.oecd.org/ech> accessed 3 August 2017, 5; Matthew G. Snyder, 'GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences' (2012) 33(4) *Michigan Journal of International Law* 821, 825; Andrew L Stoler 'The Evolution of Subsidies Disciplines in GATT and the WTO' (Symposium on WTO Litigation: Issues and Reforms, Law School of Sydney University, Australia, 14 August 2009) 1, 3.

[60] *GATT 1994*, article I; Kevin C. Kennedy, 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference' (2012) 20(3) *Michigan State International Law Review* 521, 535; a new GATT art. XXVIII (bis) provides the relaxation of reciprocity when calculating tariff to assist economic development of developing countries. *Background Document to the High Level Symposium on Trade and Development*, Geneva, 17–18 March 1999, prepared by the Development Division of the WTO, and annex I, ('*Background Document*') <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 11.

[61] Second Review Session, GATT art. XVIII (B) was introduced.

[62] OECD Joint Group on Trade and Competition, 'The Role of "Special and Differential Treatment" at the Trade, Competition and Development Interface', COM/TD/DAFEE/CLP (2001) 21/Final, OECD Publication <http://www.oecd.org/ech> accessed on 26 March 2017 [88]; see Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford University Press, 3rd ed, 2009) 534; see *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO, and annex I, ('*Background Document*') <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 11.

[63] See *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO, and annex I, ('*Background Document*') <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 11; *GATT 1994*, arts XVIII, sections A, B and C; see T Ademola Oyejide, 'Special and Differential Treatment' in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO: A Handbook* (World Bank, 2002) 504, 505.

[64] *GATT 1994*, art XVI: 4.

[65] *GATT 1947* article XXVIII bis.

> The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.[66]

And:

> Consequently, a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.[67]

This Article mentions 'low standards of living' and 'early stages of development'. These two phrases in the Article are ambiguous because Article XVIII does not specify the countries to which it is referring. Is GATT Article XVIII referring to developing countries in general or LICs or LDCs? It is difficult to determine what constitutes 'low standards of living' and 'early stages of development', even though Annex I to the GATT tries to clarify the phrase 'early stages of development'.[68] However, Annex I can be interpreted in different ways as it does not provide explicit criteria for determining which countries fall into the category of the 'early stages of development'.

Accordingly, the terms 'early stages of development' and 'low standards of living' need to be clarified. Do they refer to the population, resources, literacy, GDP, GNI or trade capacity or FDI of a country, or perhaps a combination of all these factors? Furthermore, a question arises whether Article XVIII of the GATT envisages three types of countries which have different levels of development:

(1) countries whose 'economy... can only support low standards of living' and [are] 'in the early stages of development';[69]

(2) the 'economy …[of a member who] is in the process of development but which does not come within' the first category;[70] such that

[66] *GATT 1994*, art XVIII:1.
[67] *GATT 1994*, art XVIII: 4(a).
[68] '...low standards of living, the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting parties'. *GATT 1994*, annex I.
[69] *GATT 1994*, art XVIII: 4(a).
[70] *GATT 1994*, art XVIII: 4(b); John H Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Michie Company Law Publishers, 1969) 650.

(3) a member with the first type of economy can invoke sections A,[71] B[72] and C[73] of Article XVIII of the GATT in order to deviate from the tariff preferences. A member with the second type of economy is covered by section D[74] of Article XVIII of the GATT.

An analysis of sections A, B, C and D of the GATT Article XVIII indicates that there are no adequate guidelines on how to interpret the term 'developing country' under the GATT and to enable countries to qualify for exceptions under Article 1 of GATT.[75]

In addition, Article XVIII: 1 of the GATT does not provide clear eligibility criteria regarding concessions for a developing country. Therefore, neither Article XVIII nor Annex I provide a basis for determining what constitutes a developing country.[76] For example, when Sri Lanka (then Ceylon) lodged an application under Article XVIII for exceptions, the GATT panel decided that Sri Lanka was qualified to obtain concessions under Article XVIII on the basis of a low standard of living by considering per capita income of Sri Lanka instead of GDP per capita.[77]

The GATT Panel considered Article XVIII of the GATT, because Sri Lanka resorted to this article on the basis that it was considered to be an LIC under this Article. In this case, the Panel took into consideration the manufacturing, mining and construction industries in Sri Lanka when deciding that Sri Lanka was a country which satisfied the requirements of Article XVIII.[78] Moreover, in the case of Sri Lanka, the Panel was unable to explain which countries were qualified to benefit under Article XVIII of the GATT. In the present context, per capita income cannot give a true picture of a country's status under Article XVIII of the GATT without considering trade capacity and FDI inflows of a country and share of foreign value added (FVA).[79]

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[71] Section A allows members whose economies can be classified as 'low standard of living' and who are at early stages of development to adjust or withdraw tariff concessions to protect infant industries.
[72] Section B permits members to restrict imports to address the balance of payment problems.
[73] Section C authorises members to take measures to promote already established industries.
[74] Section D allows members whose economies are just above the 'low standard of living' but in the process of development to deviate from the GATT obligations to establish particular industry.
[75] Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* above n70, 654.
[76] Wil D Verwey, 'The Principle of Preferential Treatment for Developing Countries' (1983) 23(3&4) *Indian Journal of International Law* 343, 359.
[77] *GATT Panel Report, Ceylon – Article XVIII Applications*, GATT Doc L/71 (26 November 1957); Fan Cui, 'Who are the Developing Countries in the WTO?' (2008) 1(1) *Law and Development Review* 123, 134.
[78] *GATT Panel Report, Ceylon – Article XVIII Applications*, GATT Doc L/71 (26 November 1957).
[79] UNCTAD *World Investment Report 2018 – Investment and New Industrial Policies*, United Nations Publication, Geneva (2018) 22.

In the *Australian Waiver Case*, Australia wanted to grant preferential treatment by reducing tariffs for selected products originating from developing countries.[80] Australia tried to identify the countries under Article XXV: 5 of the GATT. In this case, it was difficult to identify the countries that should benefit from the reduction of tariffs by reference to Article XVIII of the GATT. As a result, Australia had to depend on the developing country category recognised by international organisations.[81]

Furthermore, section one of Article XVIII of the GATT refers to countries which are 'in the early stages of economic development': this does not depict the true picture of developing countries as most are now beyond the early stages of development. Therefore, it can be contended that, today, section one of Article XVIII of the GATT applies to least-developed countries. In this context, section one of Article XVIII of the GATT is not relevant as a means of determining a country's economic status because the WTO accepts the UN listing of least-developed countries.[82]

The language used in Article XVIII allows developed countries to use their discretion when deciding which developing countries should be allowed to derogate from the MFN principle.[83] For example, Sri Lanka (Ceylon) applied for infant industry measures under the amended GATT Article XVIII in 1957; subsequently, the GATT members appointed a panel to investigate the matter and provide recommendations.[84] In 1960, after four years, the Panel gave its decision allowing Sri Lanka to obtain relief under GATT Article XVIII.[85] This shows that developed countries in the GATT took a tough stand to grant waivers enshrined in Article XVIII of the GATT, making waivers near-impossible to obtain.

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[80] *Australian Waiver Case* 1966, BISD Supp GATT Doc L/2443 GATT Doc. L/2464, 14, 162 et seq; Abdulqawi Yusuf, *Legal Aspects of Trade Preference of Developing States* (Nijhoff Publishers, 1982) 63, footnote 29; GuglielmoVerdirame, 'The Definition of Developing Countries under GATT and Other International Law' (1996) 39 *German Yearbook of International Law* 164, 178.
[81] Yusuf, *Legal Aspects of Trade Preference of Developing States* above n 80, 178.
[82] *WTO Agreement,* Article XI:2.
[83] Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 (2) *Journal of International Economic Law* 507, 507.
[84] *Report by the Government of Ceylon on the Operation of Release Granted to it under Section C of Article XVIII, First Annual Review under Article XVIII:6* GATT Doc L881 (15 October 1958); *Background Paper Prepared by the Secretariat XVIII:6 Third Annual Review under Article XVIII*: GATT Doc L/1593 (31 October 1961)
[85] GATT Panel Report on *Article XVII, Second Annual Review under Article XVIII:6* GATT Doc L/1228 (3 June 1960).

The request made by Sri Lanka to obtain relief under Article XVIII and the lengthy panel procedure prove that developing countries were further frustrated by the GATT legal system in their attempt to have their grievances addressed in order to improve their economic development, particularly since the Panel based its ruling on a textual interpretation of the Article.[86] For example, if any developing country sought any relief under Article XVIII (c) in regard to the imposition of restrictions to protect infant industries and another member objected to such restriction, a GATT Panel had to give a ruling, and subsequently the process could drag on for several years.[87]

Consequently, LICs considered that the open economy made it near-impossible for them to obtain any benefits, and that benefits from liberal trade would not have been accessible to them in spite of the progressive amendments that had been introduced to the GATT by Article XVIII as discussed above.[88] Further, they considered that it was difficult for them to compete with developed countries as most of them had recently won independence from developed countries. After LICs became independent, these countries tried to push the GATT to consider their low level of economic status and subsequently provide more favourable rules to improve infant industries and to reduce the balance-of-payment gap.

3.6 Haberler Report and its Impact on LICs

At the 1957 ministerial meeting of GATT, a Panel was established to investigate the reasons why less developed countries were unable to integrate successfully into international trade, and why developed countries had introduced extensive protectionist rules for agricultural products.[89] Haberler, the chairman of the Panel, submitted his report in 1958. The report stated that 'there [was] some substance in the feeling of disquiet among primary producing countries …'.[90] According to his report '… the rules and conventions' introduced by developed countries for 'commercial policies are relatively unfavourable to [LICs]'.[91] In this report, Haberler investigated why commodity prices were decreasing. The report found

[86] Hudec, *Developing Countries in the GATT/WTO Legal System* above n 56, 34; Hudec, *The GATT Legal System and World Trade Diplomacy* above n 51, 80, 81 and 82.
[87] Hudec, The *GATT Legal System and World Trade Diplomacy* above n 86, 82.
[88] Meeting of Ministers, *Statement Made by Mr. Whiduzzaman Minister for Commerce, Pakistan on 16 May 1963* GATT Doc Spec (63)87 (16 May 1963) (Delegation Release) 2.
[89] See *Preparatory Work for Ministerial Meeting in the GATT, Consultative Group of Eighteen, Sixteenth Meeting* GATT Doc CG. 18/W/62 (12 October 1981) (Secretariat Note) 2.
[90] *GATT 1958 Trends in International Trade Report* by a Panel of Experts, The Contracting Parties to the General Agreement on Tariffs and Trade Geneva, October 1958 (Haberler Report) para 62; *Basic Instruments and Selected Documents Series* GATT Doc. Spec (59) 39 (16 March 1959) 2 and 3.
[91] *GATT 1958 Trends in International Trade Report* by a Panel of Experts, The Contracting Parties to the General Agreement on Tariffs and Trade Geneva, October 1958 (Haberler Report) paras 62 and 343; Bartram S. Brown 'Developing Countries in the International Trade Order' (1993-1994) 14 *Northern Illinois University Law Review* 347, 366.

that developed countries had adopted protectionist measures to curtail the import of primary products from LICs.[92] In other words, Haberler's report found that the measures adopted by developed countries adversely affected the LICs. This report suggested reducing heavy taxes that were imposed by developed countries.[93]

In 1960, the GATT members adopted another Declaration implementing the Provisions of Article XVI: 4 of GATT, agreeing to suspend export subsidies on manufactured products.[94] However, developing countries were under no obligation to accept this provision. Fourteen developed countries did accept. Furthermore, members agreed to stop granting any form of subsidy on the export of any product other than the primary product.

Thereafter, in 1961, the GATT members adopted another resolution to promote the trade of less-developed countries.[95] In this resolution, developed countries agreed to remove the quantitative restrictions that affected the export trade of less-developed countries, to reduce tariffs on processed products and raw materials, and reduce fiscal duties in developed countries.[96] Furthermore, developed countries granted LICs preferential market access.[97] The Declaration, in addition, appealed to developed countries to be flexible in terms of reciprocity.[98] The Declaration stressed the importance of giving technical and financial

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[92] Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why When and How', WTO Staff Working Paper ERSD-2004-03, 24 <http//:www.wto.org/English/res_e/reser_eersd2004 03_e.htm.pdf> accessed on 27 May 2017, 4.

[93] *GATT 1958 Trends in International Trade Report* by a Panel of Experts, The Contracting Parties to the General Agreement on Tariffs and Trade Geneva, October 1958 (Haberler Report) para 341.

[94] *Declaration Giving Effect to the Provisions of Article XVI: 4 of the General Agreement on Tariffs and Trade* GATT Doc GLI/223 (Geneva November 1960); *Second Declaration on the Extension of the Standstill Provisions of Article XVI: 4 of the General Agreement on Tariffs and Trade* GATT Doc (Geneva 5 March 1964); *Draft Report of Working Party on Commodities, Impact of Problems on International Trade* GATT Doc W.19/7 (22 November 1961**)** 1.

[95] *Declaration on Promotion of the Trade of Less Developed Countries* GATT Doc L/1657, Annex (adopted 1 December 1961) 5; GATT *1958 Trends in International Trade* (Haberler Report); Secretariat Note, *Preparatory Work for Ministerial Meeting in the GATT, Consultative Group of Eighteen, Sixteenth Meeting* GATT Doc CG. 18/W/62 (12 October 1981) 4; *Proposed Declaration Regarding Trade Problems of Less-Developed Countries* GATT Doc Spec (61) 361 (25 November 1961) paras1, 2 and 4.

[96] Press Release, *Plans for Reducing Barriers to Trade of Less-Developed Countries Examined by Committee III* GATT Doc GATT/696 (15 May 1962).

[97] *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO and Annex I available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019 ('*Background Document*') 13.

[98] *Background Document to the High Level Symposium on Trade and Development,* Geneva, 17–18 March 1999, prepared by the Development Division of the WTO and Annex I available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019 ('*Background Document*') 13; Committee I on Expansion of Trade, Draft Report of Committee I GATT Doc Spec (59)148 (5 September 1959) 3; *Explanatory Note by the Executive Secretary, Committee III – Expansion of Trade Draft Annex A, Facilities Available to Less-Developed Countries for Participating in the Forthcoming General Meeting of Tariff Negotiations* GATT Doc Sec (61) 111 (28 March 1961) 2.

assistance to LICs to improve their domestic products and market expansion.[99] A salient feature of the Declaration was its intention to implement a programme of reduction and elimination of barriers imposed on the exports of LICs.[100] However, these agreements did not give any legal rights to waivers and the GATT Contracting Parties created no legal framework until 1963.

To a certain extent, in the Kennedy Round (in 1963) members agreed to provide a legal basis for the granting of concessions to LICs to enable them to expand their international trade and integrate them into the international trading system as equal partners.[101] After the Ministerial Meeting in 1963, a Special Session was held from1964 to 1965. In this Session, developed countries recognised that reciprocity cannot exist among all the GATT members alike because of LICs' different levels of economic development.[102] As a result of the debate on the modalities for economic development between North and South (developed and developing countries), changes were made for developing countries in the UN system in the 1960s and subsequently in the GATT.[103]

3.7 Demand for Equitable System for Trade

The GATT Ministerial Meeting held in 1965 introduced Part IV,[104] comprising three new Articles.[105] It was similar to Article XVIII of the GATT, which endeavoured to align SDT

[99] *Declaration on Promotion of the Trade of Less Developed Countries* GATT Doc L/1657, Annex (adopted 1 December 1961) para 3.
[100] Meeting of Ministers, *United States Proposal for a Declaration on Promotion of the Trade of Less-Developed Countries* GATT Doc MIN/3 (27 November 1961) para 4(a).
[101] Thus, members agreed: '[t]hat in the trade negotiations every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries.' *Background Document to the High Level Symposium on Trade and Development*, Geneva, 17–18 March 1999, prepared by the Development Division of the WTO and Annex I available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019 ('*Background Document*') 13.
[102] Hector Gros Espiell, 'GATT: Accommodating Generalized Preferences' (1974) 8(4) *Journal of World Trade* Law 341, 345.
[103] See Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd ed, Routledge, 2005) 471.
[104] See Ignaz Seidi-Hoheneldem, *International Economic Law* (2nd ed, Dordrecht: Martinus Nihoff, 1992) 95; Jianfu Chen, 'S&D Treatment for Developing Countries in the WTO Trade Regime: A False Solution on A Wrong Footing for LDCs' in Jianfu Chen and Gordon Walker (eds), *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Federation Press 2004) 109, 116; *Declaration, On the Defacto Implementation of the Provisions of the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development* GATT Doc L/2356 (11 February 1965) (adopted 8 February 1965).
[105] *Declaration, On the Defacto Implementation of the Provisions of the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development* GATT Doc L/2356 (11 February 1965) (adopted 8 February 1965); GATT 1994, articles XXXVI, XXXVII, XXXIII.

provisions to LICs without clearly specifying which countries were eligible for the SDT.[106] Part IV encouraged developed countries to open their market to LICs, however, developed countries were reluctant to relax import duties on the primary products of LICs.[107] At this Session, a new GATT Article XXVIII (bis) was introduced to negotiate tariff protection to assist the economic development of LICs.

In the meantime, after obtaining independence from their colonial masters, the newly independent states wanted to establish a NIEO.[108] NIEO is a concept created by a group of countries within the UN system to alleviate poverty, and the UN recognised this as a right to development.[109] NIEO pushed to have a more equitable international trade order prevailing between developing countries and developed countries.[110] They organised this under the UN. The United Nations Conference on Trade and Development (UNCTAD) at its inaugural conference (UNCTAD 1) endeavoured to introduce the GSP in 1964. The Conference had three aims: (a) to increase exports of developing countries to developed countries; (b) to minimise heavy dependency on trade of primary commodities as their main source of exports; and (c) to reduce foreign borrowings.[111] Simultaneously, developed countries also took initiatives to create a mechanism to provide preferences within the GATT without violating the core MFN principle. They held a meeting in July 1965 and agreed to examine a program of preferences given to less developed countries.[112]

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[106] Trebilcock and Howse, *The Regulation of International Trade* above n 103, 478; *United Nations Conference on Trade and Development on Least Developed Countries Report 2016: The Path to Graduation and Beyond – Making the Most of the Process* (UN, New York and Geneva 2016) VII.

[107] *GATT 1994*, arts XXXVI, XXXVII and XXXIII; Trebilcock and Howse, *The Regulation of International Trade* above n 103, 478; *Draft Report of the Committee on Trade and Development* GATT Doc. Spec (68) 120 (7 November 1968) 2.

[108] Frank J. Garcia, 'Trade and Inequality: Economic Justice and the Developing World (2000) 21 (4) *Michigan Journal of International Law* 976, 984; *Declaration on the Establishment of a New International Economic Order*, GA Resolution 3201(S-VI) (1 May 1974); *Permanent Sovereignty Over Natural Resources*, GA Resolution 1803 (XVII) (14 December 1962) ('*Permanent Sovereignty*'); *Proceedings of the United Nations Conference on Trade and Development* (Final Act and Report vol I) (23 March to 16 June 1964); Karen Smith and Ian Taylor, *The United Nations Conference on Trade and Development* (UNCTAD) (Routledge, 2007) 37.

[109] Surya P. Subedi, 'A Shift in Paradigm in International Economic Law: From State-Centric Principles to People-Centred Policies' (2013) 10 (3) *Manchester Journal of International Economic Law* 314, 322; H.W. Singer, 'The New International Economic Order: An Overview' (1978) *The Journal of Modern African Studies* 16(4) 539, 541.

[110] See also *Special Measures to be Taken in Favour of the Least Developed Countries Among the Developing Countries* GA Resolution 2564 (XXIV) (13 December 1969); *International Development Strategy for the Second United Nations Development Decade*, GA Resolution 2626(XXV) (24 October 1970).

[111] Kennedy, 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference' above n 60, 536.

[112] *Draft Record of Discussions of the Meeting Held from 21-25 June 1965* GATT Doc. Spec (65) 62 (25 June 1965).

In 1968, UNCTAD II was held in New Delhi and introduced a doctrine called 'differential treatment' to enable the trade of developing countries to promote their more rapid economic development under the Resolution 21.[113] The UNCTAD appreciated the difficulties of developing countries with the GATT MFN principle because 'one size fits all' is inappropriate for conducting international trade among countries with different levels of economic development.[114] At the insistence of the UNCTAD, the GATT needed to work out a mechanism of special tariff preferences for developing countries without contravening the MFN principle enshrined in Article I:1 of the GATT. In this regard, the GATT Secretariat issued a Technical Note for preferential treatment for developing countries and for an amendment to GATT Article XXV:5.[115]

3.8 Waivers under GATT

Further, in the Technical Note it was suggested that developed countries adopt a declaration to grant the GSP on a temporary basis.[116] Thereafter, Article XXV:5 of GATT was amended and that permitted members to grant waivers in exceptional circumstances.[117] According to Article XXV:5, the waivers needed to be approved by a two-thirds majority of GATT members.[118] The waivers in Article XXV:5 cover an area where other GATT articles do not provide rules.

GATT Article XXV:5 does not elaborate or specify what the exceptional circumstances are.[119] The exact criteria to be adhered to have not been defined in this GATT article. The

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[113] The resolution stated that '… the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth'. *Preferential or Free Trade of Exports of Manufactures and Semi-Manufactures of Developing Countries to the Developed Countries* (Resolution 21) UN Doc. 78th plenary meeting, 27 March 1968.

[114] Oliver Long, Law *and its Limitations in the GATT Multilateral Trade System* (Graham & Trotman Martinus Nijhoff Publishers, 1987) 90**;** Sonia E Rolland, *Development at the World Trade Organization* (1st ed, Oxford University Press, 2012) 71; Grossman, Gene M and Alan O. Sykes, 'Preference for Development: the Law and Economics of GSP (2005) 4(1) *World Trade review* 41, 42.

[115] *Preferential Tariff Treatment for Developing Countries* GATT Doc Spec (70) 6 (5 February 1970) (Technical Note by the Secretariat).

[116] *Preferential Tariff Treatment for Developing Countries* GATT Doc Spec (70) 6 (5 February 1970).

[117] Minutes of Meeting GATT Doc C/M/69 (28 May 1971) 1 (Technical Note by the Secretariat).

[118] *Article XXV:5 (a) , Applicability of the Provisions of Article XXV(a) to Obligations defined in Part I of the General Agreement* GATT Doc L/403 (7 September 1955); GATT requires its members to vote by two thirds when a country accedes to the GATT as a member. *GATT 1947* art. XXXIII; art. XXV:5 states that members are entitled to one vote in all meetings; art. XXV states that majority rule prevails but in practice consensus vote has been adopted. See full discussion in Mary E. Footer 'The Role of Consensus in GATT/WTO Decision making'(1996-1997) 17(1) *Northwestern Journal of International Law and Business* 653, 665; Kevin M Harris, 'The Post-Tokyo Round GATT Role in International Trade Dispute Settlement' (1983) 1(1) *Berkeley Journal of International Law* 142, 145.

[119] *Article XXV:5 (a) , Applicability of the Provisions of Article XXV(a) to Obligations defined in Part I of the General Agreement* GATT Doc L/403 (7 September 1955).

GATT Panels interpreting Article XXV:5 adhered to strict interpretation of rules instead of looking at the preparatory work and the intentions behind the amended Article XXV:5. In *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the Headnote to the Schedule of Tariff Concessions*,[120] it was held that:

> '… a waiver was a clause providing an exception to the application of the General Agreement, the exception must be interpreted narrowly in accordance with the interpretation of exceptions recently confirmed by a panel report (L/6513) adopted by the Contracting Parties.'[121]

This means that exceptional circumstances should be interpreted strictly and according to individual cases. The WTO Agreement Article IX (1), (2) and (3) also provides waivers for exceptional circumstances under Article IX (4).[122]

Subsequently, GATT Article XXV: 5 paved the way for incorporating GSP into the GATT system, but a question arises whether the GSP is considered as a waiver because the Decision of the GSP does not refer to GATT Article XXV:5.[123] The GSP can be defined as a concept that provides tariff preferences temporarily to balance economic disparity between equals and unequals in international trade transactions, and not to reciprocate in order to increase economic benefits to disadvantaged countries, thereby promoting export-driven industrial growth. These SDT provisions are embodied in the GSP for developing countries. The GSP provided non-reciprocal and discriminatory preferences on the basis of the economic disparity of developing countries.[124]

The GSP was adopted by GATT in 1971 for a ten-year period as an exception to the MFN doctrine enshrined in Article I of the GATT to bring equality between developed and

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[120] GATT Panel Report, *United State – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the Headnote to the Schedule of Tariff Concessions* GATT Doc L/6631-37S/228 (22 January 1990) (adopted on 7 November 1990) [3.33].
[121] GATT Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the Headnote to the Schedule of Tariff Concessions* GATT Doc L/6631-37S/228 (22 January 1990) (adopted on 7 November 1990) [3.33].
[122] Isabel Feichtner, 'The Waiver Power of the WTO: Opening the WTO for the Political Debate on the Reconciliation of Competing Interest' (2009) 20 (3) *The European Journal of International Law* 615, 619.
[123] Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 513.
[124] *Decision on Trade Negotiations among Developing Countries of November 26, 1971*, BISD, 18th Supp 26 (1971) L/3636 (30 November 1971**)** <https//docs.wto.org/gattdocs/q/1971_75.htm> accessed 02 October 2020; *Background Document to the High Level Symposium on Trade and Development*, Geneva(17–18 March 1999) prepared by the Development Division of the WTO <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc > accessed on 24 March 2019.

developing countries.[125] At that time, the main objective of the waiver decision was twofold: to increase the export revenue of developing countries to promote industrialization and to improve the economic growth of developing countries.[126] However, it was left to developed countries to determine which countries would be treated as LICs under the GSP scheme.[127] The important point here is that the decision to adopt the GSP Decision did not refer to the waivers contained in Article XXV:5 of GATT, thereby complicating the standing of waivers.

During the Tokyo Round in 1979, special provisions were introduced to provide further relief to developing countries[128] under the Agreement on Technical Barriers to Trade,[129] the Agreement on Government Procurement,[130] the Subsidies Code[131] and the Anti-Dumping Code.[132] The Enabling Clause was also introduced in the Tokyo Round, appearing to create more favourable rules for developing countries.[133] The Enabling Clause provided GSP with a permanent legal status within the GATT legal system in 1979, and it

[125] *Generalised System of Preferences Decision of 25 June 1971* GATT Doc L/3545 (28 June 1971); *Waiver for Generalised System of Preferences* GATT Doc BISD, 18th Supp 1972, 24; *Minutes of the Meeting of the Informal Group of Developing Countries held on 12 March 1971* GATT Doc LDC/M/92 (23 March 1971); *Background Document to the High Level Symposium on Trade and Development*, Geneva (17–18 March 1999) prepared by the Development Division of the WTO and Annex I available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc> accessed on 24 March 2019, 15; Chen, above n 104, 117; Bartels 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 510; *Generalized System of Preferences* ("GSP Decision") GATT Doc. BISD 18S/24 (Decision of 25 June 1971); Gregory Shaffer and Yvonne Apea, 'Institutional Choices in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights' (2005) 39(6) *Journal of World Trade* 977, 979; See Pascal Lamy, 'The Place of the WTO and its Law in the International Legal Order' (2006) 17(5) *European Journal of International Law* 969, 973.

[126] See *Generalised System of Preferences Decision of 25 June 1971* GATT Doc L/3545 (28 June 1971).

[127] Jianfu Chen, above n 104, 117.

[128] See *Background Document*.

[129] *Agreement on Technical Barriers to Trade* ('Tokyo Round Standards Code') <http://www.worldtradelaw.net/static.php?type=public&page+tokyoround > accessed on 25 March 2019, article 12.

[130] *Agreement on Government Procurement* ('Tokyo Round Government Procurement Code') <http://www.worldtradelaw.net/static.php?type=public&page+tokyoround > accessed on 25 March 2019 article III.

[131] *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* ('Subsidies Code') <http://www.worldtradelaw.net/static.php?type=public&page+tokyoround > accessed on 25 March 2019, Part III article 14.

[132] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ('Tokyo Round Anti-dumping Code") <http://www.worldtradelaw.net/static.php?type=public&page+tokyoround > accessed on 25 March 2019, article 13.

[133] *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. BISD 26 Supp 203 (1980) ("Enabling Clause"); *Background Document to the High Level Symposium on Trade and Development*, Geneva (1–18 March 1999) prepared by the Development Division of the WTO, available at <https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc > accessed on 24 March 2019, 16.

is still in operation.[134] For the first time, the phrase 'developing countries' was used in GATT jurisprudence under the Enabling Clause. Paragraph 2(a) of the Enabling Clause states that '[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the generalized system of preference'.

3.9 Enabling Clause and its Application on GSP

The 'GSP Decision' adopted in 1971 enabled developed countries to discriminate against developing countries under Article I.1 of the GATT. The Enabling Clause states that developing countries may be accorded more favourable treatment without the same treatment being accorded to other members.[135] This provides the basis for differential treatment of developing countries for market access.

Bartels states that 'the legal status of [the Enabling Clause] is not entirely clear'.[136] Contrary to Bartels' position, Jackson states that the Enabling Clause does not provide waivers to derogate from MFN enshrined in Article I:1 of the GATT as it does not refer to waiver provisions enshrined in Article XXV:5.[137] Alavi also differs, stating that the Enabling Clause is 'not mandatory but permits countries to deviate from Article I of the GATT'.[138] Kennedy states that the title of the Enabling Clause 'suggests, enables, but does not obligate developed countries to accord preferential tariff treatment to developing countries'[139] and he further argues that '[t]he Enabling Clause permits but does not mandate that developed countries extend preferential tariff treatment to beneficiary countries.'[140] Howse argues that 'the Enabling Clause is justiciable.'[141] His argument is based on the negotiation history,

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[134] *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* ("Enabling Clause") GATT Doc. L/4903 (Decision of 28 November 1979).

[135] *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. BISD 26 Supp 203 (1980) (Enabling Clause) article I.

[136] Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 514.

[137] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge University Press 2nd ed, 1999) 164; Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 514.

[138] Amin Alavi, 'On the (Non) Effectiveness of the World Trade Organisation Special and Differential Treatments in the Dispute Settlement Process' (2007) 41(2) *Journal of World Trade* 319, 340.

[139] Kevin Kennedy, 'Special and Differential Treatment of Developing Countries', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organisation: Legal, Economic and Political Analysis* (Springer, 2005) 1523, 1542; GATT Panel Report, *United States – Denial of Most-Favoured-Nation as to Non-Rubber Footwear from Brazil* GATT Doc DS18/R-39S/128 (adopted 19 June 1992) [6.14], [6.15] and [6.17].

[140] Kennedy, 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference' above n 60, 547.

[141] Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4 (2) *Chicago Journal of International Law* 385, 388.

legal text and subsequent practice with regard to the GSP.[142] Howse, having said that the Enabling Clause is justiciable, cautiously adds that '… the idea of non-discrimination in the description of the GSP has a largely, though not entirely, aspirational legal effect.'[143]

When the 'GSP Decision' in 1971, the Enabling Clause, the EU and the US GSP programmes are all considered, it is doubtful that the Enabling Clause is binding. The EU and the US were not complying with the WTO rules when they introduced the GSP, because they have asked the developing countries to comply with certain labour and environment standards and good governance.[144] This is not acceptable to WTO jurisprudence because the WTO does not require the developing countries to follow labour standards or to have good governance to qualify for GSP. Therefore, subsequent practice or State practice is not necessarily connected to the WTO GSP.

The EU also contended that the adoption of labour and environmental standards was consistent with the Enabling Clause.[145] It is difficult to accept the view expressed by Howse that the Enabling Clause is actionable; however, to a certain extent, his argument helps to improve and bring about amendments to the Enabling Clause. Yusuf states that '[t]he Enabling Clause was approved as an autonomous and internationally agreed upon act of the contracting parties'.[146] He also admits that the Enabling Clause has not helped the developing countries to obtain legal status in terms of acquiring preferential treatment for international trade.[147] This is because under the Enabling Clause, developing countries are not entitled to receive market access. Bartels and Haberli concede that the GSP and the Enabling Clause are not binding, further arguing that there is the possibility of making the GSP binding under Article II:7 of GATT.[148] Article II of the GATT is the second pillar of

[142] Ibid, 393.
[143] Ibid.
[144] European Commission, Proposal for a Regulation of the European Parliament and of the Other Council Applying a Scheme of Generalize Tariff Preferences SEC (2011) 536 final, SEC (2011) 537 final, Brussels, 10.5.2011, COM (2011) 241 final, 2011/0117(COD) article 2 (k); Applying a Scheme of Generalize Tariff Preferences, Council Regulation (EC) No 980/2005' (30.06.2005) *Official Journal of the European Union* L169/1, L169/19.
[145] *Trade Policy Review, The European Union, Minutes of Meeting* on 12 and 14 July 2000 WTO Doc WT/TPR/M72 (26 October 2000) [165]; *European Parliament 2014 -2019, Plenary Sitting on the implementation of the GSP Regulation (EU)* No 978/2012 (2018/2107(INI) RR\1178053EN.docx, Committee on International Trade, Report by Christofer Fjellner (26.02.2019) 4; Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' above n 141, 386.
[146] Yusuf 'Differential and More Favourable Treatment: the GATT Enabling Clause' above n 9, 506.
[147] Ibid 507.
[148] Lorand Bartels and Christian Haberli, 'Binding Tariff Preferences for Developing Countries under Article II GATT' (2010) 13 (4) *Journal of International Economic Law* 969, 976 and 977.

the GATT, which deals with custom duties. The argument of Bartels and Harberlis is also flawed because without an amendment to Article XVIII, the GSP Decision and the Enabling Clause, amending Article II would not make the Enabling Clause binding. They talk about tariff criteria for the GSP which are binding and transparent among grantors of GSP and beneficiaries.[149] In other words, they want to have new modalities of tariff-free and quota-free markets which are binding. However, they do not specify the criteria.

It is important to discuss Articles 1, 2 and 3 of the Enabling Clause in terms of their legal enforceability. Paragraph 2(a) states: 'preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences'. Paragraph 2(d) provides for '[s]pecial treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries'. When paragraphs 2(a) and 2(d) of the Enabling Clause are considered, it can be construed to mean two country categories. One is developing countries and the other is least-developed countries. The Enabling Clause, however, does not elaborate on the level of GSP to be granted to least-developed countries and the level to be granted to developing countries.[150] Again 'developing countries' referred to here can be interpreted to mean all developing countries or small developing countries, which is not a clear criterion.

The Enabling Clause does not refer to larger developing countries or LICs. When one looks at the strict interpretation, one can argue that it is *sui generis*,[151] meaning that it is outside the GATT rules. The Enabling Clause states in Article 1 that '[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment for developing countries…'. So on the one hand, one can argue it is sui generis, and on the other, when para 1 is considered, one may equally argue it is not sui generis.[152]

[149] Ibid, 995.
[150] See also Kennedy, 'Special and Differential Treatment of Developing Countries', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organisation: Legal, Economic and Political Analysis* above n 139, 1540.
[151] Panel Report, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/R (1 December 2003).
[152] Panel Report, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/R (1 December 2003) [7.26] and [7.29].

When one looks at the wording of paragraph 2(a) and footnote 3 of the Enabling Clause, it can be argued that the Enabling Clause has no legal validity; nor are developed countries bound by it. The Preamble to the Enabling Clause does not expressly state that it provides a legal basis for the GSP. The Enabling Clause has not provided a framework mechanism for giving GSP to developing countries. In other words, it did not mandate that developed countries should offer GSP to developing countries.[153] Furthermore, the implementation of the Enabling Clause is voluntary.[154] This is evident from the wording of the Preamble to the GSP Decision. It notes that 'the statement of developed contracting parties that the grant of tariff preference does not constitute a binding commitment and they are temporary in nature'.[155] When the Preamble to the GSP decision is taken together with the Preamble of the Enabling Clause, it does not create a legal regime. This position is further reiterated in the DSU. The *European Communities – Conditions for the Granting of Trade Preference to Developing Countries EC – Tariff Preferences* case did not dispel the ambiguity of Footnote 3 of the Enabling Clause.[156] The Appellate Body did not clarify what is meant by the necessary conditions applied to the GSP,[157] and nor did it consider whether it covered any limitations to the exclusion of particular products or range of goods under the GSP decision. The Appellate Body did not consider the obligation to provide the GSP under conditions that are unrelated to the WTO objectives.[158]

The jurisdiction of the DSU is limited to the WTO Covered Agreements, DSU and the WTO Agreement establishing the Covered Agreements.[159] Bartels states that most of the Covered Agreements have dispute settlement provisions, whereas the Enabling Clause has

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[153] Kennedy, 'The Generalized System of Preferences after Four Decades: Conditionality and the Shrinking Margin of Preference' above n 60, 547.

[154] *Generalised System of Preferences Decision of 25 June 1971* GATT Doc L/3545 (28 June 1971); Brazil Delegation stated that the GSP 'schemes were of a voluntary character and did not constitute a binding obligation for the preference-giving countries ...'. *Minutes of Meeting Held in the Centre William Rappard on 14 May 1987 GATT* Doc. C/M/209 (29 May 1987) 12.

[155] *Generalised System of Preferences Decision of 25 June 1971* GATT Doc L/3545 (28 June 1971); Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 513.

[156] Appellate Body Report, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004); Kennedy, 'Special and Differential Treatment of Developing Countries', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organisation: Legal, Economic and Political Analysis* above n 139, 1540.

[157] See Howse, 'Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences' above n 9, 1364.

[158] Appellate Body Report, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004) [164]; Gene M Grossman and Alan O Sykes 'A Preference for Development: the Law and Economics of GSP' (2005) 4(1) *World Trade Review* 41, 48; Shaffer and Apea, above n 125, 1002.

[159] *DSU* article 1.1.

only paragraph 4(b) which provides for consultations. Therefore, he argues that the relevant measures enshrined in the Enabling Clause have been violated and a developing country cannot invoke Article 1.1 of the DSU; in this instance, a country can go to the DSU for breaches against Article I.1 of the GATT.[160] In violation of GATT Article I:1, a member has to recourse to the DSU. However, Bartel's argument is difficult to admit on the grounds that the waivers are voluntary; they are not mandatory and criteria for granting GSP are not specified. Furthermore, developed countries have the discretion to grant GSP and to choose the recipients.

No doubt the granting of GSP to developing countries stems from the Enabling Clause, although it is not a part of the GATT or WTO when one looks at the Waiver Decision of 1971. The preferences were recognised in the UNCTAD on the basis of the right to development. Onyejekwe states that the GSP introduced by UNCTAD was not binding in the 1960s, 1970s and 1980s, but argues that subsequently 'the norm of the law of trade preferences metamorphosed into binding international customary law…'.[161] His argument was based on the UN concept of the right to development.[162] He puts forward a somewhat convincing argument that the Enabling Clause makes the GSP legally binding. Onyejekwe, when analysing the legal status of the GSP, has emphasized the UN initiative to introduce the GSP through right to development. His arguments are however not sound enough to support the notion that the GSP is binding. On the one hand, a norm to be crystallised into customary international law depends solely on the State's practice and acceptance of it as a law for a lengthy period of time.[163] This is not the case for GSP which is granted temporarily. On the other hand, waivers introduced into the GATT system were intended to reduce the economic disparity and encourage the expansion of trade of LICs as equal partners. This view is further supported by Article XXV:5. Waivers are granted under exceptional circumstances and require a two-thirds majority.

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[160] WTO Ministerial Conference, *Implementation-Related Issues and Concerns* WTO Doc WT/MIN (01) (20 November 2001) para 12.2.

[161] Kele Onyejekwe, 'International Law of Trade Preferences: Examinations from the European Union and the United States' (1994) 26(2) *St. Mary's Law Journal* 425, 436.

[162] Ibid 500.

[163] What is not binding initially cannot be made so subsequently, unless there is *opinio juris*. Francis G Jacobs, 'Verities of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18(2) *International and Comparative Law Quarterly* 318, 329; Sir Ian Taggart Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984 2nd ed) 137; *Opinio juris* provides a mental element to accept provisions to be binding as laws on States' practice. North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark: Federal Republic of Germany v Netherlands [1969] ICJ Rep 29[37].

The Enabling Clause has been incorporated in Annex 1A, that is the GATT 1994 when establishing the WTO.[164] Therefore, a question arises whether Article XXV:5 is still in force and /or if it is in force, to what extent? This question has yet to be answered. Bartels states that Article XXV:5 of GATT is not included in the footnote to Paragraph 1(b)(iii) of the Language Incorporating GATT 1947 and other Instruments into GATT 1994.[165]

Jackson states that Article XXV of GATT makes provisions for waivers. However, the Enabling Clause does not function as a waiver.[166] Paragraph 2(a) of the Enabling Clause refers to 'the Decision of the Contracting Parties of 25 June 1971', and '…the establishment of 'generalised, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'.[167] Paragraph 1(b) (iii) of Language Incorporating GATT 1947 and other Instruments into GATT 1994 states that 'decisions on waivers granted under Article XXV:5 of GATT 1947 are still in force on the date of entry into force of the WTO Agreement'.[168] Furthermore, in the same document, paragraph 1(b)(iv) states that 'other decisions of the CONTRACTING PARTIES to GATT 1947' have entered into force. Does this mean that Article XXV:5 and the Enabling Clause are binding for the WTO Members? Therefore, a question arises whether Article XXV:5 of the GATT is outside the scope of the Enabling Clause. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body held that the objective of Article 'XVI:1 of the WTO Agreement[169] and paragraph 1(b) of the language of Annex 1A incorporating the GATT 1994 into the WTO agreement' is to ensure the 'smooth transition' of GATT 1947 into the GATT 1994.[170]

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[164] *General Agreement of Tariff and Trade, Language Incorporating GATT 1947 and other Instruments into GATT 1994* (WTO Analytical Index: GATT 1994) paragraph 1 (b) (iii) and (iv).

[165] Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' above n 83, 514.

[166] Jackson, *The World Trading System: Law and Policy of International Economic Relations* above n 26, 164; Howse, 'Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short-Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences' above n 157, 1346.

[167] Footnote 3 of the paragraph 2(a) of the Enabling Clause; Generalized *System of Preferences* ("GSP Decision") GATT Doc. BISD 18S/24 (Decision of 25 June 1971) (emphasis is added).

[168] WTO Analytical Index: GATT 1994.

[169] 'Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to the GATT 1947 and the bodies established in the frame work of GATT 1947'. *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) ('*WTO Agreement'*) hereinafter referred to as the *WTO Agreement* art.XVI:1.

[170] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS/8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 13.

The Enabling Clause states that if any dispute arises, it should be referred to consultation. Under the DSU, if consultation fails (whether parties like it or not) panels are appointed.[171] In this context, one can argue that the DSU has the jurisdiction to hear cases regarding the violation of the Enabling Clause. The Enabling Clause is neither substantive nor procedural law. It is more like a directive principle or broad guidelines. Consequently, it is questionable whether the Enabling Clause has given any legal rights to developing countries. Moreover, a question arises whether Article 1.1 of the DSU provides a legal basis for the Enabling Clause. Article 1 of the DSU traverses the DSU, covered agreements and the WTO Agreement. It can be argued that the Enabling Clause does not fall under the covered agreements. Another issue is whether the DSU has the jurisdiction to question the validity of the Enabling Clause. There are two observations to be made here. First, the DSU should hold that the Enabling Clause is a part of the WTO agreement. Second, the DSU should decide that the Enabling Clause is binding. From the above discussion, it is apparent that the Appellate Body has not considered these issues and avoided them in *European Communities – Conditions for the Granting of Trade Preference to Developing Countries* (*EC – Tariff Preferences*).[172] Either the Appellate Body should have decided, according to the negotiation history and the wording of the GSP Decision and the Enabling Clause, that they were unable to make a decision, or they should have decided that the Enabling Clause is not binding. Furthermore, the unbinding nature of the Enabling Clause and the GSP Decision is evident from the wording of the Doha Decision on Implementation, in which WTO Ministers '[r]eaffirm that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause") should be generalised, non-reciprocal and non-discriminatory'.[173]

3.9.1 EC – Tariff Preferences Case and Developing Countries

In *EC – Tariff Preferences*, the EU members stated that they would be willing to provide SDT that considers the individual needs and degree of economic vulnerability of the countries in question.[174] The EU gave special benefits to selected developing countries who were affected by drug production and drug trafficking under their GSP programme. In this case, India challenged the European Union's (EU) GSP scheme and the Drug Arrangement

[171] DSU article 4.7.
[172] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004).
[173] *Doha WTO Ministerial Conference, Implementation-Related Issues and Concerns*, Decision of 14 November 2001 WTO Doc WT/MIN (01)/17 (20 November 2001) para 12.2.
[174] Panel Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [6.7].

on the basis that the EU violated Article I:1 of the GATT and the Enabling Clause. India alleged that the EU has granted different tariff treatments for selected developing countries without giving the same concessions to India.[175] The EU provided a special program to combat drug production and trafficking under EC Council Regulation.[176]

The Appellate Body in *EC – Tariff Preferences* did not define development, financial and trade needs but attempted to assess these through 'objective standards' of a country by considering 'the WTO Agreement or in multilateral instruments adopted by international organizations…'.[177] The Appellate Body did not dispel the ambiguity of paragraph (3) and further complicated it because the UN recognises high-income, low-income countries and least-developed countries. The WTO does not define development. The word 'shall' in paragraph 3(c)[178] has been interpreted in *EC – Tariff Preferences* to mean 'respond positively to the needs of developing countries'.[179] Which developing countries? Does 'respond positively' mean legally binding? Paragraph 3(c) of the Enabling Clause does not clarify the conditions that can be imposed by the GSP grantors.[180]

Paragraph 3(c) of the Enabling Clause is also unclear as it states that the preferences provided under it shall 'be designed and, if necessary modified, to respond positively to the development, financial and trade needs of developing countries'. This is a broader section and it talks about development, finance and trade needs. Surprisingly, it does not give clear indication of the development, financial or trade needs of developing countries when GSP should be granted to them.

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[175] Panel Report, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/R (1 December 2003) [1.1]; Request for Consultations by India, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC-Preferences)* WTO Doc WT/DS246/1) (12 December 2002).

[176] Council Regulation (EC) No 2501/2001 (10 December 2001) Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004 [31.12. 2001] OJL 346/1, articles 7 and 8.

[177] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004)[163].

[178] '[S]hall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries'. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* ("Enabling Clause") GATT Doc. L/4903 (Decision of 28 November 1979).

[179] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004)[158].

[180] See Howse, 'Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences' above n 157, 1364.

On the other hand, it can be argued that there is no ambiguity in the Enabling Clause referring to Article XVIII of the GATT. When the Enabling Clause is interpreted by considering Article XVIII, the Article states 'early stages of economies development' and 'low standard of living'. How does it determine early stages of development and low standard of living? Are there any criteria that should be applied? Can developed countries consider least-developed countries according to the UN least-developed country criteria? Again, they have the discretion to consider that least-developed countries are not experiencing a low standard of living or early stages of development as outlined in Article XVIII of the GATT. Nor has the WTO established any particular criteria, and yet it applies the UN criteria to identify the least-developed countries.

The WTO itself is silent on how a developing country is categorised; countries can nominate themselves as developing countries and join the WTO. Not even the WTO cases have defined a developing country in their interpretation. However, the Panel in *EC – Preferences* decided 'that the Enabling Clause is one of the most important instruments in the GATT and the WTO providing special and more favourable treatment for the developing countries'.[181] The case of *EC Tariff Preferences* focused on the issue of whether all developing countries should be given identical tariff preferences under the GSP schemes without differentiation.[182] The Panel held that the term 'developing countries', when used in paragraph 2(a) of the Enabling Clause,[183] referred to all developing countries.[184]

Conversely, the Appellate Body held that 'developing countries' refers to those countries obtaining benefits under the Enabling Clause and which are at a similar stage of development. In this case, the Appellate Body held that not all developing countries are

[181] Panel Report, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/R (1 December 2003) [7.31].
[182] Appellate Body Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/ R (7 April 2004) [78].
[183] Paragraph 2(a) requires preferential treatment to be accorded by developed contracting parties to products originating from developing countries in accordance with the Generalized System of Preferences, Enabling Clause (decision of 28 November 1979).
[184]'[T]he term "developing countries" in paragraph 2(a) means all developing countries, with the exception that, where developed countries are implementing a priori limitations, "developing countries" may mean less than all developing countries; and (iv) paragraph 2(d), as an exception to paragraph 2(a), allows developed countries to provide special treatment to the least-developed countries'. Panel Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [7.176].

entitled to obtain identical tariff preferences under the GSP,[185] although in arriving at this decision, it did not define 'developing countries'.

It is not clear whether the WTO Panels or Appellate Body should interpret a developing country by considering the economic index or Human Development Index, GDP per capita or content index. Developing countries have various levels of development. It is difficult to determine which are 'developing countries' according to early stages of development as many have gone beyond this early stage.

Rom argues that the Enabling Clause applies to only least-developed countries after the establishment of the WTO.[186] His argument is based on paragraph 5 of the Marrakesh Declaration.[187] However, Rom's argument is difficult to accept because the Marrakesh Declaration mentions 'developing countries' as well.[188] The Declaration suggests that a special programme should be implemented for least-developed countries.[189]

Espiell states that the Preamble to the Enabling Clause does not 'contain any development concerning the foundation of preference and the right to development'.[190] He also states that Part IV of the GATT has not been referred to in the Enabling Clause.[191] In that respect, Espiell's argument on the Enabling Clause that it does not refer to the development objective has no basis, because Article 3 of the Enabling Clause specifies the objectives of the Enabling Clause. Part IV of the GATT has not been referred to in the Enabling Clause because it does not come under the GATT. This view is supported by the Third-Party Submission made by the US[192] to the Appellate Body for *EC – Tariff Preferences*.[193]

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[185] Appellate Body Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/ R (7 April 2004) [162].
[186] 'Interestingly enough, a reference to the Enabling Clause is included in the Final Act [WTO] in the Decision on measures in favour of the least developed countries only'. Footnote 9, Michael Rom 'Some Early Reflections on the Uruguay Round Agreement as Seen from the Viewpoint of a Developing Country' (1996) 28(6) *Journal of World Trade* 5, 7.
[187] Marrakesh Declaration, *Uruguay Round Agreement* (15 April 1994) para 5.
[188] Ibid.
[189] Ibid.
[190] Espiell 'GATT: Accommodating Generalized Preferences' above n 102, 360.
[191] Ibid 361.
[192] Executive Summary of the Third Participant Submission of the United States of America in *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (2 February 2004) [4].
[193] Appellate Body Report, *European Communities – Conditions for the Granting of Trade Preference to Developing Countries (EC – Preferences)* WTO Doc WT/DS246/AB/R (7 April 2004).

Even though a GSP regime is established on a permanent basis in the WTO system, LICs fail to effectively use the GSP due to supply-side constraints they face because they do not have capacity to increase and diversify their exports.[194] To improve the market access of the LICs, the GSP alone is not enough without FDI (see section 2.7.3). FDI improves the capacity building of LICs to obtain technology to specialise in production.

3.10 FDI for Market Access for LICs

The WTO facilitates market access through removing trade barriers and recognising reciprocity among its members, and it also ensures competition among imported and domestic products.[195] LICs' market access is designed in the WTO through the SDT, Enabling Clause and the GSP and it is provided on the basis of non-reciprocity due to disparity among developed, developing countries and LICs.[196] The objective of the GSP is to improve the trade capacity of LICs and it can be done only through investment.[197] The market access commitment of developed countries is not actionable (see section 3.9 and 3.9.1). The GSP is not enough to provide market access because LICs do not have adequate capital to invest money to improve their productions.[198] LICs should increase their production for export and they can export only if they have surplus stocks. To have surplus stocks, LICs should be able to enhance the production capacity. Production can be increased only if investors invest money in different industries.[199] Exports growth improves the economic growth and the growth of FDI contributes to exports growth.[200] Volume of trade can be increased if a country receives FDI and FDI helps to develop new industries and infrastructure.[201]

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[194] *UNCTAD, The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) 15; *The WTO Annual Report 2020*, 15.

[195] Kyle Bagwell, P C Mavroidis and Robert W Staiger, 'It's a Question of Market Access' (2002) 96(1) *American Journal of International Law* 56, 56.

[196] Tania Sharmin Jahan 'Is There a Linkage between Sustainable Development and Market Access of LDCs' (2013) 6(1) *The Law and Development Review* 143, 157; Tania, Sharmin J, 'Duty-Free-Quota-Free Market Access for LDCS: Falling within or Outside the GSP Downsides' (2013) 29(1) *Connecticut Journal of International Law* 115, 139.

[197] Daniel Flento and Stefano Ponte, 'Least-Developed Countries in a World of Global Value Chains: Are WTO Trade Negotiations Helping?'(2017) 94 *World Development* 366, 366.

[198] *UNCTAD, The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) 15; Flento and Ponte, above n 197, 372**;** Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' in Simon J Evenett and Bernard M Hoekman (eds), Economic Development & Multilateral Trade Cooperation (The World Bank and Palgrave Macmillan, 2006) 147, 158 and 171.

[199] Alessia Amighini and Marco Sanfilippo, 'Impact of South-South FDI and Trade on the Export Upgrading of African Economies' (2014) 64 *World development* 1, 3.

[200] Rifat Baris Tekin, 'Economic Growth, Exports and Foreign Direct Investment in Least Developed Countries: A Panel Granger Causality Ananlysis' (2012) 29(3) *Economic Modelling* 868, 869.

[201] Katerina Gradeva and Inmaculada Martinez- Zarzoso, 'Are Trade Preferences More Effective Than Aid in Supporting Exports? Evidence from the 'Everything But Arms' Preference Scheme' (2016) 39(8) *The*

FDI can increase a country's competitiveness on the global market and it provides the opportunity of improving the efficiency of production and promotes specialization of products.[202] Due to poor technology and less concentration of FDI in LICs, they do not have a capacity to improve their domestic products and as a result, LICs cannot reap the positive effect of trade preferences. LICs which have greater FDI inflow experience larger benefits from their trade preferences and LICs' GSP programme is linked with the rules of origin which requires that LICs should fulfil conditions of developed countries.[203] The rules of origin prohibit trade deflection and re-exporting goods manufactured in other countries.[204] The LICs have supply-side constraints due to poor trade capacity and less FDI concentration.[205] Therefore, to improve market access for LICs, the WTO members not only grant GSP but also provide FDI. To enhance the market access of LICs, FDI should be introduced into the WTO.

3.11 Conclusion

This chapter discussed the historical development of trade law and how the developing country notion emerged within GATT jurisprudence. Furthermore, this chapter discussed the introduction of the GSP and the Enabling Clause and their legal status to demonstrate the ambiguity of the GSP Decision and the Enabling Clause. It is evident that the GATT was established without giving any recognition to LICs. LICs were able to push for exceptions under GATT Article I:1 to derogate the MFN principle in order to reduce balance-of-payment gaps and to protect infant industries with the help of UNCTAD. Subsequently, the GATT Members decided to grant SDT and the GSP. The GSP introduced into the GATT system is voluntary and not binding, as is evident from State practices and

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World Economy 1146, 1149; David Greenaway, David Sapsford and Stephan Pfafferenzeller, 'Foreign Direct Investment, Economic Performance and Trade Liberal' (2007) 30(2) *World Economy* 197, 202.

[202] Joshua Aizenmana and Ilan Noyb, 'FDI and Trade – Two-Way Linkages' (2006) 46 (3) *The Quarterly Review of Economics and Finance* 317, 320.

[203] 'For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994'. Agreement on Rules of Origin article 1.

[204] For example, '[t]he current E.U. Rules of Origin Regulation, in determining substantial transformation, adopts a combination of different tests: change in tariff headings, specific processing and value-added test'. Sharmin J, 'Duty-Free-Quota-Free Market Access for LDCS: Falling within or Outside the GSP Downsides' above n 196, 139 and 141.

[205] Pradeep S Mehta and Pranav Kumar, 'WTO Doha Round and Special Measures for Less Developed Countries' CUTS International, Briefing Paper No. 7/2007)1, 2; WTO, *World Trade Statistical Review2019, available at* <*https://www.wto.org/English/res_e/statis_e/wts2019_e/wts2019_toc_e.htm*>, accessed on 01 January 2020, 62; *The Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges* (United Nations, New York, 2019) Chapter 1, 7.

the negotiation history. Most of the academics admit that the GSP Decision in 1971 and the Enabling Clause are not binding, despite their arguments endeavouring to read the Enabling Clause as binding.

In *EC – Tariff Preferences*, the Appellate Body did not hold that the Enabling Clause is binding; nor did it decide who the developing countries are. The AB merely suggested that all developing countries cannot receive identical tariff preferences; it did not explain why they were different. This chapter revealed that the Enabling Clause does not come under the Covered Agreements. The WTO Agreement also has not clearly incorporated the Enabling Clause. The manner in which it was incorporated into the GATT does not make any significant impact on the Enabling Clause and the GSP Decision of 1971.

The Enabling Clause does provide the basis for granting the GSP, but developed countries are not bound by it because of its ambiguity. Thus, the Enabling Clause has created uncertainty in the WTO system. This has encouraged the EU and the US to introduce their own GSP scheme. The Panel and the Appellate Body do not consider the validity and the binding or unbinding nature of the Enabling Clause, but they can see whether the EU and the US violate the MFN principle under their GSP scheme.

To overcome this ambiguity of Article XVIII of GATT, this chapter contributes to the literature geared towards amending Article XVIII of the GATT by removing ‘early stages’ and ‘low standard’ to countries whose economy is below one percentage of international trade, and allowing FDI to obtain the GSP and to derogate the MFN principle. Simultaneously, the Enabling Clause and the GSP Decision should be amended to state that countries whose trade capacity and FDI is low in world trade should be granted GSP. The introduction of FDI into the WTO will help to create an investment and trade regime in the world under one umbrella for sustainable economic development. Sustainable economic development can be achieved only if the world has a predictable international investment dispute system. The next chapter tries to build a conceptual framework for a CIIIA and to examine the weaknesses of the existing investment agreements.

Chapter 4: Proposition for A Comprehensive International Investment Agreement (CIIA): In Search of Missing Threads

4.1 Introduction

Within the framework of the WTO, the TRIMs agreement[1] and the GATS[2] both deal with investment, they do not provide for a CIIA, and these two agreements have not covered the entire gamut of FDI as these rules do not govern investors and the regulatory autonomy of host States.[3] The scope of these two agreements is limited to the GATT Articles III (national treatment for imported products) and XI (elimination of quantitative restrictions) and trade in services respectively.[4] Commitments made by developed countries under the GATS are not adequate as restrictions have been placed on foreign service providers.[5] Rules regarding trade in services and investment relating to trade do not provide an adequate framework for FDI-related disputes when one considers the present expansion of FDI worldwide.[6] FDI has increased rapidly in the world[7] and there is a threat of arbitrary

[1] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement).

[2] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*).

[3] *Communication from the European Community and its Member States, Working Group on the Relationship between Trade and Investment*, WTO Doc WT/WGTI/W/121 (27 June 2002) paras 5, 6, 7 and 8; Keith E Maskus and Denise R Eby, 'Developing New Rules and Disciplines on Trade-Related Investment Measures' (1990) 13 (4) *The World Economy* 523, 525.

[4] Patrick Low and Arvind Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1996) 380, 381; Kevin C Kennedy 'GATT 1994' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer Science + Business Media, Inc., 2005) vol. 1, 89, 123 footnote 144; Kurtz Jurgen, *The WTO and International Investment Law*: *Converging Systems* (Cambridge University Press, 2016) 49.

[5] *Proposals Regarding the GATs Agreement in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration, Preparations for the 1999 Ministerial Conference, Communication from India*, WTO Doc WT/GC/W/224 (2 July 1999).

[6] UNCTAD *World Investment Report 2018 – Investment and New Industrial Policies* (United Nations Publication, Geneva, 2018) xii; According to the UNCTAD *World Investment Report 2017*, overall FDI would increase to US$1.8 trillion worldwide with a further increase in 2018. UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva, 2017) 3; UNCTAD, *Global Investment Trend Monitor, Global Investment Prospects Assessment 2016-2018*, No. 24 (6 October 2016); The UNCTAD report forecasted that FDI would increase to US$65 billion in Africa while, for developing countries in Asia, total FDI was expected to increase to US$515 billion. UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva, 2017) 4; The World Bank's *World Development Report 2017* states that investors do not want to take the risk of investing money on foreign soil for fear of expropriation. *A World Bank Group Flagship Report: World Development Report 2017: Governance and the Law* (World Bank Group, 2017) 145 and 148.

[7] In 2010, the number of multinational companies engaging in FDI worldwide was about 100,000: these companies, in turn, controlled more than 900,000 subsidiary companies. Karl P Sauvant, 'Sustainable Development through FDI Induced Innovation and Technology Transfer: Aim Investment Report 2015: Trends and Policy Changes' (Columbia Centre on Sustainable Development 2nd ed, 2015) 10; The UNCTAD *World Investment Report 2017* also states that in 2017 86,000 multinational enterprises (MNEs) were

expropriation of investors' property by host States.[8] Equally, host States also have a fear that their legitimate expectation to make laws for sustainable development is undermined without coherent rules and regulations to govern investment.[9] Therefore, it is necessary not only to have international regulations to check and balance against the expropriation or arbitrary take-over of foreign-owned enterprises by host States, but also to have a uniform legal system for governing FDI that includes the recognition of host States' regulatory autonomy and sovereignty.[10] It follows that investors and host States should equally be governed by a uniform investment law in this era of globalisation of the world economy.[11]

Similarly, other trade and investment instruments, such as Chapter 11 of the NAFTA,[12] the draft MAI[13] and the TTIP[14] address investment, but do not provide rules for a CIIA. The NAFTA and the MAI do not balance the host States' regulatory authority and investors' rights, and these three agreements do not provide rule-based investment dispute settlement mechanisms.[15] International trade and investment are interlinked and interconnected.[16] The NAFTA is a free trade agreement (FTA) and the NAFTA Chapter 11 (investment) is discussed in this chapter to show how they deal with both trade and investment in one

operating in collaboration with 1,500 large multinational enterprises (MNEs). UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (United Nations Publication, Geneva, 2017) 31.

[8] Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 (4) *New York University Journal of International Law and Politics* 953, 954.

[9] Rachel L. Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7 (1) *Journal of International Dispute Settlement* 135, 136.

[10] Karl P Sauvant, 'FDI Protectionism is on the Rise' (2009) 9 (World Bank, Policy Research Working Paper No. 5052) 1, 14; Sungjoon Cho and Jurgen Kurtz, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29(1) *The European Journal of International Economic Law* 169, 186.

[11] UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations Publication, Geneva, 2018) 104.

[12] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico, 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) (Chapter 11, Investment).

[13] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text*, DAFFE/MAI (98)7/REV1 (22 April 1998).

[14] *Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce Chapter II Investment* (EU Commission Draft Text TTIP Investment) available at <https://trade.ec.europa.eu/doclib/html/153807.htm> accessed on 24 January 2019.

[15] Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11' (2005) 25(2) *Northwestern Journal of International Law & Business* 279, 301; Beatriz Bugeda, 'Is NAFTA Up to Its Green Expectations? Effective Law Enforcement under the North American Agreement on Environmental Cooperation' (1999) 32 *University of Richmond Law Review* 1591, 1592; Chris Tollefson, 'Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime' (2002) 27(1) *The Yale Journal of International* Law 141, 146; OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 53; see *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce Chapter II Investment* (EU Commission Draft Text TTIP Investment Articles 6 and 7; Patricia Garcia Duran and Leif Johan Ellasson, 'The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions' (2017) 51(1) *Journal of World Trade* 23, 30.

[16] *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) paras 20 and 22.

agreement and to establish a ground for the proposition of a CIIA in the WTO. Since the WTO does not deal with investment, States are negotiating BITs incorporating both trade and investment. This will affect even the rule-based trade regime and further fragment investment law. Therefore, the endeavour of this study is to propose a CIIA as part of a single undertaking by converging trade and investment within the WTO framework.

This chapter discusses MFN and NT principles, and the general exceptions in the WTO Agreements and investment law, to demonstrate that the MFN and NT principles and the general exceptions enshrined in investment agreements do not balance the host States' regulatory authority to protect the environment, labour standards and investors' rights.[17] The WTO's MFN, NT, and the general exception provisions are the cornerstone of any prospective investment agreement to balance investor protections and the regulatory authority of host States. Therefore, MFN, NT and the general exceptions concepts are discussed to build a theoretical foundation for a CIIA.

This chapter first discusses the objectives and scope of TRIMs, GATS and NAFTA Chapter 11 to highlight the importance of investment for a trade regime and identify reasons why they do not provide rules for a CIIA for FDI. It then examines the MFN, NT and Exceptions of the GATT along with NAFTA, to demonstrate the lack of regulatory flexibility in investment agreements. The chapter highlights the importance of establishing a CIIA for investment worldwide, similar to the agreement for trade under the WTO. The purpose of the CIIA is to strike a balance between the regulatory autonomy of States and investors' rights. Chapter 4 justifies the importance of a separate multilateral investment regime in the WTO.

4.2 Objectives and Scope of TRIMs Agreement

As discussed in Chapter 1, developed and developing countries were unable to establish a CIIA due to disagreements: on the definition of investment, on a host State's sovereign rights to regulate foreign investment, on restrictions on the taking back of FDI profits and

[17] Andrew Newcombe, 'General Exceptions in International Investment Agreements' (Draft Discussion Paper, BIICL [British Institute of International and Comparative Law] Eighth Annual WTO Conference, 13-14 May 2008, London) 1, 9.

on performance requirements.[18] Instead, the result was two patchwork agreements on investment, namely, the GATS and the TRIMs Agreement.[19]

The TRIMs Agreement was introduced to prevent distorted investment rules and to liberalise investment worldwide.[20] The Agreement means that States cannot impose discriminatory domestic content rules and export performance requirements as they must strike a balance between their State's economic interests and investors' rights.[21] The TRIMs Agreement allows developing countries to protect their local industries during a transitional period of five years; however, the Agreement does not recognise the special needs and inequality experienced by developing countries.[22] The TRIMs Agreement was also introduced to create a dialogue to establish a CIIA in future negotiations.[23]

The objective of the TRIMs Agreement is to prohibit domestic laws pertaining to investment that are directly and indirectly trade-distorting.[24] This means that discriminatory rules cannot be introduced by a member State. The title, 'Agreement on Trade-Related Investment Measures', demonstrates that the TRIMs Agreement is confined to trade-related investment measures.[25] Therefore, a question arises whether the TRIMs Agreement is then adequate. Often, trade-related investment measures can be challenged under the GATT

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[18] *Doha WTO Ministerial Declaration* WT Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) paras 20, 21 and 22; Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 420; Kevin Kennedy, 'Introduction to the GATT-WTO System' in Raj Bhala and Kevin Kennnedy, *World Trade Law: The GATT-WTO System, Regional Arrangements, and U.S. Law* (Lexis: Law Publishing, A Division of Reed Elsevier Inc., 1998) 1, 12; Kavaljit Singh, 'Multilateral Investment Agreement in the WTO Issues and Illusions (Asia Pacific Research Network, 2003) 5, 7; Sanjay Suri, 'After Trade, A Mess over Investment' (Global Policy Forum, Inter Press Service, 5 September 2003) available at <https://www.globalpolicy.org/component/content/article/209/43214html> accessed on 1 October 2017; Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' (UN Vision Project on Global Public Policy Networks) available at <www.globalpublicpolicy.net> accessed on 3 October 2017, 4; Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42(1) *Columbia Journal of Transnational Law* 123, 124; *Singapore Ministerial Declaration* WTO Doc WT/MIN (96) DEC (18 December 1996) (adopted on 13 December 1996) paras 3, 14, 19 and 20.

[19] Jurgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' (2002) 23(4) *University of Pennsylvania Journal of International Economic Law* 713, 723.

[20] *Proposals Regarding the Agreement on Trade-Related Investment Measures in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration, Preparations for the 1999 Ministerial Conference, Communication from India,* WTO Doc WT/GC/W/203 (14 June 1999) para 1.

[21] Ibid paras 1 and 2.

[22] Ibid.

[23] *Communication from Brazil, Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment,* WTO Doc WT/GC/W/271 (26 July 1999) paras 1 and 2; see Paul Civello, 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization' (1999) 8(1) *Minnesota Journal of Global Trade* 97, 98.

[24] Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2002) 96.

[25] John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997) 316.

rules.[26] This position is illustrated in the Preamble to the TRIMs Agreement which states that:

> Following an examination of the operation of the GATT Articles related to the *trade restrictive and distorting effects* of investment measures, negotiations should elaborate, as appropriate, *further provisions that may be necessary to avoid such adverse effects on trade*.[27]

The emphasis is added here (by the researcher) to show that the TRIMs Agreement is not an investment agreement *per se*.[28] As indicated in the Preamble, the Agreement applies only to trade in goods, with trade being generated through investment. Therefore, the TRIMs Agreement has not created any new rights with regard to investment. The Agreement itself admits in the Preamble that it is necessary to have negotiations on further provisions that deal with investment.[29] The Preamble *per se* provides for the fact that the WTO member States wanted to have a CIIA in the future.[30] The Preamble goes on to state the purpose of the Agreement as being:

> …to promote the expansion and progressive *liberalisation of world trade and to facilitate investment* across international frontiers so as to *increase the economic growth* of all trading partners, particularly developing country Members, while ensuring free competition.[31]

The TRIMs Agreement Preamble admits that investment is necessary to liberalise world trade. The Preamble also recognises that investment is important to increase the economic

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[26] *GATT 1994* articles XXII and XXIII; Mohamed Ariff, 'TRIMs: A North-South Divide or a Non-Issue?' (1989) 12(3) *The World Economy* 347, 349; *Submission by the United States, Negotiating Group on Trade-Related Investment Measures, Group of Negotiations on Goods* (GATT) GATT Doc MTN.GNG/NG12/W/2 (1 April 1987) 2; *Past Discussions of GATT on Trade-Related Investment Measures, Negotiation Group on Trade-Related Investment Measures* GATT Doc MTN.GNG/12/W/3 (21 May 1987) (*Note by the Secretariat*) 2; Mina Mashayekhi, 'Trade-Related Investment Measures in UNCTAD', in *A Positive Agenda for Developing Countries; Issues for Future Trade Negotiations* (United Nations New York and Geneva, 2000) 239; Mina Mashayekhi and Murray Gibbs, 'Lessons from the Uruguay Round Negotiations on Investment' (1999) 33(6) *Journal of World Trade* 1, 7.

[27] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs agreement), Preamble.

[28] Paul Demaret, 'The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization' (1995) 34(1) *Columbia Journal of Transnational Law* 123, 149.

[29] See Maskus and Eby, above n 3, 524.

[30] 'Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade'. TRIMs Preamble.

[31] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement), Preamble.

growth of member States and especially for developing countries.[32] After taking a closer look at the Preamble, one can reach the conclusion that the WTO member States wanted FDI discipline in the WTO for FDI liberalisation. The idea is that the liberalisation of FDI would bring economic development to all member States and especially to developing countries.[33]

Having stated that investment is necessary for economic growth, the Preamble continues by indicating that the TRIMs Agreement prohibits certain types of trade-related investment measures (trade-restrictive and trade-distorting measures). However, these measures are important for host States' regulatory autonomy. The Preamble further narrows the scope of Article I of the TRIMs Agreement which states that member States can only invoke the Agreement upon violation of the NT principle and the GATT's quantitative restrictions provision.[34] Article I of the TRIMs Agreement is not applicable to any measure adopted by a member State regarding services. Having stated that the TRIMs Agreement applies to trade, its scope is limited to the GATT Article III: 4 and paragraph I of XI.[35] This means the non-discriminatory trade-related investment measures are applied to imported products and prohibition of 'imposing quantitative restrictions for importation and exportation of goods'.[36] The TRIMs Agreement, therefore, does not cover FDI-related rules, but it does lay down the provisions on certain performance requirements related to trade in investment.[37] Nevertheless, Balasubramanyam has argued that the WTO member States introduced the TRIMs Agreement with the objective of promoting FDI for the economic development of member States.[38]

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[32] See Terence P Stewart, *The GATT Uruguay Round, A Negotiation History* (1986-1992) (Kluwer Law and Taxation Publishers, 1993) vol 1, 102.
[33] V N Balasubramanyam 'Putting TRIMs to Good Use' (1991) 19(9) *World Development* 1215, 1224.
[34] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) article I; *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*General Agreement on Tariffs and Trade*) hereinafter referred to as *GATT 1994*, articles III and XI; Elizabeth Smythe, 'Your Place or Mine? States, International Organizations and the Negotiations of Investment Rules (1998) 7(3*) Transnational Corporations* 85, 99.
[35] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) Annex; Patrick Low and Arvind Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 381.
[36] Kevin C Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' (2003) 24(1) *Michigan State University College of Law* 77, 135.
[37] Rachel McCulloch, 'Investment Policies in the GATT' (1990) 13(4) *The World Economy* 541, 546.
[38] Balasubramanyam, above 33, 1224; Stewart, above n 32.

The TRIMs Agreement does not define trade-related investment measures.[39] Instead, it provides a list of measures that conflict with the NT of the GATT and restrictive market access. Briefly stated, the TRIMs Agreement provides rules to eliminate these trade-distorting measures.[40] Although the illustrative list in the annex of TRIMs is descriptive, it is not adequate. As a result, trade-distorting measures imposed by countries need to be non-discriminatory in relations between a domestic investor and a foreign investor.[41] Balasubramanyam divides the TRIMs Agreement into two groups: 'commodity-based TRIMs and factor-based TRIMs'.[42] According to this author, incentives such as 'export subsidies and import entitlements' can be identified as 'commodity-based' TRIMs.[43] He continues by stating that the rules controlling export requirements and local content requirements, prescribing certain percentages of ownership of investment companies and employees belonging to the host State, constitute what he terms the 'factor-based' TRIMs Agreement.[44]

The discriminatory trade-related investment measures can be divided into two types. 'Positive' (investment encouragement measures) and 'negative' (performance requirements).[45] 'Positive' investment measures can be described as tax holidays, subsidies and financial incentives to promote the establishment of industries in an identified geographical region with a view of improving economic development of LICs and enhancing foreign reserves.[46] Negative' investment measures are identified as: local equity mandate and licensing conditions, trade balancing requirement, restrictions on profit remittances, local content requirements, domestic sales requirements, export performance requirements and import substitutions, and transfer of technology requirements.[47] Negative

[39] WTO Committee on Trade-Related Investment Measures, Joint Study by the WTO and UNCTAD Secretariat, *Trade-Related Investment Measures and Other Performance Requirements* WTO Doc G/C/W/307 (1 October 2001) 1.
[40] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) article 2.
[41] Ibid Annex.
[42] Balasubramanyam, above n 33, 1215.
[43] Ibid
[44] Ibid.
[45] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) Annex; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem'above n 36, 136; Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 10.
[46] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem'above n 36, 136; *UNCTAD World Investment Report: Investment, Trade and International Policy Arrangements*, 180.
[47] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 136; WTO Committee on Trade-Related Investment Measures, Joint Study by the WTO and UNCTAD Secretariat, *Trade-Related Investment Measures and Other Performance Requirements* WTO Doc G/C/W/307 (1 October

measures are prohibited and limited under TRIMs to prevent discrimination. Low and Subramanian observe that the major shortcoming of the TRIMs Agreement is that it does not address export performance requirements due to opposition from India.[48] Their view is difficult to accept, however, as export performance requirements are explicitly prohibited under the TRIMs Agreement. Negative measures are important for host countries for the regulatory autonomy and for sustainable economic development.

Local content requirements refer to measures that prescribe a minimum or a certain percentage of the value of local materials obtained by investors for manufacturing from the host State's resources.[49] Export performance requirements state that a certain percentage of the volume or value of production that an investor should export is to be restricted.[50] The trade balancing requirement is to minimise the trade surplus as it relates to input exports and output imports.[51] Local equity mandates state that a certain percentage of the shares of companies should be owned by local investors.[52] Profit remittance restrictions are imposed to limit the extraction of investment profits from the host State.[53] Under these restrictions, investors should manufacture a fixed amount of products for the host State's market (domestic sales requirements).[54] A host State may prescribe that investors utilise specified

2001) 2; OECD, WTO and UNCTAD, *Report on G20 Trade and Investment Measures* (30 June 2017) 26; Eden S H Yu and Chi-Chur Chao, 'On Investment Measures and Trade' (1998) 21(4) *The World Economy* 549, 550.

[48] Low and Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 388.

[49] Maskus and Eby, above n 3, 527; David Greenaway, 'Trade-Related Investment Measures and Development Strategy' (1992) 45(2) *KYKLOS* 139, 141 and 142; *Submission by the United States, Negotiating Group on Trade-Related Investment Measures,* Group of Negotiations on Goods (GATT) GATT Doc MTN.GNG/NG12/W/2 (1 April 1987) 3; Eric M Burt, 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' (1997) 12(6) *American University International Law Review* 1015, 1036; Low and Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 384.

[50] Maskus and Eby, 'Developing New Rules and Disciplines on Trade-Related Investment Measures' above n 3, 527; Greenaway, above n 49, 141 and 142; *Submission by the United States, Negotiating Group on Trade-Related Investment Measures,* Group of Negotiations on Goods (GATT) GATT Doc MTN.GNG/NG12/W/2 (1 April 1987) 3; Burt, above n 49, 1036; Low and Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 384.

[51] Maskus and R Eby, above n 3, 527; Greenaway, above n 49, 141 and 142; *Submission by the United States, Negotiating Group on Trade-Related Investment Measures,* Group of Negotiations on Goods (GATT) GATT Doc MTN.GNG/NG12/W/2 (1 April 1987) 3; Burt, 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' above n 49, 1036.

[52] Maskus and Eby, above n 3, 527.

[53] Low and Subramanian 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 384.

[54] Maskus and Denise R Eby, above n 3, 527.

technology for manufacturing goods and that research needs to be carried out locally.[55] The TRIMs Agreement prohibits the above measures as trade-distorting measures: this is a shortcoming of the Agreement as it does not recognise host States' regulatory autonomy. Negative investment measures are needed to protect industries that are in their infancy and to preserve economic stability, especially for LICs. The above measures are important for the regulatory autonomy of host States and to achieve economic development.

Article 2:1 of the TRIMs Agreement stipulates that member States should not apply any measures that violate Articles III or XI of the GATT 1994. The TRIMs Agreement Annex states that measures are mandatory and that they cannot be enforceable under domestic law or administrative rulings. In other words, a host State is prohibited from imposing a requirement that an investor use a certain percentage of local content or ingredient for manufacturing goods. For example, a host State cannot insist that foreign investors buy or utilise some percentage or proportion of local raw materials in terms of the volume or value of products that they manufacture.[56] The TRIMs Agreement considers such measures to be discriminatory under Article III:4.[57] These measures are important for host States to improve their economies and to provide more welfare-oriented facilities for their people. Host States can also solve unemployment and increase the gross domestic products and protect domestic industries.

The issue of protecting domestic industries was discussed in *Indonesia, Certain Measures Affecting the Automobile Industry*.[58] In this case, Indonesia had established a 'car program' in 1993 which was expanded in 1996.[59] This 'car program' boosted the number of cars manufactured locally and made provision for local content requirements.[60] Japan, the US and the EU complained that Indonesia's 'car program' violated Article 2 of the TRIMs Agreement.[61] The Panel established by the DSB held that Indonesia's 'car program',

[55] Greenaway, above n 49, 141; Low and Subramanian, 'Beyond TRIMs: A Case for Multilateral Action on Investment Rules and Competition Policy?' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* above n 4, 384.
[56] Panel Report, *Indonesia, Certain Measures Affecting the Automobile Industry* WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998) [6.94]; Panel Report, *India – Measures Affecting the Automotive Sector* WTO Doc WT/DS146/R, WT/DS175 R (21 December 2001) [8.1].
[57] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) annex.
[58] Panel Report, *Indonesia, Certain Measures Affecting the Automobile Industry* WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998).
[59] Ibid [2.3, 2.4 and 2.5).
[60] Ibid [2.5].
[61] Ibid [1.1, 1.5 and 1.9].

through providing tariff and tax benefits for local content requirements, violated Article 2 of the TRIMs Agreement as the 'car program' constituted 'advantages' within the four corners of the illustrative list of Article 2 of the TRIMs Agreement to Indonesia.[62] However, the 'advantages' are not defined in the Agreement. Mashayekhi argues that, as the TRIMs Agreement does not define 'advantages', the 'advantages' can be interpreted to include subsidies that come under the Agreement on Subsidies and Countervailing Measures (SCM).[63] According to Mashayekhi, even the provision of subsidies can be construed as investment incentives.[64] This thesis rejects Mashayekhi's argument because the TRIMs and SCM agreements need to be interpreted in accordance with the objectives that lie behind them. Subsidies are given as a concession to achieve a level of economic development and it is not an advantage because the advantage is gained by a State through a measure which is discriminatory.

The TRIMs Agreement outlines the parameters of obtaining the advantages. How these advantages are obtained is unclear when a State introduces a measure for its advantage that is inconsistent with the TRIMs Agreement, and when this inconsistent measure can be enforced under domestic law or international law. For example, if Sri Lanka introduces a rule that investors are to use 40% local ingredients in the production of goods with a view to gaining advantages for the country's economy, this measure is inconsistent with the TRIMs Agreement Annex I, and should be withdrawn by Sri Lanka as it violates the TRIMs Agreement. Withdrawing such a measure does not provide advantages to Sri Lanka, but instead brings advantages to investors or the investing State. Therefore, the TRIMs Agreement has not balanced the interests of the host State and those of investors, especially those of LICs.

According to the Annex to the TRIMs Agreement, when distorting trade-related investment measures are not present, this does not benefit the host State, but instead benefits investors. Trade-distorting investment measures benefit host states. For instance, in the case *Indonesia, Certain Measures Affecting the Automobile Industry*, identifying measures

[62] Ibid [6.25]; Panel Report, *India – Measures Affecting the Automotive Sector* WTO Doc WT/DS146/R, WT/DS175/R (21 December 2001) [4, 109] footnote 196.
[63] Mashayekhi, 'Trade-Related Investment Measures in UNCTAD' in *A Positive Agenda for Developing Countries; Issues for Future Trade Negotiations* above n 26, 240; *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*Agreement on Subsidies and Countervailing Measures*).
[64] Mashayekhi, 'Trade-Related Investment Measures in UNCTAD' in *A Positive Agenda for Developing Countries; Issues for Future Trade Negotiations* above n 26, 240.

imposed by Indonesia in the TRIMs Agreement and the GATT relationship proved to be a difficulty.[65] India and other larger developing countries opposed local content requirements as they considered such measures would hamper their development.[66] However, Indonesia argued that local content requirements were necessary to improve the country's economic development.[67]

Non-discriminatory measures enshrined in the TRIMs Agreement apply not only to foreign investors, but also to local investors, thus linking together foreign investment and international trade.[68] The TRIMs Agreement covers not only existing but also future investments. It deals with negative investment measures, such as measures that are discriminatory on import and export of goods. The Agreement does not provide clear rules on measures that can be adopted by countries to attract FDI and to retain FDI in the host countries.[69] For example, TRIMs does not address the rules relating to sending back profits and the transfer of technological know-how to protect the regulatory autonomy of host States.[70]

LICs are especially dependent on FDI and, therefore, rules to attract FDI are necessary (see section 2.7.3). Hence, a mechanism to govern investment-related issues is needed. The following scenario is illustrative: a host State has copious amounts of sugar cane. An investor is producing sugar in the host State which imposes restrictions that the investor should use sugar cane that is locally produced in the host State. This measure is incompatible with the TRIMs Agreement. Host States impose local content requirements to boost their economy. The framers of the TRIMs Agreement have not considered this aspect, which is common to all countries. However, developing countries, based on their

[65] Ibid 241.
[66] *Proposals Regarding the Agreement on Trade-Related Investment Measures in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration, Preparations for the 1999 Ministerial Conference, Communication from India* WTO Doc WT/GC/W/203 (14 June 1999).
[67] *Communication from Brazil on the Agreement on Trade-Related Investment Measures, Preparations for the 1999 Ministerial Conference* WTO Doc WT/GC/W/271 (26 July 1999); Kavaljit Singh, 'Multilateral Investment Agreement in the WTO: Issues and Illusions' (2003) *Asia Pacific Research Network* 5, 23.
[68] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) Annex 1(a) and (b).
[69] Demaret, above n 28, 150.
[70] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 138.

balance-of-payment difficulties, are granted exemptions, allowing them to deviate from their TRIMs Agreement obligations under GATT Article XVIII.[71]

4.2.1 Notification Procedure and Transitional Period under the TRIMs Agreement

The TRIMs Agreement requires member States to declare within 90 days their trade-related investment measures that are inconsistent with the Agreement.[72] After this notification, the member States should withdraw these incompatible measures within two years.[73] However, developing countries and LDCs are respectively given time periods of up to five years and seven years.[74] Member States that are developing countries or LDCs can request additional time upon demonstrating difficulties in complying with the TRIMs Agreement, but these difficulties are not defined in the Agreement.[75] Therefore, LICs should be given a grace period until their FDI and trade capacity improvements reach a certain percentage; thereafter, they should be given notification to undertake their obligation. This can be monitored by a Trade and Investment Committee that the WTO establishes and appoints. Disputes arising from the TRIMs Agreement are heard by the DSU and these disputes arise among States, not with investors. The introduction of investment under TRIMs is a positive step to introduce a CIIA under the WTO. The GATS also introduced investment for the services sector through reciprocity and, therefore, it is relevant to discuss its structure since trade in services essentially involves investment.

4.3 Investment Elements in the GATS

The GATS provides rules for services and has opened the door for services liberalisation in, for example, digital trade, the telecommunications, financial services and the tourism industries.[76] These sectors have received an enormous amount of FDI which has, in fact, boosted States' economies, particularly for LICs.[77] The GATS disciplines provide for cross-border services which allow LICs to have FDI inflows to develop their economies,[78]

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[71] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) article 4.
[72] Ibid article 5.1.
[73] Ibid article 5.2.
[74] Ibid.
[75] Ibid article 5.3.
[76] 'WTO members' exports commercial services totalled US$ trillion 6.8 in 2018.' *WTO World Trade Statistical Review 2019*, 15.
[77] According to the WTO *Annual Report 2018*, the share of the services trade may increase up to 25% by 2030. *WTO World Trade Report 2018, Future of World Trade: How Digital Technologies are Transforming Global Commerce* 3, 4, 54, 134 and 135.
[78] *WTO World Trade Report 2018, Future of World Trade: How Digital Technologies are Transforming Global Commerce* 134; Regis Y Simo, 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) 23(1) *Journal of International Economic Law* 65, 66.

with the GATS extremely important for introducing investment to the services sector.[79] Therefore, the GATS disciplines are a *sine qua non* for investment.[80]

The GATS is a covered and binding agreement of the WTO.[81] It establishes a multilateral framework of rules for trade and investment in services,[82] with the exception of maritime and air transport services,[83] among its members. The GATS prohibits restrictions for trade in services to expand trade liberalisation in the services sector.[84] The basic policy objective is embodied in the GATS Preamble which states that the aim of the GATS is the growth and development of the world's economy.[85] This means that member States agree that investment in trade in services indisputably improves economic growth. The Agreement places its central emphasis on the development of developing countries. The GATS has requested that developing countries participate in the service liberalisation process in line with their national policy objectives.[86]

The GATS is built on MFN status, transparency, market access and NT.[87] MFN status provides rules for a country to treat a service supplier of one-member State no less

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[79]According to the United Nations Conference on Trade and Development (UNCTAD) I*nvestment Trends Monitor 2017*, FDI in the services sector covers 65% of the world trade. UNCTAD, *Investment Trends Monitor, Investment and Trade in Services: The Out-sized Role of Holdings and Intra-Firm Services* (UNCTAD, 2017) 3; OECD, WTO and UNCTAD, *Report on G20 Trade and Investment Measures* (4 July 2018) 72.

[80] *WTO World Trade Statistical Review 2018*, available at <https://www.wto.org/english/res e/statis e/wts2018 e/wts2018 e.pdf> accessed on 24 January 2019, 20; '… the global GDP gains from liberalizing Mode 5 services at multilateral level could reach up to EUR 300 billion by 2025 and world trade could increase by over EUR 500 billion.' Alessandro Antimiani and Lucian Cernat, 'Liberalizing Global Trade in Mode 5 Services: How Much Is It Worth?' (2018) 52(1) *Journal of World Trade* 65, 65; Simo, above n 78; see also Pierre Sauve, 'Gendered Perspectives on Services Trade and Investment' 2020 54(4) *Journal of World Trade* 481, 482.

[81] Laura B Sherman, ''Wildly Enthusiastic' about the First Multilateral Agreement on Trade in Telecommunications Services' (1998) 51(1) *Federal Communications Law Journal* 61, 64.

[82] Harry G Broadman, 'International Trade and Investment in Services: A Comparative Analysis of the NAFTA' (1993) 27(3) *The International Lawyer* 623, 631; Tim Wu, 'The World Trade Law of Censorship and Internet' (2006) 7(1) *Chicago Journal of International Law* 263, 267.

[83] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 102.

[84] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Preamble; Rudolf Adlung, 'Services Liberalization from a WTO/GATS Perspective: in Search of Volunteers' (World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2009-05, 16 February 2009) 1, 2; Mina Mashayekhi, 'GATS 2000: Progressive Liberalization' in UNCTAD, *A Positive Agenda for Developing Countries; Issues for Future Trade Negotiations* (United Nations New York and Geneva, 2000) 169.

[85] United Nations Department of Economic and Social Affairs Statistics Division, *Background Note on GATS Mode 4 Measurement*, World Trade Organization (New York, 24 February 2006) 3.

[86] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Preamble.

[87] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*)

favourably than that of any other member State supplying services. Transparency in the Agreement refers to the publication by member States of effects on the GATS by relevant measures.[88] The GATS does not define market access and domestic regulations, creating difficulties for host countries to introduce policies for regulatory purposes.[89] It does not have substantive provisions for emergency safeguard measures, subsidies and government procurement which are vital for regulatory autonomy.[90] For instance, if a subsidiary measure is distorting, the members have to avoid the distorted trade measure in service, even if a subsidiary is necessary to uplift the economy of a LIC**.** The market access commitment provides member States with the obligation to allow foreign suppliers of services to enter their local market for the supply of services without any hindrance.[91] The market access rule can be enforced even in the absence of NT violation. For instance, if a country bans internet gambling for all foreigners and locals equally, this is not a violation of NT even though this measure violates market access rules.[92] However, such measures violate market access rules only to the extent of that country's market access commitment.[93]

The concept of NT involves member States treating foreign services suppliers the same as domestic services suppliers. The scope of NT in the GATS is wider than the GATT, as it becomes mandatory for compliance not only with services relating to products, but also with suppliers' services.[94] The GATT deals with unconditional MFN status for products only. Again, the GATS is limited to the scheduled sectors, as each member State has committed to open its market to foreign services competitors, such as insurance and

articles II, III, XVI and XVII; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 104; Kavaljit Singh, above n 67, 24.

[88] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) article III.

[89] Joost Pauwelyn, 'Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS' (2005) 4(2) *World Trade Review* 131, 131; Erich Vranes, 'The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services'(2009) 12 (4) *Journal of International Economic Law* 953, 963.

[90] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) articles X, XIII and XV.

[91] Ibid article XVI; Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Doc WT/DS285/AB/R (7 April 2005) [214].

[92] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) article XII.

[93] Tim Wu, 'The World Trade Law of Censorship and Internet' (2006) 7(1) *Chicago Journal of International Law* 263, 270; Aaditya Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora's Box?' (1997) 31(1) *Journal of World Trade* 107, 107.

[94] Aaditya Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora's Box?' (1997) 31(1) *Journal of World Trade* 107, 107.

banking firms, and, at times, these commitments can also be divided into subsectors.[95] This is called the 'positive list' approach.[96] The 'negative list' provides for reservations related to the four modes of supply of foreign services.[97] Developed and developing countries use 'negative list'[98] reservations in the form of establishment requirements and discriminatory treatments against foreign services suppliers seeking market access.[99]

4.3.1 The Structure of the GATS

GATS consists of six parts: Part one (Articles I and XXVIII) deals with the scope, the coverage and the definition of relevant words. Internationally, GATS governs exchangeable services which have commercial elements. However, Article I:3(b) of the GATS covers all cross-border services, but excludes any services supplied in the exercise of governmental authority on non-commercial services.[100] Part two (Articles II to XV) covers general obligations and describes the basic principles governing the international market as it relates to services among member States. This part includes the MFN principle, disclosure of confidential information, and transparency, which are mandatory provisions with which member States should comply. Part three (Articles XVI to XVIII) provides specific commitments that deal with market access and the NT principle.[101] These provisions are specifically applicable to service providers based on agreed commitments to the schedule by their respective countries. This is similar to tariff concessions given under the GATT in Article II. The Annex to Article II of the GATS provides MFN exemption. These exemptions are listed in the Schedule of Commitments submitted at the end of the Uruguay Round negotiations by member States and that are not extended for more than 10 years.[102] A salient feature is that these exemptions are subject to future trade negotiation

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[95] Anders Ahnlid, 'Comparing GATT and GATS: Regime Creation under and after Hegemony' (1996) 3(1) *Review of International Political Economy* 65, 67; Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2002) 123.

[96] Riyaz Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24 (1&2) *Fordham International Law Journal* 275, 294; Lowenfeld, *International Economic Law* above n 24, 123.

[97] Lowenfeld, above n 24, 123.

[98] Ibid.

[99] Bernard Hoekman, 'Assessing the General Agreement on Trade in Services' in Will Martin and L Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1996) 88, 98; Lowenfeld, above n 24, 123.

[100] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) article I(3) (c).

[101] However, '… like GATT article III:4, the GATS National Treatment article contains no explicit reference to a text similar to the purpose statement in GATT article III:1'. Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effect" Test' (1998) 32(3) *The International Lawyer* 619, 633.

[102] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*)

rounds.[103] Part four (Articles XIX to XXI) provides rules for future negotiations for the progressive liberalisation of trade in services and plans for the new introduction of schedules. The aim of the new round of negotiations is to increase new commitments. Part V (Articles XXII to XVIII) deals with dispute settlement. The GATS disputes are resolved under the DSU. Part VI (Articles XXVII to XXIX) encapsulates the final provisions of the GATS and comprises eight annexes. These annexes provide specific rules for commitments to identified sectors, such as maritime transport, telecommunications and financial services.

At the Uruguay Round, the member States had disagreements with regard to maritime transport, telecommunications and financial services. As a result, they had to formulate guidelines and deadlines with the objective of future market access negotiations.[104] In 1997, member States were able to enter into two agreements, namely, the Agreement on Financial Services (Financial Services Agreement [FSA])[105] and the Agreement on Basic Telecommunications. The Agreement on Financial Services liberalises rules relating to trade and investment with regard to financial services. The Agreement on Basic Telecommunications introduced rules relating to trade and investment in basic telecommunications services.

The GATS Article I:2 defines services as the 'supply of a service' and it permits four modes of supply of trade in services. The first mode provides for cross-border supply of services from one country to another country.[106] This is a situation where an engineer or engineering firm in Australia sends a drafted structural building plan by mail to a company in Sri Lanka. The second mode is a supply of services for consumption in one country to another country

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Annex on article II para 6; OECD, Working Party of the Committee, 'Trade in Services: A Roadmap to GATS MFN Exemptions' TD/TC/WP(2001)25/Final (29 October 2001) paras 5 and 6; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem'above n 36, 108.

[103] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on article II para 6; see also Wu, above n 93, 270.

[104] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above 36, 105.

[105] *WTO Successful Conclusion of the WTO's Financial Services Negotiations*, WTO News:1997 Press Releases (Press/86) (15 December 1997) available at <https://www.wto.org/english/news_e/press97_e/pr86_e.htm> accessed on 20 September 2017; *WTO Second Protocol to the General Agreement on Trade in Services* WTO Doc S/L/11 (25 July 1995) available at *International Legal Material* (1996) 35(1) 203; WTO Second Decision on Financial Services WTO Doc S/L/9 (adopted on 21 July 1995) (24 July 1995) available at *International Legal Material* (1996) 35(1) 204; WTO Decision Adopting the Second Protocol to the General Agreement on Trade in Services WTO Doc S/L/13 (24 July 1995) available at *International Legal Material* (1996) 35(1) 206.

[106] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on article I(2)(a).

or several countries.[107] For example, this mode of service can be illustrated when an Indian company offers Sri Lankan pilgrim visitors facilities to visit Bodhgaya and Nepal. In this situation, the consumption of services is taking place in India and Nepal. The third mode of services supply is where one country provides services to another country 'through a commercial presence' in that country.[108] For example, the Commonwealth Bank of Australia provides services in England through its bank branch. The third mode of service supply introduces FDI to countries as it establishes a commercial presence in services.[109] This mode provides for the physical presence of foreign companies to supply services which also brings competition to the host State's local market.[110] The fourth mode of service refers to one country providing services to another country through its natural persons.[111] For example, a Sri Lankan doctor goes to Australia to provide medical services to a hospital in Australia. The abovementioned four modes are important for LICs, but still developed countries have not made satisfactory commitments.[112]

Internet services also attract large financial investments and most of the services are provided through the internet itself, and therefore there should be clear rules for internet services. This is lacking in the GATS rules. Thus, a question arises whether trade in services means services, or goods, or services related to goods.[113] Does the GATS cover internet-based services or is it the GATT that covers this area? For example, when reading the *Journal of International Economic Law*, a question arises as to whether it is a good or a service. In the GATS, this area is obscure. The line between the GATS and the GATT is blurred, particularly in relation to internet-based services. Do songs, software and books downloaded from the internet and kept in electronic form come under the GATS or the GATT? The GATS does not define the 'digitised transmission' of goods.[114]

[107] Ibid Annex on article I(2)(b).
[108] Ibid Annex on article I:2(c).
[109] Kurtz, *The WTO and International Investment Law: Converging Systems* above n 4, 50.
[110] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 107.
[111] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on article I(2)(d).
[112] *Communication from India Preparations for the 1999 Ministerial Conference, Proposals Regarding the GATS Agreement in Terms of Paragraph 9(a)(i) of the Geneva Declaration* WTO Doc WT/GC/W/224 (2 July 1999).
[113] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WTO Doc.WT/DS27/AB/R (9 September 1997) (EC Banana III) [41 and 42].
[114] Heinz Hauser and Sacha Wunsch-Vincent, 'A Call for a WTO E-Commerce Initiative' (2001) 6(1) *International Journal of Communications Law and Policy* 1, 29.

Lack of clear rules for regulatory autonomy are further illustrated from the Appellate Body in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Antigua–United States)*. In this case the Appellate Body did not discuss the classification of internet services under the GATS, but merely upheld the Panel's findings without considering the submissions from the US on regulatory freedom to make laws to protect its people from internet gambling to save money in the US.[115] In the *Antigua–United States,* Antigua had legalised internet gambling.[116] Antigua made a complaint against the US, alleging that several US federal and state laws had imposed a prohibition on the cross-border supply of gambling services.[117] Antigua contended that the decision of the US to impose such a prohibition was tantamount to a GATS violation.[118] The main argument put forward by Antigua was that laws introduced by the US had damaged its domestic gambling industry.

Antigua stated that its economy survived mainly on the tourism industry but, as hurricanes had destroyed its hotels and infrastructure, it had diversified its economy by introducing electronic commerce.[119] Antigua's submission is also interesting because they wanted to have non-discriminatory rules to generate income and to use that income for political economy purpose to give more facilities to its people.[120] The Panel held that the US had violated the GATS Article XVI:1 and XVI:2.[121] The GATS excludes any services rendered by government on the bases of non-commercial or non-competitive purposes. Non-commercial and non-competitive services, in the modern context, are very minimal as

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[115] Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Doc WT/DS285/AB/R (7 April 2005) [373]; Lode Van Den Hende, 'GATS Article XVI and national regulatory sovereignty: what lessons to draw from US—Gambling?' (2007) 20(1) *Cambridge Review of International Affairs* 93, 97; 'Driven to its logical conclusion, the approach in *US - Gambling* risks WTO intrusion into the regulatory freedom of WTO Members far beyond what was originally agreed to in the WTO Treaty.' Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' above n 89, 133.

[116] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [3.20].

[117] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7April 2005) [2].

[118] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [3.134].

[119] First Submission of Antigua in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (1 October 2003) [8]; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [3.2].

[120] This electronic commerce had attracted the internet gambling industry and provided the government of Antigua with revenues that could, in turn, be used to provide basic facilities such as goods and services to its people.

[121] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [7.2].

governments are involved in supplying welfare services through public and private partnerships.

4.3.2 Agreement on Financial Services and Investment

In the Uruguay Round, Member States laid the foundation for the Financial Services Agreement (FSA), but were unable to reach an agreement due to disagreement between them. The US did not support a comprehensive agreement on financial services due to India, Malaysia, Hong Kong, Thailand, Brazil and South Korea declining to give adequate market access commitments.[122] Therefore, an interim agreement was entered into in 1995.[123] However, on 12 December 1997, member States were able to finalise the FSA under the interim agreement starting from zero, and were able to make commitments to cross-border insurance, banking securities and financial leasing, as well as money brokering and assets management.[124]

Financial services plays an important role in the modern world economy.[125] The FSA came into force on 1 March 1999 and it became the first-ever multilateral FSA under the WTO framework.[126] The GATS Annex on Financial Services provided room for greater absorption of FDI and, thereby, liberalisation of market access.[127] Most FDI in LICs are concentrated in the Financial Services and Telecommunication sectors.[128] The GATS does not make provision to stop sudden withdrawal of foreign capital by multilateral corporations.[129] LICs fear that greater liberalisation of Financial Services would hamper

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[122] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem'above n 36, 119.

[123] *WTO Overview of the 1995 and 1997 Negotiations on Financial Services* available at <https://www.wto.org/english/tratop_e/finance_fiback_e.htm> accessed on 20 September 2017; *WTO Second Protocol to the General Agreement on Trade in Services* WTO Doc S/L/11 (25 July 1995) available at *International Legal Material* (1996) 35(1) 203; Ahnlid, above n 95, 83; *WTO Fourth Protocol to the General Agreement in Services* (Services: Protocols WTO Doc S/L/20 (30 April 1996); *WTO Fifth Protocol to the General Agreement on Trade in Services* (Services: Protocol) WTO Doc S/L/45 (3 December 1997).

[124] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on Financial Services, article 5.

[125] Paragraph 5 of the Annex on Financial Services under the GATS provides for the above list to be wider and it can be used to construct any services that may be associated with a financial element.

[126] *WTO Successful Conclusion of the WTO's Financial Services Negotiations*, WTO News:1997 Press Releases (Press/86) (15 December 1997) available at <https://www.wto.org/english/news_e/press97_e.htm> accessed on 23 September 2017.

[127] Kennedy 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 122; Philip Harms, Aaditya Mattoo and Ludger Schuknecht, 'Explaining Liberalization Commitments in Financial Services Trade' (2003) 139(1) *Review of World Economics* 82, 103.

[128] UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 33.

[129] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) article XI; Gabriel Gari, 'GATS Disciplines on Capital Transfers and Short-term Capital Inflows: Time for Change?'(2014) 17(2) *Journal of International Economic Law* 399, 412.

the national financial service due to the domestic financial service being unable to compete with foreign service providers and foreign service providers becoming a threat to the sovereignty of LICs.[130] However, under Paragraph 2 (Domestic Regulation) of the GATS Annex on Financial Services, member States are not deterred from undertaking prudential measures to regulate their financial services. This provision recognises member States' authority to regulate rules that protect the stability and integrity of their financial system. The aim of Paragraph 2 is to protect investors, depositors and policy holders while ensuring the economic sovereignty of WTO member States, but neither the FSA nor the GATS defines prudential measures creating uncertainty in the financial services sector.[131] The FSA's application of these measures should not be implemented to defeat NT and the commitment to market access.

The question arises then of how a measure adopted to protect the stability and integrity of countries' financial services is illegal and violates NT and market access? No criteria are available to determine whether such a measure is legal or not. Is it determined according to the facts of the case? Suppose a situation where country A adopts a measure to protect a financial stability measure to protect its economy. This measure is legal under Paragraph 2 (a) of the GATS Annex on Financial Services but it violates the same paragraph if it violates NT and market access. Therefore, this provision is contradictory. However, a member State can make rules derogating market access and NT on the basis of safeguarding its balance of payments,[132] general exceptions[133] and security exceptions.[134] There are no provisions to support regulatory autonomy of host States due to the ambiguity of Paragraph 2(a) of the GATS Annex on Financial Services but all countries have stressed the point that their regulatory autonomy should be preserved while liberalising the financial service.[135] The liberalisation of telecommunications services under the GATS was achieved by taking a similar approach to attract FDI.

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[130] Ayesha Malik, 'Why "Trade" in Financial Services. An Assessment of the Agreement on Trade in Financial Services under the GATS' (2000) 1 (2) *Journal of World Investment* 357, 359 and 369; Joel P. Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Analysis' (1995) 34 *Columbia Journal of Transnational Law* 40, 48.
[131] Malik, above n 130, 367.
[132] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on Financial Services, article XII.
[133] Ibid Annex on Financial Services, article XIV.
[134] Ibid Annex on Financial Services, article XIV bis.
[135] Malik, above n 130, 369.

4.3.3 GATS Annex: Telecommunications Agreement

Sixty-nine (69) member States of the WTO took initiatives to sign the Agreement on Basic Telecommunications on 15 February 1997[136] which came into operation on 1 January 1998.[137] Paragraph 1 of the GATS Annex on Telecommunications attempts to achieve two purposes, namely: '[a] distinct sector of economic activity and as the … means for other economic activities …'[138] The scope of the Annex is therefore wider, applying to measures that hinder the use of and access to public telecommunications transport networks and services.[139] However, a noteworthy feature of the negotiations by member States confines telecommunications transport networks and services to liberalisation of the telecommunications services of voice telephone, telex and telegraph. This offers substantial commitments in respect of value-added services, such as electronic e-mails and computer-generated databases, but not radio and television broadcasting.[140]

The modes of value-added telecommunications services are delivered either by cross-border or foreign commercial presence. Paragraph 5(a) of the Annex of the Agreement on Basic Telecommunications makes it mandatory for member States to not discriminate against service suppliers from any member State with regard to access and use of public communications transport networks and services which are in that member State's schedule.[141] The wording of Paragraph 5(a) suggests that no discrimination is possible within member States' commitment to the listed schedule regarding access or use of public telecommunications networks or services. However, developing countries and LDCs are given special opportunities to protect and strengthen their domestic telecommunications

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[136] *WTO Fourth Protocol to the General Agreement in Services* (Services: Protocols WTO Doc S/L/20 (30 April 1996); Marco C E J Bronckers and Pierre Larouche, 'Telecommunications Services and the World Trade Organization' (1997) 31(3) *Journal of World Trade* 5, 5; Eric Senunas, 'The 1997 GATS Agreement on Basic Telecommunications: A Triumph for Multilateralism, or the Market?' (Intellectual Property and Technology Forum, Boston College, 1997) available at <http://www.bciptf.org> accessed on 24 September 2017, 1; Stefan M Meinsner, 'Global Telecommunications Competition a Reality; United States Complies with WTO Pact' (1998) 13(5) *American University International Law Review* 1345, 1347.

[137] Bronckers and Larouche, above 136, 9; Laura B Sherman, ''Wildly Enthusiastic' about the First Multilateral Agreement on Trade in Telecommunications Services' (1998) 51(1) *Federal Communications Law Journal* 61, 62.

[138] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on Telecommunications, para 1.

[139] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 124.

[140] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on Telecommunications, para 2(a) and (b).

[141] Ibid, para 5(a) footnote 152.

system and services.[142] The basic telecommunications industry now covers a vast part of the world's economy with a great deal of FDI invested in this industry in LICs.[143] Liberalisation of telecommunication services is important to increase investment and to achieve economic booms,[144] but liberalisation of telecommunication has helped the monopolistic corporations in developed countries to get benefits (profits), while LICs do not get similar benefits due to the lack of technology to compete with monopolies.[145]

The TRIMs agreement and GATS, to a certain extent, introduced investment to the WTO but these agreements deal only with member States and do not provide rules for a CIIA. Consequently, member States enter into BITs. This is evident from the NAFTA as it endeavours to bring detailed rules to FDI. Most BITs have been influenced by the NAFTA, with investors in these member States having recourse to dispute resolution under NAFTA Chapter 11. This is a new dimension in international law that shapes the framing of a CIIA under the WTO.

4.4 NAFTA Chapter 11 and Investment

The NAFTA provides a regulatory framework for trade and investment between the US, Canada and Mexico.[146] In late 2018, the US, Mexico and Canada replaced the NAFTA and entered into an agreement on economic cooperation (USMCA), and introduced an investment agreement under Chapter 14.[147] The USMCA has been enforced on 1st July 2020 and the investors still have not invoked the USMCA provisions. Therefore, the NAFTA Chapter 11 is analysed in this chapter to demonstrate that trade and investment agreements can be converged in a CIIA. However, the NAFTA does not provide adequate

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[142] Technical cooperation and capacity building of developing countries and LDCs are emphasised in Paragraph 6. *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) Annex on Telecommunications, para 5(g); Jennifer Laura Feltham, 'Polish Communications Law: Telecommunications Takes Off in Transition Countries but at What Price are They Becoming Wired? (2000) 33(1) *Vanderbilt Journal of International Law* 147, 151.

[143] UNCTAD, *World Investment Report 2018 – Investment and New Industrial Policies* (UN Publication, Geneva, 2018) 41.

[144] *WTO World Trade Report 2019, Future of Service Trade* 4, 9 and 14.

[145] See Angus Henderson, Iain Gentle and Elise Ball, 'WTO Principles and Telecommunications in Developing Nations: Challenges and Consequences of Accession' (2005) 29 (2and 3) *Telecommunication Policy* 205, 208 and 210

[146] James H Love and Francisco Lage-Hidalgo, 'Investment? A Perspective on NAFTA' (1999) 22(2) *The World Economy* 207, 208.

[147] *Agreement between the United States of America, the United Mexican States and Canada* (The USMCA) (signed on 30 November 2018) (Entered into force on 1st July 2020). The USMCA is not a CIIA but it has introduced freedom to make laws for regulatory objectives under Articles 14.16 and 14:17 and its dispute settlement system is weakened; see Amrita Bahri and Monica Lugo, 'Trumping Capacity Gap with Negotiation Strategies: the Mexican USMCA Negotiation Experience' (2020) 23(1) *Journal of International Economic Law* 1, 5.

rules to safeguard the regulatory autonomy of States, but does provide rules to protect investors' rights.[148] The objective of the NAFTA is to reduce tariffs, to remove trade barriers and to facilitate cross-border investment between these three countries.[149] The Preamble states that the NAFTA is:

> [a] harmonious development and expansion of world trade and provide[s] a catalyst to border international cooperation: 'market access'; 'predictability' to investment; and 'sustainable development'.[150]

Furthermore, the Preamble emphasises that the rights created under the NAFTA are built on the GATT and that NAFTA operates in harmony with the GATT 1994.[151] The objective of the NAFTA reiterates the MFN, NT and transparency principles. The Preamble must then be interpreted in accordance with the GATT principles when there is a dispute.[152] Does this narrow down the NAFTA Chapter 11 jurisdiction? This question needs to be answered when discussing the MFN and NT principles.

The word 'predictability' is used in the Preamble as an attempt to provide uniform rules and regulations to govern investment between the three countries. The objective of the NAFTA is to increase investment opportunities and protect intellectual property rights.[153] Again, the question could arise whether the NAFTA (in the fullest sense of the word ensuring 'predictability') created an investment regime between these three countries. The Preamble also expanded its scope to include the enforcement of environmental laws and protection of the rights of the people, for example, labour rights within member States. Therefore, its scope is wider than that of any other bilateral investment agreement.

Chapter 11 of the NAFTA introduces investment rules which are applicable to States and investors.[154] Investors can have recourse to NAFTA Chapter 11 for investment disputes against a State.[155] Furthermore, NAFTA Chapter 11 can be divided into four parts:

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[148] Chris Tollefson, 'Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime' (2002) 27(1) *The Yale Journal of International Law* 141, 156.
[149] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) Chapter One, article 102.
[150] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) Preamble.
[151] Ibid.
[152] Ibid articles 102 and 103.
[153] Ibid article 102.
[154] Ibid article 1101:1 (a), (b) and (c).
[155] Tollefson, above n 148, 143.

measures relating to investors,[156] liberalisation of investment through non-discrimination,[157] investment protection[158] and dispute settlement.[159]

4.4.1 Scope of NAFTA Chapter 11

Chapter 11 of the NAFTA not only deals with investors but also introduces investment-related measures, expanding it to include performance requirements[160] and environmental measures.[161] In addition, Chapter 11 attempts to provide a wider definition of investment under Article 1139.[162] According to this Article, investment includes 'enterprise', 'equity security' (portfolio investment), 'debt security', 'real estate' and 'shares' of a company.[163] Inclusion of portfolio investment suggests that NAFTA Chapter 11 goes beyond FDI as this definition of investment is not limited to any percentage of the ownership of an enterprise. Wider definition of investment would reduce the host States' sovereign authority to make laws for sustainable development.

Indirect investment is called a portfolio investment. Foreign investors can invest money to buy shares, stocks and bonds of another country,[164] with these assets called a portfolio investment. A salient feature of these investments is that investors do not have control over them but investors are able to recover the capital they invest by selling these stocks. The study documented in this thesis has not examined portfolio investment as these investments deal directly with countries' municipal laws.

There is no clear definition to the word investment but investment can be described as the hoarding of wealth that provides a country with opportunities to increase its economic activities.[165] Investment can be categorised into direct and indirect investment. Direct

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[156] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) articles 1101 and 1139.
[157] Ibid articles 1102–1104 and 1106.
[158] Ibid articles 1105 and 1110.
[159] Ibid articles 1115–1136.
[160] Ibid article 1106.
[161] Ibid article 1104.
[162] Ibid article 1139 (a)–(h).
[163] Ibid article 1139; see also Jurgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' (2002) 23(4) *University of Pennsylvania Journal of International Economic Law* 713, 733.
[164] WTO, 'Trade and Foreign Direct Investment', 'New Report by the WTO', Press Releases, Press/57 (9 October 1996); Mark Vallianatos, 'De-fanging the MAI', (1998) 31(3) *Cornell International Law Journal* 713, 715.
[165] *A World Bank Group Flagship Report, World Development Report 2017: Governance and the Law* (World Bank Group, 2017) 170; Edmund Valpy Knox, Rodrigo Cubero-Brealey and Anand Lehmann, 'The Development Implications of the Multilateral Agreement on Investment: A Report Commissioned by the Department for International Development' (Finance and Trade Policy Research Centre, 21 March 1998) 1, 6.

investment involves capital being invested in an industry by a State or by an investor in another State (host) with long-term and short-term interest and a greater degree of control of the business entity by the investing State or investor.

Sornarajah defined investment by stating that it 'involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets'.[166] Sornarajah's definition of investment was seen to cover development as well as profits. His definition covered the transfer of assets from one country to another country. Sornarajah's definition of investment does not cover sustainable economic development, however, because it also covers transfer of profits.

The International Monetary Fund (IMF) defined direct investment as 'the category of International investment that reflects the objective of a resident entry in one economy obtaining a lasting interest in an enterprise resident in another country (the resident entry is the direct investor and the enterprise is the direct investment enterprise)'.[167] The lasting interest is also defined by the IMF as 'the existing of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise'.[168] Furthermore, it added that this involved: 'subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated.'[169] Investors invest money (not only long-term but also short-term) with a view to profits. The IMF definition of investment did not cover short-term interest and the IMF provides a narrower definition of investment when compared with the NAFTA. The WTO defined FDI as when 'an investor based in one country (home country) acquires an asset in another country (the host country) with the intent to manage that asset'.[170] The NAFTA, IMF and the WTO definitions of investment do not cover the sustainable economic development aspects.

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[166] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd ed, Cambridge University Press, 2010) 36; Lowenfeld, *International Economic Law* above n 24, 8.
[167] International Monetary Fund (IMF), *Balance of Payments Manual* (5th ed, 1993) para 359.
[168] Ibid.
[169] Ibid.
[170] WTO, 'Trade and Foreign Direct Investment', 'New Report by the WTO', Press Releases, Press/57 (9 October 1996); see also *WTO Report of the Working Group on the Relationship between Trade and Investment to the General Council* WTO Doc WT/WDTI/6 (9 December 2002) paras 17–22.

Chapter 11 of NAFTA also has provisions to protect investment between the three countries from expropriation under Article 1110. It also prescribes adherence to 'minimum standard of treatment' and 'fair and equitable treatment' which are guaranteed under international law for the 'full protection and security' of investment under Article 1105 (1) to protect investors' interest.[171] These terms have not been defined in the NAFTA as such definitions are problematic to construct and create the issue of increased complexity in investment disputes.[172] Article 1110 (1) states that 'on payment of compensation …', investment can be taken over by a State.

Article 1110 states that direct or indirect expropriation or nationalisation of the investment of an investor is prohibited except 'for a public purpose; on a non-discriminatory basis; in accordance with due process of law'.[173] Therefore, this provision prevents governmental authority from directly or indirectly arbitrarily taking over the investment of an investor without due compensation. This can be described as a measure that prohibits all forms of governmental activities except under the limbs (a), (b), (c) and (d) of Article 1110, thus restricting host States regulatory autonomy. This Article is not only ambiguous, it also discourages government authorities from making laws for sustainable development. Therefore, the NAFTA has failed to address the inherent tension between regulatory autonomy and investor rights. Article 1106 (1)(f) of the NAFTA prohibits the imposition of restrictive rules on technology transfer requirements by a State against investors. This Article does not restrict incentives for investment, but the question could arise of whether the incentive can be given in relation to meeting (or not meeting) performance requirements.[174]

The direct or indirect taking over of investment is manifested as expropriation and nationalisation unless it is not coming under exceptions (a) to (b) of Article 1100 (1). The NAFTA has not defined indirect acquisition of investment by a host State. A State, without discrimination, can introduce rules that may impact on investment. In the NAFTA Article

[171] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) articles 1110 and 1105.
[172] Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' above n 163, 738.
[173] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) article 1110 (a), (b), (c) and (d); Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' above n 163, 736.
[174] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) article 1106 (a), (b), (c) and (d).

1110 (1), it is stated that a governmental direct or indirect 'measure [is] tantamount to nationalization or expropriation of such an investment …'. Suppose a situation where a State, through its administrative authority, did not approve a particular project of an existing investor or an industry as this would cause environmental hazards for living beings. Could this be interpreted as tantamount to nationalisation or expropriation of investment? In this situation, the above-mentioned measure does not come under nationalisation or expropriation of investment. This measure does not bring economic benefits but stabilises long-term environmental sustainability.

In *Metalclad Corporation v United Mexican States* (*Metalclad*),[175] a similar situation arose. *Metalclad* is a US company which purchased a block of land in a Mexican municipality called Guadalcazar to construct a station to operate and transfer hazardous waste in La Pedrera.[176] On 23 January 1993, the Mexican Federal Authority apparently granted permission to build the waste landfill, following which *Metalclad* began construction work.[177] Subsequently, the municipal authority in Guadalcazar refused to issue a permit due to environmental issues and ordered the work to stop on the grounds of the absence of a valid permit.[178] Before this happened, *Metalclad* had been contracted to begin constructing the site and was told that the municipal authority would grant the permit. *Metalclad* began to construct the site, completing the site work in 1995.[179] Subsequently, in 1997, the governor of the province declared that this particular area was the ecological area for a 'rare cactus'.[180] On behalf of *Metalclad*, it was argued that Mexico had violated the minimum standard of treatment (Article 1105) and expropriation (Article 1110) rules of the NAFTA, appearing before the ICSID Arbitration Tribunal.[181] The Tribunal awarded damages in favour of *Metalclad* because Mexico was unable to treat *Metalclad* fairly and equitably under Article 1105 of the NAFTA.[182]

[175] *Metalclad Corporation v United Mexican States* (Award) (ICSID) (ARB(AF)/97/1 (30 August 2000).
[176] Ibid [28].
[177] Ibid [29].
[178] Ibid [40, 42–44 and 54].
[179] Ibid [45 and 46].
[180] Ibid [59].
[181] Ibid [104].
[182] The Tribunal was of the view that Mexico did not follow the due process when refusing the permit to *Metalclad*. In other words, the Tribunal held that Mexico violated the natural justice rule. *Metalclad Corporation v United Mexican States* (Award) (ICSID) (ARB(AF)/97/1 (30 August 2000) [131], [100] and [70] ; David A Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States–Chile Free Trade Agreement' (2004) 19(4) *American University International Law Review* 679, 710.

Furthermore, the Tribunal gave a wide interpretation of the definition of indirect expropriation. On the one hand, the Tribunal found that a legitimate measure, such as an ecological decree, would be tantamount to expropriation even if a State does not derive economic benefits. The Tribunal's reasoning prohibits a host State from taking any measure to protect the environment. The NAFTA does not have an environmental exception clause like the one in the GATT Article XX. That is why, in *Metalclad*, the Tribunal's interpretation of indirect investment was viewed as having widened to include an environmental protection measure as expropriation, even in the absence of economic benefits to the host State. On the other hand, the origin of expropriation was associated with economic benefits when newly independent colonies began to nationalise foreign-owned properties for economic development.[183] The Tribunal was unable to comprehend the historical background behind the expropriation. Thus, the flawed interpretation of indirect investment is illustrated in the following paragraph from the *Metalclad* case:

> … expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal and obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[184]

The Tribunal came to the above finding as the NAFTA does not define indirect investment and has no environmental exceptions. The *Metalclad* case considered that the indirect taking of property on environmental grounds is an expropriation, and therefore the definition of investment should not include indirect taking-over of properties.

Even though the NAFTA does not have its own dispute settlement procedure, its commitments can be enforced through State–State[185] and investor–State arbitration under the ICSID Convention.[186] In addition, the NAFTA does not provide a forum for litigation, but it encourages States and investors to utilise arbitration and alternative dispute resolution

[183] Sornarajah, above n 166, 36
[184] *Metalclad Corporation v United Mexican States* (Award) (ICSID) (ARB(AF)/97/1 (30 August 2000) [103].
[185] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) chapter 20, section (b), articles 2003–2022.
[186] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) chapter 11, section (b), article 1122.

(ADR).[187] Member States are requested to establish an Advisory Committee on Private Commercial Disputes to study the effectiveness of the arbitration and ADR procedure.[188] The NAFTA Chapter 11 has brought some progressive rules for investment, such as defining, to a greater extent, direct investment, and investors are able to institute cases against States challenging States' regulatory authority. Nevertheless, it was unable to satisfactorily deal with and solve disputes between the US, Canada and Mexico. As a result, the OECD in 1991 began to draft a MAI, with a report presented to the OECD Ministerial Council in May 1995.[189] Discussion on this development continues in the next section.

4.5 OECD and Multilateral Agreement on Investment (MAI)

The OECD (EU) Ministerial Council was granted a mandate to draft a MAI to create an investment liberalisation regime, including investment protection and a dispute settlement system for investment issues in 1995.[190] A significant feature of the mandate was that it was not confined to the OECD but endeavoured to also provide access to non-OECD member States to enter into the MAI, with the US initially also in favour of such an agreement.[191] The aim of the OECD was to have a CIIA. The time frame was ambitious, with the draft to be developed within two years and negotiations to be concluded in 1997.[192] The OECD was unable to establish an MAI, however, as Canada and the EU did not agree

[187] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) article 2022; Lucille M Ponte and Erika M Brown, 'Resolving Information Technology Disputes after NAFTA: A Practical Comparison of Domestic and International Arbitration' (1999) 7(1) *Tulane Journal of International and Comparative Law* 43, 45.

[188] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) article 2022(4); Ginger Lew and Jean Heilman Grier, 'A Role for Governments in the Resolution of International Private Commercial Disputes' (1995) 18(5) *Fordham International Law Journal* 1720, 1721.

[189] OECD, *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multilateral Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) 1995*, DAFE/CMIT/CIME(95) 13/ FINAL (5 May 1995) available at <http://www1.oecd.org/draf/mai/htm/cmitcime95.htm> accessed on 30 September 2017.

[190] OECD, *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multilateral Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) 1995* [DAFE/CMIT/CIME(95) 13/FINAL, 5 May 1995] available at <http://www1.oecd.org/draf/mai/htm/cmitcime95.htm> accessed on 30 September 2017, section 3 (Mandate); Edmund Valpy Knox, Rodrigo Cubero-Brealey and Anand Lehmann, 'The Development Implications of the Multilateral Agreement on Investment: A Report Commissioned by the Department for International Development' (Finance and Trade Policy Research Centre, 21 March 1998) 1, 6.

[191] Smythe, above n 34, 101.

[192] OECD, *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multilateral Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) 1995*, DAFE/CMIT/CIME(95) 13/FINAL (5 May 1995) available at <http://www1.oecd.org/draf/mai/htm/cmitcime95.htm> accessed on 30 September 2017, section 3 (Mandate).

on the definition of investments, and extra-territorial application of US law.[193] As well, France and Canada wanted to include the cultural exemption to promote cultural industries but the US did not agree on it, while the EU wanted to exclude regional economic organisations from the MAI's scope.[194] In addition, the financial instability that arose among larger developing countries in 1998 did not help the MAI cause.[195] As a result the MAI did not become a reality. The draft ill-fated text of the OECD's MAI has 12 chapters dealing with matters including investment liberalisation,[196] investment protection,[197] dispute resolution,[198] and exceptions and safeguards.[199]

4.5.1 Draft OECD MAI and its Application as a CIIA

The draft MAI in its Preamble admits the importance of a CIIA by emphasising a 'fair, transparent and predictable investment regime' to benefit the world trading system, increase job opportunities and lift the living standards of people. The Preamble, furthermore, recognises investment not only as an 'engine of economic growth', but as also playing a pivotal role in sustainable economic growth. However, the drafters of the MAI were sceptical as countries and citizens were not ready to give up their sovereignty and to constrain regulatory authority.[200]

The definition of investment in the draft MAI is broader and a list of items that come within the definition includes '… all assets of an enterprise are part of the investment and its value,

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[193] For example, *The Cuban Liberty and Democratic Solidarity Act of 1996* (known as the Helms-Burton Act) prohibited US investors from investing in Cuba). *The Cuban Liberty and Democratic Solidarity Act, 1996* US Public Law No. 104-14, 14 March 1996; Saturnine E Lucia II, 'The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: an Initial Analysis' (1996) 27(2) *Inter-American law Review* 325, 333; Jonathan R Ratchik, 'Cuban liberty and The Democratic Solidarity Act of 1995' (1996) 11(2) *American University Journal of International Law and Policy* 343, 359; Canner, Stephen J, 'The Multilateral Agreement on Investment' (1998) 31(3) *Cornell International Law Journal* 657, 671.

[194] Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' above n 163, 759; Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 89; Kurtz, Jurgen, 'NGOs the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment' (2002) 3(2) *Melbourne Journal of International Law* 213, 224.

[195] Helmu**t** Reisen, 'After the Great Asian Slump: Towards A Coherent Approach to Global Capital Flows' (OECD Development Centre, Policy Brief No 16, 1999) 1, 5; Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Investment on Investment' above n 163, 760.

[196] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) chapter III on non-discriminatory treatment for investors and investment.

[197] Ibid chapter IV.

[198] Ibid chapter V.

[199] Ibid chapter VI.

[200] See OECD The MAI Negotiating Text (as of 24 April 1998) 7 footnotes 1 to 5.

even when the asset is itself not held as an investment'.[201] The question then arises as to whether items that are not listed can come within the definition of investment. In the draft MAI, the definition of investment does not define a particular item as being an investment and this is therefore lacking in the draft. For example, the NAFTA states that investment is associated with particular characteristics, such as 'interest arising from the commitment of capital' and 'contracts involving the presence of an investor's property in the territory of the Party …'.[202] Such characteristics cannot be found in the draft MAI's definition of investment.

In footnote 1 of the MAI's Legal Text, it is admitted that further improvement in the definition of investment needs to be undertaken for terms such as 'indirect investment', intellectual property rights', 'concessions', 'public debt' and 'real estate'.[203] At the OECD negotiation, some delegates were of the view that the inclusion of indirect investment in the definition of investment would complicate dispute resolution issues.[204] Larger developing countries did not want to accept the broader definition of investment[205] and emphasised the importance of having a set of rules for the control of restrictive business practices.[206] They especially expressed the concern that multilateral enterprises would establish monopolies that may result in local competitors losing their businesses.[207] In addition, larger developing countries considered this definition would affect their labour market due to the bargaining capacity of multilateral companies.

Broader definition of investment deprives the host States' freedom to make laws for political economy purposes (public welfare) and it undermines the regulatory flexibility of

[201] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Report by the Chairman to the Negotiating Group* DAFFE/MAI (98)17 (4 May 1998) para 8.
[202] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) article 1139(h).
[203] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 11.
[204] OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) para 6.
[205] *Communication from Hong Kong, China – Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment* WTO Doc WT/GC/W/268 (21 July 1999) para 2; *Communication from Korea – Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment* WTO Doc WT/GC/W/267 (20 July 1999) para 6.
[206] Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem' above n 36, 153 footnote 300; United Nations Conference on Trade and Development (UNCTAD), *Model Law on Competition (*2017) Revised Chapter VII UN Doc TD/B/C.I/CLP/L.7 (17 May 2017) articles 33, 35 and 36 (Proposals by China).
[207] United Nations Conference on Trade and Development (UNCTAD) *Model Law on Competition* (2017) Revised Chapter VII UN Doc TD/B/C.I/CLP/L.7 (17 May 2017) articles 33, 35 and 36 (Proposals by China).

host States.[208] The narrow definition of investment excludes portfolio investment and it narrows down the scope of the definition of investment which preserves the regulatory autonomy of host States.[209] The draft MAI introduced a provision on 'standstill and listing of country-specific reservations'.[210] 'Standstill' is a concept introduced in the draft MAI to restrict more or new exceptions to the minimum standard of treatment, and countries were requested to adopt the proposed specific reservations.[211] The word 'standstill' does not apply to exceptions like national security and balance of payment difficulties. The draft MAI does not recognise exceptions similar to the GATT Article XX. The negotiators considered the importance of maintaining labour and environmental standards to preserve regulatory autonomy of countries[212] and therefore, the Chairman's Note suggested exceptions in line with the GATT Article XX.[213]

The objective of the MAI was to liberalise investment through non-discrimination between foreign and domestic investors (applying MFN and NT principles).[214] The OECD drafters deliberately limited non-discrimination to 'like circumstances' stating that it might often

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[208] 'The broadest definitions embrace every kind of asset. They include in particular movable and immovable property, interests in companies (including both portfolio and direct investment), contractual rights (such as service agreements), intellectual property, and business concessions.' *Scope and Definition, UNCTAD Series on Issues in International Investment Agreements, IIA Issues Paper Series,* UNCTAD/ITE/IIT/11 (vol. II) (United Nations, 1999)1.

[209] 'Many investment agreements have therefore narrowed the definition of investment in various ways in furtherance of the parties' economic policies, including development policies. For example, they often exclude from the definition investment not established in accordance with host country legislative requirements, which tend to reflect a country's development policy.' *Scope and Definition, UNCTAD Series on Issues in International Investment Agreements, IIA Issues Paper Series,* UNCTAD/ITE/IIT/11 (vol. II) (United Nations, 1999) 2.

[210] OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) 60.

[211] The word 'standstill' does not apply to exceptions like national security and balance of payment difficulties. The negotiators were unable to reach agreement on how investment was to be liberalised. OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) 60; Robert Stumberg, 'Sovereignty by Subtraction: The Multilateral Agreement on Investment' (1998) 31(3) *Cornell International Law Journal* 491, 570.

[212] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 53.

[213] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI) *Chairman's Note on Environment and Related Matters and on Labour* DAFFE/MAI (98)10 (9 March 1998) 2.

[214] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) chapter III, articles 1, 2 and 3; OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) paras 4, 5 and 6; William A Dymond, 'The Main Substantive Provisions of MAI' in OECD, *Proceedings of the Special Session on the Multilateral Agreement on Investment*, Paris, 17 September 1997 OCDE/GD(97)187, 13, 14; Robert Stumberg, 'Sovereignty by Subtraction: The Multilateral Agreement on Investment (1998) 31(3) *Cornell International Law Journal* 491, 501; Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Lessons for the Regulation of International Business' in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001) 114, 125.

be abused when comparing investors and investment based on characteristics that are not relevant for comparison when defining investment.[215]

The negotiators were unable to reach agreement on how investment was to be liberalised. The Negotiating Group recognised investment liberalisation could be achieved in several rounds of negotiation in the future.[216] Negotiating countries use the word 'rollback' for the liberalisation of trade by removing restrictions for investment in several phases. The draft MAI prohibits the use of export performance requirements, including technology transfer requirements.[217] The drafters of the MAI looked at this aspect from the developed country perspective. Export performance requirements and technology transfer requirements are, to a greater extent, needed to gear up weak economies. Non-governmental organisations (NGOs) considered the MAI to be a threat to the environment unless member States had clear autonomy to impose regulations to protect environmental and labour standards,[218] for the reason that the draft MAI did not adequately address issues of economic sustainability.

4.5.2 Investment Compensation under the MAI

Chapter VI in the draft MAI provided rules for compensation to investors in the event of the host State's direct or indirect expropriation of their investment property.[219] However, the negotiating countries have not agreed to include indirect investment and portfolio investment, with no guidance provided on whether indirect expropriation means States' administrative regulations imposed to reduce the value of investment to safeguard the legitimate interest of a State for political economic purpose.[220] The wording of the draft MAI is similar to that of the NAFTA which provides 'fair and equitable treatment and full and constant security' to investment while protecting investment according to public international law.[221]

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[215] Dymond, above n 214; OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) 11 and 35 footnote 67.

[216] OECD Negotiating Group on the Multilateral Agreement on Investment, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) 60.

[217] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 18, 19.

[218] Andrew Walter, 'NGOs, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond (2001) 7(1) *Global Governance* 51, 58 and 59.

[219] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 56.

[220] Anna De Luca, Indirect Expropriations and Regulatory Takings: what Role for the "Legitimate Expectations" of Foreign Investors? (Bocconi Legal Studies Research Paper No. 2524925, 2013) 1, 4; F.V. Garcia-Amador, Fourth Report on State Responsibility (Special Rapporteur) UN Doc. A/CN.4 119) (1959) 11.

[221] OECD Negotiation Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text* DAFFE/MAI (98)7/REV1 (22 April 1998) 56 footnote 1.

The negotiators of the MAI agreed to disagree on investment incentives, with some countries saying these were necessary for the MAI to have credibility. Other countries stated that unless the impact of investment and the nature of its scope were fully studied, investment incentives were too ambitious to liberalise investment.[222]

4.6 Most Favoured Nation and National Treatment Obligations in Trade Law

4.6.1 Most Favoured Nation Treatment of Trade Law

The liberalisation of investment does not endorse the view that States should become mere onlookers. States should intervene through laws and regulations to maximise benefits and the welfare of their people (the political economy of investment).[223] It is the duty of a State to balance competing interests. The aim of investment converging into trade means not only that it should bring predictability to investment law, but also that it should benefit all countries, and especially their people. For instance, Australia endeavours to maximise investment liberalisation while, at the same time, preserving and promoting social justice.[224] This helps to maintain essential services such as health, education and housing as well as the economy and the environment. Countries try to introduce social welfar**e** regulations to achieve economic benefits for their people, with the GATT exceptions, for example, accommodating these aims.

The MFN and NT principles in the WTO are found in the GATT,[225] the TRIMs Agreement,[226] the GATS,[227], the TRIPS,[228] the Agreement on Technical Barriers to Trade

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[222] OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* [DAFFE/MAI (98)8 REV1] (22 April 1998) 18.

[223] Kenneth J Vandevelde, 'The Political Economy of a Bilateral Investment Treaty (1998) 92(4*) American Journal of International Law* 621, 635.

[224] Razeen Sappideen and Ling Ling He, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) 49(1) *Journal of World Trade* 85, 98.

[225] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*General Agreement on Tariffs and Trade*) hereinafter referred to as the *GATT 1994*, articles I and III.

[226] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Investment Measures*) (TRIMs Agreement) article 2.

[227] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) articles II and XVII.

[228] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) articles 3 and 4.

(TBT) and Agreement on Government Procurement.[229] The MFN and NT principles are core pillars in investment agreements such as the NAFTA, the draft MAI and in the majority of BITs.

The cornerstone of any prospective investment agreement should be built on the MFN and NT principles. Therefore, MFN and NT concepts are discussed below to build a theoretical foundation for a CIIA. The MFN obligation in the GATT applies at a border level for tariffs, while the NT obligation applies to governmental regulations (internal regulations and taxes) and governments can make regulations involving both in MFN and NT. The GATT Article I:1 contains the core of the MFN obligation. The International Law Commission (ILC) defines the MFN treatment as follows:

> Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.[230]

The ILC definition of MFN states that 'beneficiary State, or to persons' can invoke the protection of MFN and therefore it can be used as an "ejusdem generis" to interpret the MFN principle enshrined in BITs, and even investors can invoke it, if a host State violates it, provided the host State is governed by BITs and it breached the MFN principle in BITs.[231]

The MFN treatment can be conditional or unconditional. The central theme of conditional MFN treatment is reciprocity and that of unconditional MFN treatment is non-discrimination.[232] The economic rationale of the MFN obligation is to prevent trade diversion, to lower production costs, to increase consumer choices, to facilitate trade negotiations and to create trade. Exceptions apply to the MFN obligation, the most

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[229] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 4, article III(2)(a).

[230] Report of the International Law Commission on the Work of its Thirtieth Session (30 August 1978) 2, in *Yearbook of International Law Commission* 5 UN Doc A/33/192, reprinted in (1978) 17(6) *International Legal Material* 1518, 1519. The history of MFN goes back to the eleventh century to give equal protection to foreign merchants as to local merchants. See Okezie Chukwumerije, 'Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations' (2007) 8(5) *The Journal of World Investment and Trade* 597, 608.

[231] 'The ejusdem generis principle is the rule according to which a MFN clause can only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates'. OECD, Most Favoured Nation Treatment in International Investment Law (OECD Working Paper, 2004/02, September, 2004)1, 9.

[232] Kennedy, 'GATT 1994', in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* above n 4, 101.

important being the creation of free trade areas and customs unions, as well as the differential treatment provided to developing countries for health and environmental exceptions.

The MFN obligation's main aim is to ensure that all member States of the WTO treat all imports from other member States on an equal footing. Therefore, a member State is prohibited from favouring or discriminating in respect of imports from other member States.[233] It follows then that all imports should be treated in a non-discriminatory manner.

The word 'unconditional' means that the MFN obligation applies equally to all member States irrespective of either the country of origin or whether reciprocal trade concessions have been negotiated. It is for these reasons that the MFN commitment's main aim and objective are non-discrimination.[234] The *European Communities – Regime for Importation, Sale and Distribution of Bananas* case[235] shows that the intrinsic nature of the non-discrimination obligation is that 'like products' should be considered equally, irrespective of their origin.[236] No clear definition is provided for the term 'like products' which must be decided on a case-by-case basis.[237] As the AB made clear in the oft-quoted passage of *Japan – Alcoholic Beverages*: '[t]he concept of likeness stretches and squeezes in different places as different provisions of the WTO Agreement … evok[ing] the image of an accordion'.[238] Therefore, the definition of 'like product' appears to be relative, because no conclusive definition is provided of 'similar opportunities', 'less favourable treatment' for foreign and domestic investors or 'the necessary level playing field condition' for investment. The concept of like products in the GATT is applied on a case-by-case basis. Under investment law, however, similar circumstances are determined on the competitive

[233] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 186.
[234] Edward A Laing, 'Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law (1996) 14(2) *Wisconsin International Law Journal* 246, 255
[235] Appellate Body, *European Communities – Regime for Importation, Sale and Distribution of Bananas* WTO Doc WT/DS /27/AB/R (9 September 1997).
[236] Appellate Body, *European Communities – Regime for Importation, Sale and Distribution of Bananas* WTO Doc WT/DS /27/AB/R (9 September 1997) [190].
[237] Working Party Report, *Border Tax Adjustments* GATT Doc L/3464 (20 November 1970, adopted 2 December 1970) [18].
[238] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996) 21; Donald H Regan, 'Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional Remarks on Article III:2)' (2002) 36(3) *Journal of World Trade* 443, 444.

relation of investors and investment and the MFN is applied for all investment activities (section 4.6.4 discusses the MFN further under Domestic Investor Test).[239]

4.6.2 National Treatment of Trade Law

The NT obligation is one of the central pillars in WTO agreements and has also been adopted in investment treaties which would provide the basis for the convergence conceptual norm in any future CIIA.[240] The basis of the GATT is the NT obligation which is also a non-discriminatory obligation but imposed at the national level to provide an equitable competitive environment with the aim of market opportunities and welfare of people.[241] Therefore, trade law NT is determined on public policy, but the public policy is not relevant to determining the NT in investment law. The NT of the BITs has been designed to protect investors rather than host States and the tribunals have not considered the importance of recognising regulatory autonomy of host States when two investments are not competitive.[242] The significant difference between investment and trade law NT is that trade law applies a 'competition test' and regulatory test (exceptions) to determine the rights of States, and investment law applies the 'regulatory context test' to ascertain whether investors' rights have been breached with the introduction of regulations.[243] The NT is determined under BITs on like circumstances and the trade law determines it on like products. Several criteria are used in the WTO NT to determine whether the product at issue is a 'like product'. Panels have developed end-users, consumer taste and habit, characteristics of a product and tariff classification to determine the likeness of a product but none of the tests mentioned above are applied in determining like circumstances (section 4.6.6 discusses like circumstances).[244]

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[239] Jurgen Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' (2004) 5(6) *The Journal of World Investment and Trade* 861, 868.

[240] Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *The American Journal of International Law* 48, 59.

[241] Ibid, 81.

[242] 'Investment tribunals, in contrast, have properly declined to import trade law's focus on competition into their national treatment tests. Although the objective and purpose of each investment treaty must be evaluated independently, the overall history of investment treaties demonstrates that national treatment provisions were inserted into most BITs to protect individual foreign investors from targeted attacks by their host governments. BITs traditionally focus on the security and fairness for individual investors rather than on economy-wide efficiency or competition. The objective of protecting individual investors from discrimination has appropriately led investment tribunals to focus upon the circumstances giving rise to governmental choices concerning the regulation of investments'. DiMascio and Pauwelyn, above n 240, 81

[243] Ibid.

[244] Working Party, *Border Tax Adjustments* GATT Doc L/3464 (20 November 1970, adopted 2 December 1970) [18]; Working Party, *The Australian Subsidy on Ammonium Sulphate* GATT Doc GATT/CP. 4/39, II/188 (31 March 1950, adopted 3 April 1950) [8].

The GATT NT obligation applies to foreign goods, in the form of internal taxation and regulations, when they reach a country.[245] The GATT Article III:1 prevents the introduction of discriminatory domestic taxes and regulations for foreign goods once they have entered a member State's territory if these are less favourable than those applying to domestic 'like products', or to competitive and similar products. Article III:1 lays down the general principle in order to understand and interpret Article III:2.[246] This is illustrated in the Appellate Body Report in the case, *Japan – Taxes on Alcoholic Beverages*, which stated that:

> The purpose of Article III:1 is to establish this general principle as guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation.[247]

The above paragraph emphasises that the central NT obligation is embodied in the GATT Article III:1. Article III:2 lays down specific obligations to member States that they are not to discriminate against foreign goods, directly or indirectly, through internal taxes and charges.[248] Internal taxes and regulations should be imposed equally on domestic and foreign 'like products'. Article III:2 contains two sentences. Therefore, it is important here to point out the products that relate to 'like products' and competitive products.

4.6.2.(a) GATT Article III:2 First Sentence

The GATT Article III has been introduced to protect the social welfare of States and to deviate from laissez-faire type embedded liberalism.[249] Developing countries agreed for liberalisation of tariff on the basis that they wanted to deviate from their commitment if the

[245] GATT articles III(2) and III(4).
[246] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 18; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R (12 March 2001) [98].
[247] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 18.
[248] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996).
[249] See Kurtz, *The WTO and International Investment Law: Converging Systems* above n 4, 83; Gene M. Grossman and Elhanan Helpman, 'Protection for Sale'(1994) 84(4) *American Economic Review* 833, 848.

need arises to preserve the domestic stability (political economy of trade). This was designed under GATT Articles III and XX. BITs also provide NT principles. The NT in BITs does not embody the objective (lacking interpretative provision) enshrined in the NT principles like GATT Article III:1.[250]

According to the first sentence of Article III:2 of the GATT, countries are prohibited from imposing discriminatory taxes for imported 'like products'.[251] This is determined in comparison with domestic 'like products'.[252] The trade effect is that it is not necessary to have any impact on decreasing the demand for the product discriminated against. The aim of the first sentence of Article III:2 is to establish a conducive competitive environment for imported products in relation to domestic 'like products',[253] with this sentence preventing direct and indirect imposition of internal taxes or charges.[254]

The first sentence in Article III:2 of the GATT is relevant and applicable to FDI as this sentence can be used to accommodate FDI-related issues to ensure competition between local and foreign investors (manufacturing and services). A significant feature of the first sentence of Article III:2 is that it envisages that prohibitive regulations in the future may risk discriminating against imported products or raw materials when imported goods are in

[250] Kurtz, *The WTO and International Investment Law: Converging Systems* above n 4, 86.

[251] GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* GATT Doc L/6175-34S/136 (5 June 1987, adopted on 17 June 1987) [5.1.1]; Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 39.

[252] For example, if Australia imposes a 10% foreign revenue tax on imported beef sold in Coles and Woolworths supermarkets, thus making the price higher than that for Australian beef sold in the same supermarkets, this is discriminatory against foreign beef producers vis-à-vis domestic beef producers. This tax is prohibited under the first sentence. Australian beef and imported beef are like products. Regulations or taxes imposed as stated in the first sentence need not be a condition in an effect on trade ('trade effect') test or under *de minimis.* The *de minimis* is also determined according to the facts of the case and the objective test is not applied. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 27 and 123; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* WTO Doc WT/DS31/Ab/R (30 June 1997) 21; Kennedy, 'GATT 1994' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* above n 4, 117; GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* GATT Doc L/6175-34S/136 (adopted 17 June 1987) [5.1.9]; Henrik Horn and Petros C Mavroidis, 'Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination' (2004) 15(1) *European Journal of International Law* 39, 51.

[253] GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* GATT Doc L/6175-34S/136 (5 June 1987, adopted on 17 June 1987) [5.1.9]; Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* GATT Doc L6216-34S/83 (13 October 1987, adopted 10 November 1987) [5.5(b)].

[254]This can be direct taxes for final products or indirect taxes for raw materials used for products and, occasionally, at several stages of the manufacturing process of a product. GATT Panel Report, *Japan – Customs Duties, Labelling Practices on Imported Wines and Alcoholic Beverages* GATT Doc L/6216-34S/83 (13 October 1987, adopted on 10 November 1987) [5.8]. GATT Panel Report, *Japan – Customs Duties, Labelling Practices on Imported Wines and Alcoholic Beverages* GATT Doc L/6216-34S/83 (13 October 1987, adopted on 10 November 1987) [5.8].

that member State's territory.[255] In *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*[256] the issue argued was whether the US introduced its tobacco program under the *Budget Act of 1993* to control production price support for US tobacco producers.[257] The Panel held that the US had introduced discriminatory internal taxes on foreign tobacco and that it violated GATT Article III:2.[258] It should be noted that the applicable scope of the first sentence is for 'like products' only. The *Internal Sale and Use of Tobacco* decision is important to draft the investment NT like the GATT Article III(2) which helps to prohibit discriminatory local content requirements under like circumstances to ensure competition among investors. Furthermore, the principle enshrined in the first sentence of Article III:2 of the GATT can be used to interpret if a measure subsequently introduced by a host State is discriminatory or not which had not been anticipated at the time the investment was made (protect legitimate expectation of investment).

4.6.2(b) GATT Article III:2 Second Sentence

The second sentence of the GATT Article III:2 also prohibits discriminatory internal taxes and charges, but it is not confined to 'like products' only. It covers imported products that are directly substituted and competitive products; therefore, its product coverage is much wider than that of the first sentence.[259] The second sentence of the GATT Article III:2 is important to interpret likeness in a broader sense and it improves the efficacy of the GATT Article III:2 as a whole.

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[255] GATT Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* GATT Doc DS44/R (12 August 1994, adopted on 4 October 1994) [92, 93, 95 and 98].

[256] GATT Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* GATT Doc DS44/R (12 August 1994, adopted on 4 October 1994).

[257] The Budget Act made it a necessary condition that 75% of domestic tobacco was to be used by the end of 1994. Otherwise, tobacco manufacturers had to pay 'a non-refundable marketing assessment' and, in addition, they had to buy 'the burley and flue-cured tobacco…'. GATT Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* GATT Doc DS44/R (12 August 1994, adopted on 4 October 1994) [8].

[258] GATT Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* GATT Doc DS44/R (12 August 1994, adopted on 4 October 1994) [62 and 96].

[259] Like products are similar products that have nearly identical characteristics and it is determined case by case and the term like products connotes a wider meaning. Direct-competitive or substitutable products are products not like or similar products but that appear to be related products and the competitiveness is determined with the relationship of substitutability of foreign products through aim and effect tests in order to protect regulatory autonomy of Member States. Rex J Zedalis, 'A Theory of the GATT "Like Product" Common Language Cases' (1994) 27(1) *Vanderbilt Journal of Transnational Law* 33, 38 and 55; Robert E. Hudec '"Like Product" The Differences in Meaning in GATT Articles I and III' in Thomas Cottier and Petros Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, 2000) 101, 103; GATT Analytical Index Part II, *National Treatment on Internal Taxation and Regulation* 159.

The first sentence to Article III:2 prohibits discriminatory internal taxes *per se* while, as stated in the second sentence, it must be established that taxation is to afford protection to domestic goods.[260] Therefore, the second sentence is applicable only when imported products are in competition with domestic products, and these substitutable and competitive imported products are taxed in a discriminatory manner in comparison to domestic products. The intention of a member State's legislation should be established when dissimilar taxation is imposed to provide protection to domestic products.[261]

In *Japan – Taxes on Alcoholic Beverages*,[262] the Panel held that *shochu* and imported brandy, whisky, rum and gin were not 'like products' but that these products were directly competitive and substitutable. The Panel therefore found that Japan was dissimilarly taxing imported liquor, with this being a violation of the second sentence of the GATT Article III:2.[263] It is not sufficient to demonstrate that competitive and substitute products are dissimilar and overly taxed, but what needs to be shown is that the amount of excess tax is more than *de minimis*[264] and that 'the tax burden on imported products must be heavier than on directly competitive and substitutable products …'.[265] There is no similar provision in BITs. NAFTA Article 102 and Article 1102 have not been drafted like GATT Article III. Investment law rejects the likeness or substitution of products in competitive sectors, and the arbitrators compared like circumstances or similar situation with similar public policy measures.[266] The objective of the trade law competitiveness test is drafted for the welfare of the people but the investment law competitiveness test is designed to protect individual rights for profits.[267]

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[260] Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* GATT Doc L6216-34S/83 (13 October 1987, adopted 10 November 1987) [5.5].
[261] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* WTO Doc WT/DS31/ AB/R (30 June 1997) 32; Donald H Regan, 'Regulatory Purpose and "Like Products" in Article III:4 of the GATT (with Additional Remarks on Article III:2)' above n 238, 443.
[262] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996).
[263] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 2; Panel Report, *Japan – Taxes on Alcoholic Beverages* WTO Doc WT/DS8/R, WT/DS10/R, WTDS11/R (11 July 1996) [7.1(ii)].
[264] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* WTO Doc WT/DS/AB/R, WT/DS110/AB/R (13 December 1999) [49].
[265] Ibid.
[266] DiMascio and Joost Pauwelyn, above n 240, 72; *Methanex Corporation vs United States of America* (Final Award) (UNCTRAL) Part IV Chapter B (15 January 2001) paras 34 to 37.
[267] DiMascio and Pauwelyn, above n 240, 81.

4.6.2(c) GATT Article III:4

Protecting the interests of investors and ensuring regulatory autonomy is important and the GATT Article III:4 can be utilised to balance the tension between the investors and the host States. The scope of GATT Article III:4 is central to discriminatory internal laws, regulations and requirements that are affecting 'like products' other than taxes that affect imports.[268] This Article does not directly cover competitive and substituted products (animal and fish protein and synthetic protein were not considered as 'like products').[269] Article III:4 of the GATT envisages internal regulations and laws to cover the sale, purchase and distribution of imported products and can even permit investigation of obstacles to competitive opportunities in the local market.[270] Thus, in the case of *Canada – Administration of the Foreign Investment Review Act* (*FIRA*),[271] Canada imposed a condition on investors that raw materials be purchased locally if competitively available in Canada.[272] This means that investors should give preference to local inputs to gain approval for investment by the Canadian government. The Panel held that Canada's regulation to give preference to the purchase of local inputs by investors was a violation of GATT Article III:4.[273]

Article III:4 of the GATT provides for competition between foreign and local traders for 'like products' and this Article is important for regulatory autonomy of States.[274] Trade balancing (offset) is not permitted by imposing discriminatory taxes or internal charges for selected imported products and granting more favourable treatment for other imported products.[275] This also brings predictability to expected future investments if incorporated

[268] Kennedy, 'GATT 1994' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* above n 4, 122; Lothar Ehring, 'De Facto Discrimination in World Trade Law National and Most-Favoured-Nation Treatment – or Equal Treatment?' (2002) 36(5) *Journal of World Trade* 921, 923.
[269] Panel Report, *EEC Measures on Animal Feed Proteins* GATT Doc L/4599-25S/49 (2 December 1977, adopted 14 March 1978) [4.10, 4.11 and 4.12]; Kennedy, 'GATT 1994' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* above n 4, 122.
[270] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* WTO Doc WT/DS44/R (31 March 1998) [10.379 and 10.380].
[271] Panel Report, *Canada – Administration of the Foreign Investment Review Act* (*FIRA*) GATT Doc L/5504-30S/140 (25 July 1983, adopted 7 February 1984).
[272] Ibid [5.9].
[273] Ibid [5.11].
[274] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001) [99]; Donald H Regan, 'Further Thoughts on the Role of Regulatory Purpose under Article III of General Agreement on Tariffs and Trade: Tribute to Bob Hudec' (2003) 37(4) *Journal of World Trade* 737, 750.
[275] GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930* GATT Doc L/6439-36S/345 (16 January 1989, adopted 7 November 1989) [5.14].

in a CIIA, and it ensures the regulatory autonomy of host States.[276] For instance, in the *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)* case, the Appellate Body made a distinction between 'like products' and regulatory purpose under Article III:4. The Appellate Body stated that a competitive nexus is a necessary condition to determine likeness, but implicitly admitted that it is not grounds for examining and closing down the regulatory purpose and objectives of States under Article III:4.[277] This statement recognises the authority of States to make laws and regulations for their betterment. In the *EC – Asbestos* case, AB admitted that France had greater regularity, stretchability and autonomy in pursuing distinct legitimate objectives enshrined in the WTO agreements to protect the health of people;[278] however, this is lacking in investment law.[279]

4.7 Most-Favoured Nation and National Treatment of Investment Law

4.7.1 The MFN Principle Captured in Foreign Investment

The MFN principle stipulates that the host State is not to treat a foreign investing State or investor more favourably than any other foreign State or any investor from that other State.[280] The NAFTA Article 1103 covers non-discriminatory treatment, making provision for investors or investments of a third party in relation to the 'establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments' that are 'in like circumstances'.[281] Therefore, the MFN principle prevents discrimination on the broader level in relation to: certain sectors of a country's economy in which investors invest money, quantitative restrictions by prescribing how many investors are allowed into specific sectors, and regulatory measures.[282]

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[276] 'In our view, the fact that, under the GATT 1994, a Member's right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction'. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WTO Doc WT/DS400/AB/R, T/DS401/AB/R, 22 May 2014) [5.125].

[277] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001) [48, 88, 153, 154 and 155].

[278] Ibid [34, 47,88 and 156].

[279] Abba Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties' (2007) 8(4) *Journal of World Investment and Trade* 457, 475.

[280] Okezie Chukwumerije, 'Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations' (2007) 8(5) *The Journal of World Investment and Trade* 597, 598.

[281] NAFTA article 1103:2.

[282] Kurtz**,** 'The MFN Standard and Foreign Investment: An Uneasy Fit?' above n 239, 868.

Historically, the MFN principle for investment was developed by States to protect their nations' properties from expropriation and to obtain full compensation for expropriation if it occurred.[283] The NAFTA MFN is discussed in the *Cross-Border Trucking Services* case.[284] In this case, the US imposed restrictions on trucking services between the US and Mexico, and refused to issue a permit to Mexican investment companies in the US.[285] At the same time, the US granted permission to similar service providers from Canada.[286] The issues in this case were whether the US had violated the MFN principle and whether the Canadian and Mexican service providers could be placed 'in like circumstances'. The Panel held that 'in like circumstances', according to the objective of trade liberalisation, is an exception to that and that it is not an operative part in the application of different treatment, thereby narrowly interpreting likeness (a broad interpretation makes the NAFTA Articles 1202 and 1203 meaningless).[287] The Panel went further, stating that the '… differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety …'.[288] The safety parameters were not defined in this case. Conversely, in *Emilio Agustin Maffezini v Kingdom of Spain* (*Maffezini*),[289] the attempt was made to widen the scope of the MFN principle in investment, not only applying it as a substantive principle, but also as a procedural principle to protect investors rights.[290] Maffezini is a national of Argentina and complained against Spain due to discriminatory treatment against his investment in the Spanish region of Galicia.[291] Spain challenged the jurisdiction of the Arbitral Tribunal on the basis of non-exhaustion of local remedies. The Tribunal, interpreting as follows:

[283] *Charter of Economic Rights and Duties of States*, General Assembly (GA) Resolution 3281(XXIX) 29th Session United Nations General Assembly Official Records (UNGAOR Supp. No.31 UN Doc A/RES/29/3281 (adopted 12 December 1975) article 2(2)(c).
[284] *Cross-Border Trucking Services* (Final Report) (NAFTA Chapter 20 Arbitration No. USA-MEX-98-2008-01, 6 February 2001).
[285] Ibid [2].
[286] Ibid.
[287] Ibid [258, 259 and 260]; Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' above n 239, 874.
[288] *Cross-Border Trucking Services* (Final Report) (NAFTA Chapter 20 Arbitration No. USA-MEX-98-2008-01, 6 February 2001) [258].
[289] *Emilio Agustin Maffezini v Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID) Case No. ARB/97/7 (25 January 2000).
[290] Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' above n 239, 878 and 879.
[291] *Emilio Agustin Maffezini v Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID) Case No. ARB/97/7 (25 January 2000) [1].

> In all matters governed by this Agreement, such treatment shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country.[292]

In *MTD Equity Sdn. Bhd.* and *MTD Chile S.A. v Republic of Chile* (*MTD Equity*) the arbitrators interpreted the MFN treatment to protect investors by combining it with the objective of the BIT, stating that it was the duty of the arbitrators to interpret the MFN '… to fulfil the objective of the BIT to protect investments …'.[293] In this case, MTD Equity, a Malaysian company, wanted to build a city south of Santiago de Chile. They obtained approval to invest in Chile and signed an investment contract subject to the necessary regulations, including environmental approval.[294] The company thereafter purchased land and requested zoning changes.[295] This request was rejected by the Ministry of Housing on the basis that the government had made a policy decision to develop housing schemes south of Santiago.[296] MTD Equity brought a case against Chile under the Malaysia–Chile BIT stating that Chile had violated the obligation to treat an investor fairly and equitably. In this case, it was held that the Chilean act was an indirect expropriation and the Tribunal did not consider the intention of the State.[297] The MFN treatment was applied to this case retrospectively, instead of prospectively and the arbitrators considered the MFN principle as a substantive obligation.[298] That is the reason why Canada, when drafting model BIT, has drafted to avoid the application of the MFN treatment of the existing BITs already in force.[299] The Draft Model BIT provides for the Canadian government to decide the scope of the application of the MFN treatment.[300]

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[292] *Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments* (signed on 3 October 1991, came into force 28 September 1992) article IV(2); *Emilio Agustin Maffezini v Kingdom of Spain* (Decision of the Tribunal on Objections to Jurisdiction) (ICSID) Case No. ARB/97/7 (25 January 2000) [38].
[293] *MTD Equity Sdn. Bhd.* and *MTD Chile S.A. v Republic of Chile* (Award) (ICSID) Case No. ARB/01/7 (25 May 2004) [104].
[294] Ibid [119].
[295] Ibid [56].
[296] Ibid [188].
[297] Ibid [207 and 208].
[298] 'Whilst the ultimate result turned on the substantive obligation to accord investors fair and equitable treatment under the Malaysia-Chile BIT, the investor also attempted to invoke the MFN clause in that BIT to invoke as well the provisions of both the Chile-Denmark BIT and the Chile-Croatia BIT'. Kurtz, Jurgen, 'The MFN Standard and Foreign Investment: An Uneasy Fit? (2004) 5(6) *The Journal of World Investment and Trade* 861, 882; *MTD Equity Sdn. Bhd.* and *MTD Chile S.A. v Republic of Chile* (Award) (ICSID) Case No. ARB/01/7 (25 May 2004) [103].
[299] *Model Agreement between Canada and ——— for the Formation and Protection of Investments* Annex III.
[300] Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit? above n 239, 884.

4.7.1 (a) Domestic Investor Test

The MFN principle is applied under investment law to protect foreign investors vis-à-vis domestic investors in comparison with like circumstances. Article 1102(1–3) of the NAFTA Chapter 11 requires that foreign investors of different countries be accorded no 'less favourable treatment' than what may be given to domestic investors 'in like circumstances'. The *Pope & Talbot v Canada* case defined 'no less favourable treatment' as 'the best treatment accorded to the comparator'.[301] This definition means that even if one domestic investor is treated more favourably by a State than the complaining foreign investor, this will be considered 'less favourable treatment' in investment law.[302] Arbitrators do not consider similar treatment given to other domestic investors vis-à-vis a foreign complainant.[303] By *ipso facto*, the arbitrators examine the issue at hand and generally disregard the measure's effect on other foreign investors under like circumstances.[304] For instant, the NAFTA investment NT provides for the best possible treatment for foreign and domestic investors and investment alike.[305] This position is well illustrated below by Dimascio and Pauwelyn:

> … the object and purpose of investment agreements greatly influence the test for determining whether a measure treats a foreign investment less favourably than comparable domestic investments. Because their goal is to protect individual investors from injury, national treatment provisions in investment agreements entitle foreign investment to the best treatment afforded to comparable domestic investments. In contrast to national treatment in the trade context, no group analysis comparing the entire 'domestic pool' to the entire 'imported pool' is called for [in the] investment context.[306]

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[301] *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) [42].

[302] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4,110 and 114; Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?'above n 239, 873.

[303] 'The foreign claimant need only prove that they operate in a competitive relationship with a single domestic actor and that this single actor is treated more favourably by the host state. Investor-state arbitration already confers broad rights to initiate legal action, without the filters to check for incautious or improper invocation at play in state-to-state systems of dispute resolution'. Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) 115.

[304] *Methanex Corporation vs United States of America* (Final Award) (UNCTRAL) Pt IV Chapter B (15 January 2001) [21]; *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) [23-45].

[305] *Archer Daniels Midland Company* and *Tate & Lyle Ingredients Americas, Inc. v The United Mexican States* (*Mexico*) (Award) (ICSID Case No. ARB(AF)/04/05, 21 November 2007) para 205.

[306] DiMascio and Pauwelyn, above n 240, 78.

Dimascio and Pauwelyn reveal the current investment law position regarding 'less favourable treatment': their argument is nothing new and their suggestion can be found in the award of the *S. D. Myers, Inc.* case, which applied business or economic or competitiveness among the same sector to determine like circumstances.[307] Following the *S. D. Myers Inc.* case, arbitrators no longer applied the competitiveness test and the same sector of business to determine the like circumstances but included all sectors.[308] Therefore, investment law, as it currently stands, is to protect investments and investors alike. This approach takes away States' regulatory discretionary authority, which is jealously guarded under the WTO system. The State responsibility to protect investors and investments is an outdated concept and needs to be amended.[309]

4.7.2 Tests for Determining Likeness in Investment Law

Foreign investors and domestic investors are compared in like circumstances to determine whether the NT is breached by the host State.[310] Article 1102 of the NAFTA NT obligation requires a State to provide a treatment to foreign investors not less favourable than that given to domestic investors 'in like circumstances'.[311] The question may arise of how likeness is determined in investment law. Does it mean identical circumstances?[312] The 'like product' trade concept has been well established: tests are used to determine 'similar products', 'like products', 'competitive products' and 'substituted products' and these categories of products are often referred to as 'like products.' A product's end-users, health risks, characteristics, listing on tariff schedules and the taste of food and drink products are a few characteristics that determine the likeness of a product. Should these characteristics be used to determine likeness in investment, or should more characteristics be added, including characteristics from business or economic sectors? Are these different to 'like circumstances' or are there similar situations and competition in all sectors? These questions can be answered by analysing the investment arbitration cases.

In *S. D. Myers, Inc. v Government of Canada*, the arbitrators stated that 'like circumstances' were determined according to general principles embodied in the investment agreement

[307] *D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000) [248].
[308] *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award) (UNCITRAL Case No. UN 3467, 1 July 2004) [173]; Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016) 97.
[309] Sornarajah, above n 166, 36.
[310] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 84.
[311] *United Parcel Service of America, Inc. v Canada* (Award on the Merits) (NAFTA Chapter 11 Arbitration, (24 May 2007) Separate Statement of Dean Ronald A Cass [6].
[312] *United Parcel Service of America, Inc. v Canada* (Award on the Merits) (NAFTA Chapter 11 Arbitration, 24 May 2007) Separate Statement of Dean Ronald A Cass [7] see Canada's argument on 'like circumstances'.

(NAFTA). Furthermore, they held that violation of the NT obligation was determined according to 'in like situation', based on the comparison between foreign investors and domestic investors when placed in a similar situation in a given sector such as business or economic or competitiveness among them.[313] In other words, competition is recognised in this case in determining 'like circumstances'. This is further illustrated in the *United Parcel Service of America, Inc. v Canada* case in the following Separate Statement:

> Article 1102 [of the NAFTA] focuses on protection of investors and investments against discriminatory treatment. A showing that there is [a] competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances.[314]

In the above-mentioned cases, the principles enunciated demonstrate that in an NT inquiry, tribunals often observe competition between foreign investors and domestic investors in order to decide likeness. In stark contrast, in the *Occidental Exploration and Production Company v The Republic of Ecuador* case,[315] arbitrators rejected a competitiveness test in an NT inquiry to determine likeness which was earlier based on the business or economic sector and instead applied all sectors (the *Occidental* test) to determine likeness.[316] Occidental Exploration and Production Company is a US company that entered into a contract with the Ecuador State-owned company, Petroecuador, to explore for and produce oil.[317] Initially, Occidental was given a refund of value-added tax (VAT). In 2001, the Ecuadorian officials refused to continue refunding VAT on the basis that the VAT refund

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[313] *S. D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000) paras 248, 249 and 250; see also *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) [78].

[314] *United Parcel Service of America, Inc. v Canada* (Award on the Merits) (NAFTA Chapter 11 Arbitration) (24 May 2007) Separate Statement of Dean Ronald A Cass [17].

[315] *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award) (UNCITRAL Case No. UN 3467, 1 July 2004).

[316] *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award) (UNCITRAL Case No. UN 3467, 1 July 2004) [173]; Ying Zhu, 'Environmental Discrimination in International Investment Law' (2019) 51(2) *New York University Journal of International Law and Politics* 385, 409; 'The critical issue in the case was whether the failure of the Ecuadorian tax authority to refund value-added tax to the U.S. investor who operated in the oil sector breached this obligation given that companies operating in other, non-oil-related export sectors (such as mining and seafood products) had received VAT refunds. After some muddled analysis seeking guidance from the national treatment Article iii in the GATT, the Tribunal came to the extraordinary decision that the term "in like situations" was not limited to companies competing in the same economic sector but to all companies engaged in exports even if involved in different economic sectors'. Kurtz, Jurgen, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' (2004) 5(6) *The Journal of World Investment and Trade* 861, 871, Footnote 39.

[317] *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award) (UNCITRAL Case No. UN 3467, 1 July 2004) para 1.

was not applicable to the oil sector, but applied to natural resources, such as flowers, mining and seafood products.[318]

In this case, the issue involved was whether Ecuador was in violation of the NT obligation. Ecuador argued that flowers, mining and seafood products did not fall within the same sector. Therefore, they had not violated the NT obligation.[319] In other words, they contended that tests applicable to the issues of this case constituted a competitiveness test. The arbitrators rejected Ecuador's argument and held that the wording of 'in like circumstances' in the Ecuador–US BIT had sufficient scope to compare Occidental to all domestic exporters: the Panel granted relief to Occidental.[320] In the *Occidental* case, the arbitrators attempted to stretch the NT artificially to protect investors in a broader sense by misinterpreting the NT obligation to disregard the competitive test to include all domestic exports to consider the breach of NT.[321] Sometimes, the GATT NT principle must be interpreted narrowly, while at other times, it requires a broad interpretation, like an accordion which stretches and compresses at various stages.

The arbitrators were unable to grasp the core principle behind the GATT Article III. The decision in the *Occidental* case was erroneous as the interpretation of likeness should have been confined to the same sectors, according to the facts of the case. If the arbitrators attempt to give a wider interpretation to the word 'likeness', the governmental authority to impose regulations to foster sustainable economic development and preserve national security is in peril. Furthermore, this may take away the discretionary right of the regulating authority of governments which is a fundamental principle of sovereignty.[322] Any potential CIIA needs to balance investor protection and the regulatory authority of States,[323] and this is why a CIIA is opposed by most of the larger developing countries.[324] Investment

[318] Ibid para 3.
[319] Ibid [171].
[320] Ibid [173 and 177]; Dolzer and Christoph Schreuer, *Principles of International Investment Law* above n 233, 184.
[321] *Occidental Exploration and Production Company v The Republic of Ecuador* (Final Award) (UNCITRAL Case No. UN 3467,1 July 2004) [173].
[322] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 103.
[323] Peter T Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34(3) *The International Lawyer* 1033, 1038.
[324] '…FDI appears to be dependent on a host of other factors than the investment regimes per se; for example, the size of the market, skilled labour, political stability, sound legal regime and good infrastructure are some of the factors that have been mentioned by Members themselves in their various submissions'. *Communication from India, Working Group on the Relationship between Trade and Investment* WTO Doc WT/WGTI/W/86 (22 June 2000) para 3(viii); Aaron Cosbey, Luke Peterson, Howard Mann and Konrad von Moltke, 'Investment, Doha and the WTO' (Report, The Royal Institute of International Affairs, September 2003) 1, 6; Sanjay Suri, 'After Trade, a Mess over Investment' (Inter Press Service, 5 September 2003)

tribunals, when determining an investment issue, have not considered the rationality or reasonableness of a measure and its proximity, nexus and the policy behind it.

It is now apparent that investment law endeavours to interpret the NT obligation based on nationality, rather than on the basis of firms operating in the same sector, regardless of their nationality.[325] The arbitrators consider that the NT obligation in BITs is to protect investors and their properties in host States. Arbitrators should emerge from this framework of thinking to impart predictability to investment law. Conversely, trade law recognises States' regulatory authority in interpreting the NT obligation. For example, in *Chile – Taxes Alcoholic Beverages*,[326] the issue was whether the NT obligation had been violated. In examining this issue, the Appellate Body succinctly stated that '[t]hus we consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure are intensely pertinent …'.[327] However, this investigation is lacking in investment disputes for the reason that the existing investment law (the NAFTA and BITs) does not provide substantive law to engage with the issues that come before arbitral tribunals.

Another example can be given to demonstrate how the trade law recognises governmental authority to enact laws and regulations to preserve economic stability and protect health. The Dominican Republic imposed 'a transitional surcharge on all imports' which was undertaken to stabilise its economy.[328] Honduras challenged this measure under the GATT Articles II:1(b), III:2 and III:4.[329] In the *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* case,[330] it was held that '[the tax on] imported cigarettes was higher than for some domestic cigarettes ... [which is] sufficient to establish less favourable treatment under Article III:4 of the GATT 1994' and the AB emphasised that tax discrepancy resulted not from nationality but from market share of the domestic

available at <http://www.globalpolicy.org/component/content/article/209/4314.html> accessed on 1 October 2017.

[325] Arbitrators stated that 'Article 1102 [of the NAFTA] prohibits treatment that discriminates on the basis of the foreign investment's nationality'. *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) para 78.

[326] Appellate Body, *Chile – Taxes Alcoholic Beverages* WTO Doc WT/DS87/AB/R, WT/DS110/AB/R (13 December 1999).

[327] Appellate Body, *Chile – Taxes Alcoholic Beverages* WTO Doc WT/DS87/AB/R, WT/DS110/AB/R (13 December 1999) [71].

[328] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* WTO Doc WT/DS302/R (26 November 2004) [2.2].

[329] Ibid [3.1].

[330] Appellate Body, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* WTO Doc WT/DS302/AB/R (25 April 2005).

market.[331] In *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, the Panel applied 'perceived difference between biotech products and non-biotech products in their safety, etc.' and refused to accept different treatment on the basis of nationality.[332] Therefore, like circumstances are determined under investment law to protect the investors' rights and the arbitrators disregard the host States' regulatory authority in the investigation of the breach of the NT.

4.7.3 NAFTA Chapter 11 and the National Treatment Principle

The obligation enshrined in Article 1102(1) is limited to foreign investors from a NAFTA State, with the Article stipulating that they are not to be treated less favourably 'in like circumstances' than domestic investors. However, Article 1102(1) does not have any guideline principles, unlike the GATT Article III:1 which provides a guideline to interpret the GATT Article III:2 and III:4. Such a guideline is lacking in the NAFTA Chapter 11. Therefore, it is questionable whether, under the NAFTA, the expected investment liberalisation took place. The NT principle is embodied in Article 1102(1) of Chapter 11 of the NAFTA which states that:

> Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[333]

The GATT Article III:4 does not refer to Article III:1. On the face of it, the GATT Article III:I cannot stand alone to prevent the imposition of discriminatory internal laws and regulations. This issue was resolved in the *Japan – Taxes on Alcoholic Beverages* case. In this case it was held that '… Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III'.[334] What is needed is the NT principle for an investment treaty under the WTO, similar to that in the GATT Article III, with the scope to cover investment issues and create the same competitive environment for foreign investors as it does for domestic investors. In this endeavour, the 'like product' concept can be applied 'in like circumstances' or in a

[331] Ibid [96].
[332] Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006) [7.2514].
[333] NAFTA article 1102(1).
[334] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) 18.

similar investment situation. This not only protects investments, but also ensures competition.

The NT principle for investment should cover like circumstances in the same way as it does in the GATT Article III:1, III:2 and III:4. In the absence of guidelines similar to those available under the GATT Article III:1, it is more often difficult to establish a competitive relationship in investment arbitration with respect to 'in like circumstances'. This is evident from the *Methanex v United States of America* case.[335] *Methanex* is a Canadian company which produced and sold methanol in Canada, the USA and some other countries.[336] However, California banned methyl tertiary-butyl ether (MTBE) (investment in the US).[337] On behalf of *Methanex*, it was contended that the competitive relationship between foreign and domestic investors is the relevant fact that determines 'in like circumstances' (the identical test).[338]

The arbitrators held that the GATT meaning for the term 'like product' cannot be used to interpret 'in like circumstances' in the NAFTA, as the term 'like products' was not referred to in the text of the NAFTA Chapter 11 and no breach of the NT obligation had occurred.[339] The California ban not only affected *Methanex* but also US investors.[340] This shows that, in the *Methanex* case, the arbitrators applied a narrow interpretation of the NT obligation in the NAFTA Article 1102. The arbitrators compared identical foreign and domestic exporters based on nationality to decide on a measure considered to be in violation of the NT obligation.[341] The main flaw in their reasoning was that they considered the NAFTA Chapter 11 in isolation and excluded the competition as a test to assess likeness between foreign and domestic investors. Inspiration should have been sought from the NAFTA

[335] *Methanex Corporation vs United States of America* (Final Award) (UNCTRAL) Part IV Chapter B (15 January 2001).
[336] *Methanex Corporation vs United States of America* (Final Award) (UNCTRAL) Part II Chapter A (15 January 2001) [4].
[337] *Methanex Corporation vs United States of America* (Final Award) (UNCTRAL) Part I (15 January 2001) [1].
[338] Ibid [4 and 5].
[339] *Methanex Corporation vs United States of America* (Final Award) (UNCITRAL) Pt IV Chapter B (15 January 2001) [29].
[340] Ibid [18 and 19].
[341] Ibid [19]; 'The tribunal accepted the domestic methanol industry as the 'identical' comparator to the claimant. As the Californian ban had the same effect on these domestic actors as the foreign methanol producer (Methanex), the tribunal concluded there was no breach of the national treatment obligation'. Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 100; DiMascio and Joost Pauwelyn, above n 240, 76.

objective enshrined in Article 102(1) (b) and its purpose, for example Chapter 12, because competition is the key test that is applied in determining the NT.[342]

In contrast to the *Methanex* case, the case of *S. D. Myers, Inc. v Government of Canada*[343] *(S. D. Myers, Inc.)* applied the competitiveness test[344] based on the same sector.[345] S. D. Myers Inc. is a US-owned company which conducted business activities in Canada, transporting polychlorinated biphenyl (PCB) hazardous waste from Canada to their factory in Ohio.[346] Canada imposed a ban on PCB exports from November 1995 to February 1997. S. D. Myers Inc. argued that Canada's measure was in violation of the NT obligation (Article 1102), minimum standard of treatment (Article 1105) and, according to them, it was a kind of indirect expropriation (Article 1110). The Tribunal granted relief under the NT obligation and the minimum standard of treatment violation.[347] The Tribunal, when addressing the issue of the violation of the NT obligation, held that 'like circumstances' had to be interpreted by considering the entire agreement.[348]

Furthermore, the Tribunal said that mere intention or motive was not enough to establish a breach of the NT obligation but a complaining party had to prove that the measure of which they were complaining had an adverse effect on investment.[349] This means under current treaty-based investment law, arbitrators do not recognise the NT obligation violation *per se* in establishing a claim similar to that stated in the first sentence of the GATT Article

[342] NAFTA Article 1405:5 recognises different or identical competitiveness opportunities; see also Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 42, 101.
[343] *S. D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000).
[344] 'The most natural reading of NAFTA Article 1102, however, gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in a NAFTA dispute under Article 1102. Article 1102 focuses on protection of investors and investments against discriminatory treatment. A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a prima facie case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the burden shifts to the respondent Party to explain why two competing enterprises are not in like circumstances'. *United Parcel Service of America, Inc. v Canada* (Award on the Merits) (NAFTA Chapter 11 Arbitration) (24 May 2007) Separate Statement of Dean Ronald A. Cass [17].
[345] *S. D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000) [248].
[346] Ibid [93 and 94].
[347] Ibid [322].
[348] 'The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor'. *S. D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000) [245 and 250].
[349] *S. D. Myers, Inc. v Government of Canada* (Partial Award) (UNCITRAL) (13 November 2000) [254].

III:2. Nor can they consider the adverse effect on investment as a result of the impugned measure. Apparent discrimination is also not considered in establishing a claim. The reason is that the NT obligation has not been designed in the same way as the GATT Article III where it provides maximum liberalisation of trade.

The NT obligation should guarantee competitive opportunities equally to foreign investors and domestic investors. When no competition is present between domestic investors and foreign investors, consumers often must buy low-quality products and cannot even buy them at lower prices. Foreign investors, from their monopoly position, through competition may sometimes defeat local investors. Therefore, it is necessary that the government should intervene and remedy this imbalance. Such intervention could be carried out through internal regulations that, in turn, would guarantee social welfare,[350] with this intervention differing from country to country and region to region.[351] The proponents of liberal trade have also voiced their view that similar benefits would arise from trade.[352] The structure of the GATT/WTO system has embodied the political economy concept within the WTO. This concept is well entrenched in the GATT/WTO system through the GATT Articles, such as Article XIX (emergency safeguard to protect sudden capital withdrawal), Article XI (quantitative restrictions) Articles I, III (1) and III:8 (a) (government purchasers) and Article XX (general exceptions).[353] The GATT Article I:1 does not prohibit different tariff levels for different goods for foreign suppliers due to the stretched flexibility of the concept of 'like products'. Therefore, States are not precluded from introducing different tariff levels for different goods.[354]

[350] Gene M Grossman and Elhanan Helpman, above n 249, 847 and 848; Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102(1) *The American Journal of International Law* 48, 54.
[351] Luisa Corrado, David Andreas Londono Bedoya, Francesco S Mennini and Giovanni Trovato, 'The Welfare States in a United Europe' (2003) 1(1) *European Political Economy* 40, 43.
[352] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 86.
[353] Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11(2) *European Journal of International Law* 249, 253.
[354] Hudec explains this explicitly as follows: '[t]he fact that Article I accepts the business of tariff protection means, among other things, that it must also accept the tools of tariff protection. Especially, governments managing a policy of tariff protection need to be able to draw lines between products in order to confine protection to those imports which do in fact threaten domestic producers, and also to confine tariff liberalization to those products for which the removal of protection will be found acceptable to domestic interests'. Robert Hudec, 'Like Product: The Differences in Meaning in GATT Articles I and III' in Thomas Cottier, Petros Mavroidis and Patrick Blatter (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press: Ann Arbor, MI, 2000) 101, 108.

4.8 GATT Exceptions for Investment Liberalisation and Regulatory Autonomy of the Host States

The exception provisions for a CIIA are important and relevant because (unlike trade agreements which are essentially signed by States) any potential CIIA does govern relation with host States and investors. Host States need to make laws for sustainable economic development purposes, improve welfare and the health of their people. Governments of host States stand or fall due to the policies they adopt to protect their subjects.[355] Therefore, regulatory autonomy is important to protect host States' rights to make laws for the betterment of their citizen.[356] The GATS Articles XIV (General Exceptions) and XIV bis (Security Exceptions) provides exceptions. However, the GATS does not have any provision dealing with environmental exceptions similar to GATT Article XX (g). Hence, the drafting of exceptions in BITs do not provide greater regulatory flexibility to look after the public interest and these exceptions are interpreted by arbitrators to protect investors rights as the BITs do not have interpretative guidelines similar to Articles III and XX of the GATT. [357]

The GATT Article XX provides basic protective solutions for a potential investment agreement for the host States. Even though the scope of exceptions in BITs are in embryonic stages, some attempts have been made to introduce exceptions to investment law. For example, exceptions are to be found in the Canada–Peru BIT,[358] the Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China,[359] and the New-Age Economic Partnership between Japan and the Republic of Singapore.[360] BITs should preserve natural resources and public health

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[355] '… the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations'. ILA 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (2002) 2(2) *International Environmental Agreements: Politics, Law and Economics*.

[356] See *Agreement between the United States of America, the United Mexican States and CanadaText* (The USMCA) (signed on 30 November 2018) (entered into force on 1st July 2020) articles 14.16 and 14.17.

[357] *The India-Singapore Comprehensive Economic Co-operation Agreement (India-Singapore CECA*) (signed on 29/06/2005 and entered into force 01/08/2005) article 6.12(4); Andrew Newcombe, 'General Exceptions in International Investment Agreements' (Draft Discussion Paper, BIICL [British Institute of International and Comparative Law] Eighth Annual WTO Conference, 13-14 May 2008, London) 1, 5.

[358] *Canada–Peru BIT Agreement* (signed on 14 November 2006, entered into force 20 June 2007) article 10.

[359] *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China* (signed 7 April 2008, entered into force 1 October 2008) article 200.

[360] *Agreement between Japan and the Republic of Singapore* (signed on 13 January 2002, entered into force 30 November 2002) article 83.

exceptions as does the GATT Article XX(g).[361] Article XX of the GATT can be considered as a key public policy concern of trade law. This concept should be extended to investment to test the NT obligation to see whether the intention is to discriminate against foreign investors.[362]

In the case of *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* [*EC–Asbestos*],[363] the French government banned Canadian asbestos construction materials.[364] In this case, the Panel held that French measures banning Canadian asbestos construction materials was a violation of the GATT Article III. The Panel stated that France could not ban these materials under Article XX (b) stating that it would violate Articles III and XX.[365] The Panel reached the conclusion that all the GATT Articles should be given a meaning, and introducing 'likeness criteria' to protect 'human health and life' is contrary to obligations set out in GATT Article XX. If the Panel's position is to be taken into consideration, the GATT exceptions could not be invoked and would have no meaning. However, the Appellate Body rightly held that, under Article III:4, a health risk was necessary to determine the competition, and France could invoke the GATT Article XX (b).[366] The GATT Article XX[367] states that, while recognising member States' rights to make laws to protect their people and to justify a measure that violates MFN or NT obligations, such measures should not be 'arbitrary and unjustifiable'.[368] This means that such measures are often subject to scrutiny.

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[361] Andrew Newcombe, 'General Exceptions in International Investment Agreements' (Draft Discussion Paper, BIICL [British Institute of International and Comparative Law] Eighth Annual WTO Conference, above n, 17, 5.

[362] DiMascio and Pauwelyn, above n 240, 72.

[363] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001).

[364] 'Canada claimed that the Decree is inconsistent with a number of obligations of the European Communities under Article 2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement "), Articles III and XI of the General Agreement on Tariffs and Trade 1994'. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001) [3]; Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/R (18 September 2000) [2.3].

[365] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/R (18 September 2000) [8.130].

[366] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WTO Doc WT/DS135/AB/R (12 March 2001) [115]; the GATT article XX(b) provides that member States are to introduce laws and regulations to safeguard human, animal and plant life and health.

[367] GATT 1994 article XX(a) protects public morals; article XX(b) safeguards human, animal and plant life and health; article XX(c) is a measure dealing with exportation and importation of gold or silver; article XX(d) relates to monopolies and copyrights; article XX(e) relates to the products of prison labour; article XX(f) is concerned with national treasures; article XX(g) addresses preserving exhaustible natural resources; article XX(h) is a measure concerned with commodity agreements; article XX(i) relates to domestic materials for governments' stabilisation plans; and article XX(j) addresses governmental authority to deal with short supply products.

[368] GATT 1994, article XX.

In the *S. D. Myers* and *Methanex* cases, States respectively brought a defence justifying the violation of investment treaty protection for environmental protection. The GATS Article XIV provides general exceptions that import the protection of public morals and public order, as well as human, animal and plant life and health.[369] This is somewhat similar to the GATT exceptions, with these exceptions able to be used as a moot point for a CIIA. Most of the trade and investment treaties after the NAFTA and MAI have harmonised and converged trade exceptions for investment law. For example, the GATT Article XX and the GATS Article XIV are incorporated subject to *mutatis mutandis* in the Australia–Thailand Free Trade Agreement;[370] the Comprehensive Economic Partnership Agreement between Japan and the Republic of India;[371] and the Free Trade Agreement between Australia and China.[372]

The NAFTA does not recognise health or the environmental exceptions.[373] As a result the NAFTA is unable to give relief to a State to safeguard regulatory autonomy.[374] For example, suppose a Canadian company invests money in Mexico by running a power plant. The Canadian company invests capital and substantial profits are generated from this project. Subsequent research finds that this project will be injurious to the health of the people and will adversely affect the environment. Mexico then introduces some measures that restrict the operation of the power plant making it extremely difficult to operate and to generate income. If the Canadian investor goes to arbitration, the arbitrators may hold that this is an indirect expropriation and find in favour of the Canadian company, as the NAFTA

[369] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) article XIV (a) and (b).
[370] *Australia–Thailand Free Trade Agreement* (signed on 5 July 2005, came into force 1 January 2005) article 1601.
[371] *Comprehensive Economic Partnership Agreement between Japan and the Republic of India* (signed 11 February 2011, came into force 1 August 2011) article 11:1 and 2.
[372] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (adopted 24 October 2003, entered into force 20 December 2015) article 9.8:1 (a), (b) and (c).
[373] 'Article 1102 (National Treatment) of NAFTA is not made subject to an equivalent of Article XX (General Exceptions) of GATT. Read in its proper context, however, the phrase "like circumstances" in Article 1102 in many cases does require the same kind of analysis as is required in Article XX cases under the GATT. The determination of whether there is a denial of national treatment to investors or investments "in like circumstances" under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade'. *S. D. Myers, Inc. v Government of Canada* (Separate Opinion by Dr. Bryan Schwartz) (UNCITRAL) (12 November 2000) [129].
[374] 'IIA [International Investment Agreement] tribunals have generally emphasized the promotion and protection function of IIAs and construed exceptions narrowly.' Andrew Newcombe, 'General Exceptions in International Investment Agreements' (Draft Discussion Paper, BIICL [British Institute of International and Comparative Law] Eighth Annual WTO Conference, 13-14 May 2008, London) 1, 3 and 9.

does not recognise exceptions for health or the environment. This is evident from the *Metalclad* case discussed in section 4.4.1. A CIIA should potentially resolve such issues. In such a situation, the law of frustration can be invoked as a defence by a State.[375] In this situation, neither the investor nor the State could have reasonably anticipated the supervening circumstances.

Kolo argues that, under Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, a State, on the basis of necessity, can have regulatory autonomy to intervene in a financial crisis on investment-related matters.[376] His argument cannot be accepted as most BITs have defined rights and obligations, and customary international law principles of necessity cannot be used to breach an international obligation. However, the principle of necessity can be applied in exceptional circumstances.[377] An UNCTAD Secretariat Note identifies BITs as having become a serious challenge to developing countries due to the diversity and complexity of BITs, adding that arbitrators do not consider this to be a development concern of countries.[378]

In *Philip Morris Asia Limited vs The Commonwealth of Australia* (*PM Asia*) case, *PM Asia* challenged Australia's *Tobacco Plain Packaging Act 2011* in an investment cause of action under the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investment of 1993 under a bilateral investment treaty (BIT).[379] The arbitration was conducted under the United Nations Commission on International Trade Law (UNCITRAL) 2010.[380] *PM Asia* has intellectual property rights to tobacco products under the Philip Morris brand. *PM Asia* alleged that Australia's *Tobacco*

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[375] *Cheshire, Fifoot and Furmston's Law of Contract* (16th ed, Oxford University Press, 2012) 714.
[376] Abba Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis: Treatment of Capital Transfers and Restrictions under Modern Investment Treaties' (2007) 8(4) *Journal of World Investment and Trade* 457, 475; *Responsibility of States for Internationally Wrongful Acts, Text adopted by the Commission at its fifty-third session, in 2001* (2005, United Nations).
[377] *Gabcikovo–Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7, para 51.
[378] Note by the UNCTAD Secretariat, *International Investment Ruling*, UN Doc TD/B/COM.2/EM/21/2 22 May 2007) 7.
[379] *Tobacco Plain Packaging Act (No 148) 2011*; *Tobacco Plain Packaging – Investor-State Arbitration*, Australian Government, Attorney General's Department, available at <https://www.ag.gov.au/tobaccoplainpackaging> accessed on 8 September 2017, 1; *Philip Morris Asia Limited vs The Commonwealth of Australia* (Australia's Response to the Notice of Arbitration) (UNCITRAL, PCA Case No. 2012-12, 21 December 2011); *Philip Morris Asia Limited vs The Commonwealth of Australia* (Award on Jurisdiction and Admissibility) (UNCITRAL, PCA Case No. 2012-12, 17 December 2015).
[380] United Nations Commission on International Trade Law (UNCITRAL), *Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 and revised in 2010 and adopted in 2013.*

Plain Packaging Act 2011 violated its intellectual property rights and the BIT between Australia and Hong Kong.

The objective of Australia's plain packaging requirement was to discourage smokers and improve the health of people. Therefore, it was also required that a substantial part of the packaging should display images and information on the dangers of smoking. The arbitrators held that they did not have jurisdiction to hear this case as *PM Asia* had acquired an Australian subsidiary (Philip Morris Australia Limited).[381] The arbitrators' position was that as it has the subsidiary in Australia, *PM Asia* cannot invoke jurisdiction under a BIT entered into between Australia and Hong Kong.

Simultaneously, Indonesia invoked the WTO jurisdiction to challenge Australia's measure with regard to 'plain packaging' and the EU, Brazil, Egypt, the Ukraine, Honduras, the Dominican Republic and New Zealand participated as third parties.[382] They argued that Australia's measure was contrary to the Agreement on Technical Barriers to Trade (TBT);[383] the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement);[384] and the GATT Article III.[385] Australia submitted that its measure on '[t]obacco plain packaging [was] a legitimate public health measure…' and that Australia had not violated the GATT, TBT Agreement and TRIPS Agreement.[386]

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[381] *Philip Morris Asia Limited vs The Commonwealth of Australia* (Award on Jurisdiction and Admissibility) (UNCITRAL, PCA Case No. 2012-12) 17 December 2015) para 588; *Tobacco Plain Packaging – Investor-State Arbitration*, Australian Government, Attorney General's Department, available at <https://www.ag.gov.au/tobaccoplainpackaging> accessed on 8 September 2017, 1.

[382] *Request for Consultation by* Indonesia, Australia – *Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc. WT/DS467/1, G/TBT/D/46 IP/D/34, G/L/1041 (25 September 2013) 1. Panel Report, *Australi – Certain Measures Concerning Trade Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (28 June 2018).

[383] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*Agreement on Technical Barriers to Trade*).

[384] *Marrakesh Agreement Establishing the World Trade Organization* (opened for signature on 15 April 1994) 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*Agreement on Trade-Related Aspects of Intellectual Property Rights)*.

[385] *Request for Consultations by Ukraine, Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (*Australia – Tobacco Plain Packaging*) WTO Doc WT/DS434/1, IP/D/30, G/TBT/D/39, G/L/985 (15 March 2012).

[386] *Integrated Executive Summary of Australia's Submission, Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (*Australia – Tobacco Plain Packaging*) WTO Doc DS435/441/458 and 467 (23 March 2016) [161].

Investments by the company, Philip Morris, were at issue in this case. Despite non-violation of NT provisions enshrined in the covered agreements, States requested the WTO panels to enforce trade rights. However, the panel held Australia has not violated the WTO covered agreements.[387] The *PM Asia* case demonstrates the inherent difficulty of proving general exceptions in investment law.[388]

4.9 Contours of a Comprehensive International Investment Agreement (CIIA)

4.9.1 Regulatory Autonomy

The CIIA faces obstacles from all groups of countries, whether developed or developing, as well as LICs. Without an in-depth consideration of their concerns, it is both challenging and futile to suggest a draft CIIA. One of the difficulties outlined by developing countries is that globalisation of FDI will weaken sovereign autonomy with regard to making rules which regulate the activities of investors and investments.[389] Their concern is that liberalisation of FDI will help foreigners to control local companies and that, as a country, they lack the economic capacity to compete with multilateral companies.[390] Consequently, multilateral companies will create monopolies and introduce restrictive business practices.[391]

Furthermore, developing countries argue that the liberalisation of investment widens the balance of payment gaps and will affect domestic growth.[392] With regard to larger developing countries, this position is incorrect although, for LICs, it is factually correct. This argument partly relates to sovereignty and partly to the economy. For example, as far

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[387] 'The Panel declines to rule on Indonesia's claims under Article 1.1 of the TRIPS Agreement, Article 2.1 of the TRIPS Agreement in conjunction with Article 6 quinquies of the Paris Convention (1967), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, in respect of which Indonesia presented no arguments'. Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (28 June 2018) para 8.2.

[388] Ari Afilalo, 'Failed Boundaries: The Near-Perfect Correlation between State-to-State WTO Claims and Private Party Investment Rights' (Jean Monnet Working Paper Series, JMWP 01/13, Jean Monnet Centre for International and Regional Economic Law & Justice, 2013) 38; Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 4, 15; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles* (Oxford University Press, 2007) 80.

[389] *Communication from Korea, Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment* WTO Doc WT/GC/W/267 (20 July 1999) para 5.

[390] Sornarajah, above n 166, 92.

[391] *Draft United Nations Code of Conduct on Transnational Corporations* (1983 version) article 35.

[392] *Communication from Brazil, Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment* WTO Doc WT/GC/W/271 (26 July 1999) para 4.

back as 1947, drafters of the Havana Charter protected the sovereignty of host States and their right to make regulations for foreign investment.[393] The host States should be able to make laws to prevent restrictive business practices. To preserve host States' sovereign rights, it is necessary to introduce the NT obligation balancing investors and host States rights - in a similar way to how it is included in the GATT Article III - and exceptions which will prevent the usurping of host States' regulatory authority.

All countries should be guaranteed regulatory autonomy to carry out sustainable economic development. For example, Australia introduced an Act to examine whether any foreign investment proposal undermined Australia's national interests.[394] Protecting public interests is a major concern of all countries, and countries do not want to surrender their regulatory autonomy.[395] One opposite effect on investment is that, when a CIIA is introduced, labour standards are often lowered. For example, in the FDI free trade zones, workers are deprived of trade union activities and more equitable wages are not provided. Larger developing countries argue that liberalisation of FDI does not guarantee improved labour rights by addressing issues such as low wages, exploitation of labour and protection of the environment. However, the introduction of a CIIA should address these issues. Portfolio investment should be excluded as it can be used to avoid interference on internal matters and can maintain the host State's economic stability and sovereignty.[396]

4.9.2 Political Economy

It is argued that globalisation of investment would further marginalise LICs. This is not only common to investment, but also to trade. This is partly due to the WTO's unclear definition of developing countries. Therefore, it is necessary to classify countries according to their respective trade capacity and FDI. Any future investment agreement should not impose restrictions on States in relation to introducing laws to achieve social equilibrium by providing equity and human security, and such matters should be given priority.[397] One of the proposals submitted by India is that developing countries wanted to screen and

[393] *Havana Charter* article 12.
[394] *Foreign Acquisitions and Takeovers Act (No. 92) 1975*, sections 18-21.
[395] Sappideen and Ling He, above n 224, 99.
[396] Sornarajah, above n 166, 56 and 57; Enrique R Carrasco and Randall Thomas, 'Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis' (1996) 34(3) *Columbia Journal of Transnational Law* 539, 610.
[397] Lloyd Axworthy, 'Human Security and Global Governance: Putting People First' (2001) 7(1) *Global Governance* 19, 20.

manage FDI for their country's domestic needs.[398] Developing countries should be assured that a CIIA would not undermine their interests.

4.9.3 Predictability

The aim of the CIIA is to bring predictability to investment and political stability to countries.[399] The objective of FDI liberalisation should be equal distribution of benefits between developed and developing countries, and LICs.[400] Investors may ask host States to relax their existing environmental laws and labour laws before they invest, and this is an area that also needs to be addressed. Politicians of developing countries or of LICs may ask for investors' capital in order to grant investment rights, and may even choose investors, such as through tender processes. This is a practice that should be thwarted. Having obtained investment and built economic hubs such as seaports, airports, etc, LICs sell or offer 99-year leases to the same companies or to different companies in reward. For example, Sri Lanka gave Hambantota port to a Chinese company despite massive protests due to corruption, environmental and security issues. China, Cuba, India, Kenya, Pakistan and Zimbabwe have emphasised the fact that any future CIIA should assure host States that investors' businesses would not undermine their States' development objectives and policies.[401] Furthermore, the said countries have emphasised that investment should be able to contribute to host States' economic development.[402] A CIIA must address these issues.

4.10 Conclusion

This chapter has discussed the scope of the TRIMS Agreement, the GATS, the NAFTA and the MAI to demonstrate the shortcomings of existing investment agreements. FDI is increasing rapidly and in an unprecedented way. To address the FDI-related issues, a CIIA should be put in place. The chapter discussed the point that the WTO's NT and MFN

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[398] *Communication from India, Working Group on the Relationship between Trade and Investment* WTO Doc WT/WGT/W/149 (7 October 2002) available at <http://commerce.nic.in/trade/international_trade-investment-3.asp> accessed on 17 September 2017, para 9.

[399] *Communication from Costa Rica, Preparations for the 1999 Ministerial Conference, Negotiations on Trade and Investment in Terms of Paragraph 9(a)(i) of the Geneva Ministerial Declaration* WTO Doc WT/GC/W/280 (29 July 1999), Communication.

[400] *Ministerial Declaration of the Least Developed Countries*, New York (24 September 2016) para 17; *Declaration of the Least Developed Countries Ministerial Meeting to UNCTAD XIV* UN Doc TD/505 (18 July 2016) para 10.6.

[401] *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe*, *Working Group on the Relationship between Trade and Investment* WTO Doc WT/WGTI/W/152 (19 November 2002) <http://commerce.nic.in/trade/international_trade-investment-3.asp> accessed on 17 September 2017, para 10; see also *Zanzibar Declaration, Meeting of the Ministers Responsible for Trade of the Least Developed Countries*, WTO Doc WT/L409 (6 August 2001) para 25.

[402] *Zanzibar Declaration, Meeting of the Ministers Responsible for Trade of the Least Developed Countries*, WTO Doc WT/L409 (6 August 2001) para 25.

principles should offer a theoretical anchor to converge investment into a WTO covered agreement.

The chapter revealed that the GATT Article III was drafted in a manner that protects States' autonomy to introduce rules and regulations to protect their economy. The concept of the 'like product' itself is a result of interpretation by the Panels and the Appellate Body to ensure non-discrimination at the border and national levels; simultaneously, the Appellate Body was able to develop jurisprudence to achieve sustainable economic development through trade liberalisation. The liberalisation of trade or investment does not mean that the sovereign authority of countries to make laws should be undermined. This is especially the case for countries that need to uplift the living standards of their people and achieve sustainable economic development. This political economy exists in trade law. The WTO and its system, while ensuring States' rights to preserve their political economy, has introduced a rule-based trade regime which, at present, is lacking in investment law.

It was observed in this chapter that investment law, at present, does not recognise political economy for investment. This is obvious from the cases of *Metalclad Corporation* and *Methanex* in which the political economy of investment was not considered. In the *S. D. Myers* case, an attempt was made to consider competitiveness on a sector basis, but subsequent cases did not follow this path, as drafters of BITs laid down substantive law in a different fashion. The contribution of this chapter is that it investigated the current predicament of investment law treaties and suggested a uniform investment law under the WTO as a covered agreement. Any covered agreement on investment will become successful on a rules-based dispute settlement system. Therefore, it is necessary to discuss a dispute settlement mechanism for investment. Prior to that, the next two chapters identify shortcomings of the existing investment dispute settlement mechanism, and the difficulty of the enforcement of arbitration awards under arbitration to establish a CIIA within the WTO framework.

Chapter 5: The Complexity of International Investment Arbitration

5.1 Introduction

Chapter 4 discussed the shortcomings of the TRIMS Agreement, the GATS, the NAFTA and the draft MAI to demonstrate that these agreements do not establish a CIIA and that they do not adequately protect the regulatory autonomy of States.[1] This chapter examines the present predicament with regard to the arbitration procedure worldwide to demonstrate the uncertainty and unpredictability in investment law with a brief description of the historical development of international investment law.[2] It studies the arbitrability, choice of law, forum convenience, the applicable law, and the definition of the dispute and investment in the ICSID Convention. It will be shown that the current system is inadequate and complex.[3]

The law governing investment arbitration is fragmented and lacks coherence.[4] The current situation of international investment arbitration has no binding jurisprudence and there is little confidence in its effectiveness as a global investment dispute settlement mechanism.[5] International investment law is difficult to ascertain and, as it differs from one case to

[1] See *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment Treaties by Treaty Parties* 39th session UN Doc. A/CN.9/WGIII.191 (17 January 2020) para 26.
[2] *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October -2 November 2018) UN Doc.A/CN.9/964 (6 November 2018) para 22; *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters* UN Doc. A/CN.9/WGIII/WP.150 (28August 2018) para 5; Jeffrey P Commission, 'Precedent in Investment Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) *Journal of International Arbitration* 129, 142; Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed' (2014) 29(2) *ICSID Review* 372, 416.
[3] *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)* 52nd session UN Doc. A/CN.9/964 (6 November 2018) paras 28 and 29.
[4] *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October – 2 November 2018) A/CN.9/964 (6 November 2018) para 25; Jaemin Lee, 'Mending the Wound or Pulling It Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39(1) *Northwestern Journal of International Law & Business* 1, 8; 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (World Economic Forum, Geneva Switzerland, 2013) 1, 8; Siqing Li, 'Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses' (2018) 19(1) *Chicago Journal of International Law* 189, 194.
[5] *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)* 52nd session UN Doc. A/CN.9/964 (6 November 2018) paras 28 and 29.

another,[6] international investment arbitration lacks predictability.[7] FDI has rapidly increased worldwide,[8] creating urgency among countries to establish a process for rules-based investment dispute settlement.[9] Similarly, investment arbitration cases have increased worldwide and the awards arising from these cases have complicated investment law due to the lack of uniformity.[10]

Complexity of investment arbitration often arises with regard to the choice of law, arbitrability, the law governing the underlying contract and the law applicable to the arbitration agreement.[11] The latter two laws are not essentially the same because sometimes applicable law is governed by the law of one country and the law governing arbitration is governed by the seat of arbitration. The seat of arbitration is also a highly contested issue.[12] Although a plethora of BITs have been put in place, they are inconsistent in terms of content and application.[13]

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[6] See Charles N Brower and Stephan, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(2) *Chicago Journal of International Law* 471, 473; Pierre Mayer 'Conflicting Decisions in International Commercial Arbitration' (2013) 4(2) *Journal of International Dispute Settlement* 407, 408.

[7] Brower and Stephan, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' above n 6, 473; *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October -2 November 2018) UN Doc. A/CN.9/964 (6 November 2018) paras 41 and 42; *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS) Interpretation of Investment Treaties by Treaty Parties* 39th session UN Doc. A/CN.9/WGIII.191 (17 January 2020) para 6 and 7.

[8] *Commission on Transnational Corporations*: Report on the 15th sess, UN Doc E/1989/28/Rev. 1, E/C.10/1989/16/Rev. 1 (5-14 April 1989) chapter II para 6; Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles* (Oxford University Press, 2007) 3.

[9] Pauwelyn, above n 2, 372.

[10] Petr Polasek and Sylvia T Tonova, 'Enforcement Against States: Investment Arbitration and WTO Litigation' in Jorge A Huerta-Goldman and Antoine Romanetti (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 357, 357; *Not by Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS*), *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session A/CN.9/WG.149 (5 September 2018) para 1; *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October-2 November 2018) A/CN.9/964 (6 November 2018) para 28; 'Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to Both States and Investors' European Commission, Fact Sheet, Memo/15/6060 (12 November 2015); Mark S Manger and Clint Peinhardt, 'Learning and the Precision of International Investment Agreements' (2017) 43(6) *International Interactions* 920, 923; Piero Bernardini, 'Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests' (2017) 32((1) *ICSID Review* 38, 56.

[11] Nigel Blackaby and Constantine Partasides, with Alan Redfern and Martin J Hunter (eds), *International Arbitration* (Oxford University Press, 6th ed, 2015) 157.

[12] Ibid 160.

[13] Albert Jan van den Berg, '*Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*' (2019) 34 (1) ICSID *Review* 156, 157.

International investment disputes are governed by the law of arbitration.[14] The right to invoke arbitration is vested in the BITs, and disputes relating to international investment arbitration can take place between investors and host States.[15] BITs allow investors from signatory States to make a complaint against a host State in relation to investment disputes.[16] This is a progressive step in international investment arbitration,[17] however, these agreements are apparently seen as threatening a State's authority to maintain its regulatory autonomy to make laws for the public benefit.[18] Furthermore, the language of these treaties does not protect regulatory autonomy of States and treaty provisions are interpreted in an investor-friendly manner against States (see Chapter 4).[19] Even though BITs, the ICSID Convention and the NAFTA[20] provide for governing the law for investment, these agreements state that applicable laws are those agreed to by the parties and that the parties to the dispute have more flexibility in this process (party autonomy) than those governed by applicable rules of international law.[21]

Countries have enacted arbitral laws under domestic law.[22] Domestic courts often must determine the validity of arbitral awards because judges of domestic courts think that arbitration lacks transparency and does not develop law.[23] Therefore, domestic courts are often asked to determine the choice of law issues, forum convenience, arbitrability, and the

[14] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301, 301.
[15] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 45.
[16] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force on 1 January 1994) (Chapter 11, Investment) article 1117.
[17] Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 159.
[18] Brower and Stephan, above n 6, 475; Bernardini, above n 10, 39; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 20; Umair Ghori, 'Investment Court System or Regional Dispute Settlement: The Uncertain Future of Investor-State Dispute Settlement' (2018) 30(1) *Bond Law Review* 83, 85.
[19] Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investment–State Arbitration' (2007) 47(4) *Virginia Journal of International Law* 953, 960; *CMS Gas Transmission Co. v Republic of Argentina* (Award) (2005) ICSID Case No. ARB/01/8,1,80 and 81 [274 and 279]; *Metalclad Corporation v United Mexican States* (Award) (2000) ICSID Case No. ARB(AF)/97/1,1,30 [113]; Roberto Echandi, 'The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987- 2017) and Policy Implication' (2019) 34(1) *ICSID Review* 32, 34 and 50; Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) *The American Journal of International Law* 45, 46; *Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce Chapter II-Investment* which has been proposed to balance the rights of investors and those of host States (EU Commission Draft Text TTIP-Investment) article 2.
[20] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force on 1 January 1994) (Chapter 11, Investment).
[21] Ibid article 1131:1.
[22] *International Arbitration Act of Australia (No. 136) 1974 amended up to Act No. 5 of 2011)* articles 15, 18; *Arbitration Act 1996* (England, 1996 Cap 23); *The Federal Arbitration Act* (USA); *Arbitration Act No. 11of 1995* (Sri Lanka); *International Arbitration Act* (Singapore, Cap 143A, 2002 rev ed).
[23] Susan L Karamanian, 'Courts and Arbitration: Reconciling the Public with the Private' (2017) (9) *Yearbook on Arbitration and Mediation* 1, 3.

validity of the award.[24] In addition, courts must consider whether a particular award should be enforced on the grounds of the host State's public policy or State immunity (see Chapter 6).[25] Therefore, this thesis argues that converging investment into the WTO will bring predictability to investment law and it will create a rule-based investment dispute settlement to the world, striking a balance between the regulatory autonomy of host States and the rights of investors.[26] The UN tried to introduce UN Commission on Transnational Corporations (UNCTS) to establish an investment regime but failed due to diverse interests of parties.[27] In this context, it is important to trace the history of international investment law and investment arbitration to provide the background as to how international investment law and investment arbitration have evolved with the passage of time to lay down a conceptual framework for a CIIA.

5.2 Genesis and Development of International Investment Law

5.2.1 Investors from being Object to Subject of International Law

International investment law originally derived from a branch of traditional international law intended to protect foreign nationals and their properties abroad, with this being the responsibility of a State.[28] This is known as diplomatic protection of a natural person or a legal person from the wrongful act of a State.[29] In the past, foreigners had difficulty conducting business outside their own country. At times, foreigners were deprived of their rights and were unable to sue for personal injury and damage to their properties. The reason was that, traditionally, public international law regulated the relationship between States only. Individuals and legal persons were not recognised as the subjects of international law.[30] An individual or legal person was traditionally considered as an object of public international law. For example, if State A caused an injury to a citizen of State B (who did business in State A) or her property, she had no remedy under public international law.

[24] Roy Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17(1) *Arbitration International* 19, 21.
[25] Jack Beatson FBA, 'International Arbitration, Public Policy Considerations, and Conflict of Law: The Perspectives of Reviewing and Enforcing Courts' (2017) 33(2) *Arbitration International* 175, 176; Stephen R Tully, 'Challenging Awards before National Courts for Denial of Natural Justice: Lessons from Australia' (2016) 32(4) *Arbitration International* 659, 661; Olga Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System' (2015) 26(1) *The American Review of International Arbitration* 47, 48.
[26] *Metalclad Corporation v United Mexican States* (Award) (ICSID) (ARB(AF)/97/1 (30 August 2000).
[27] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 261.
[28] Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality' (2017) 42(1) *The Yale Journal of International Law* 1, 5.
[29] *Interhandel* (*Switzerland vs United States*) (ICJ, 6, 21 March 1959) 46; Edwin M Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad' (1913) 7(3) *American Journal of International Law* 497, 507.
[30] *Reparation for Injuries Suffered in the Service of the Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

However, State B can instigate a case against State A as if the injury had been caused to State B.[31] Therefore, international investment law was developed to remedy injury caused to foreigners by means of granting compensation.[32]

Any infringement of the rights of foreigners was considered a violation of the rights of the foreign States to which these foreigners belonged.[33] This concept gave States the grounds for claiming damages from another State for injury done to their citizens or their citizens' property.[34] This practice crystallised into customary international law based upon *opinio juris* and State practice.[35] Compensation for injury or damages to foreigners or their property is intrinsically connected with sovereignty. Sovereignty allows a State to protect not only its own citizens and their properties, but also foreigners and their properties.[36] Therefore, the concept of sovereignty confers upon States the exclusive right to protect their territorial integrity and obliges them to protect foreign nationals and their properties. Moreover, States could confiscate properties under the UN Resolution on Permanent Sovereignty over Natural Resources (PSNR) and this resolution provided provisions for the economic development of developing countries**.**[37] Developed countries did not support the PSNR. Therefore, the General Assembly adopted another resolution titled Charter of Economic Duties and Rights of States.[38]

Fair and equitable treatment (FET) does not permit sovereign States to take over property without paying compensation.[39] This concept originated in the 18th century and is derived from natural law for the protection of investors' rights.[40] FET is a customary law principle

[31] See Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50(2) *Harvard International Law Journal* 491, 498.
[32] Kenneth J Vandevelde, *United States Investment Treaties Policy and Practice* (Kluwer Law and Taxation Publishers 1992) 17.
[33] Maximilian Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law* (Kluwer Law International, 2016) 23.
[34] Sornarajah, above n 27, 11.
[35] Sornarajah, above n 27, 82.
[36] Sornarajah, above n 27, 41.
[37] The PSNR allowed developing countries to have complete control over natural resources, which were at that time controlled by developed countries, to develop their economies. Permanent Sovereignty over Natural Resources, 14 December 1962, 17 UN - GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII) (14 December 1962); Surya P Subedi, 'A shift in Paradigm in International Economic Law: From State-centric Principles to People-centred Policies' (2013) 10 (3) *Manchester Journal of International Economic Law* 314, 327.
[38] *Charter of Economic Duties and Rights of States UN DOC. UN Resolution 3281 (XXIX*) (12 December 1974).
[39] OECD Fair and Equitable Treatment Standard in International Investment Law (Working Papers on Investment, 2004/03) 1, 8 Footnote 32.
[40] Andrew C Blandford, 'The History of Fair and Equitable Treatment before the Second World War' (2017) 32(2) *ICSID Review* 287, 289.

which was incorporated into BITs after the Second World War as a result of negotiations between developed countries.[41] The minimum standard of treatment comprised the general principles recognised by civilised nations.[42] The minimum standard of principles were known as 'the general principles of justice and equity' as applied to investment protection under customary international law.[43] FET is a part of the minimum standard treatment and FET is used to determine whether the minimum standard treatment is violated. Both provide for the rules for non-discrimination to ensure justice.

5.2.2 Historical Development of International Investment Law Arbitration

Investors and host States have competing interests. On the one hand, investors want to have clear rules to protect their investment while, on the other hand, States want to protect their regulatory autonomy (sovereignty) by making rules that enable them to achieve sustainable economic development.[44] Unlike international trade laws, no uniform set of rules is available that can help to balance these competing interests.[45] FDI is important for the economic development of all countries whether they are developed countries, larger developing countries or LICs to improve economic activities, which can include an increase in domestic production, development of infrastructure, reduction in the balance of payments, better health facilities, and the achievement of sustainable development.[46] Investors anticipate that the capital they invest in host countries will bring them profit. Therefore, countries and investors have begun to sign investment treaties to foster FDI and to govern and regulate international investment.

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[41] Ibid 288.

[42] Elhiu Root, 'Basis of Protection to Citizens Residing Abroad' (1910) 4(3) *American Journal of International Law* 517, 521; Edwin M Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad' (1913) 7(3) *American Journal of International Law* 497, 516.

[43] *Convention Relative to the Creation of an International Prize Court* (opened for signature 18 October 1907 (which did not enter into force) article 7 (Prize Court Convention); Jeremy K Sharpe, 'Chapter 19: The Minimum Standard of Treatment, Glamis Gold, and Neer's Enduring Influence', in Meg Kinner, Geraldine R Fischer, et al (eds) *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 269, 270; Daniel Kalderimis, 'International Arbitration in a Brave New World' (2018) 34(4) *Arbitration International* 533, 544.

[44] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles* (Oxford University Press, 2007) 21; *CMS Gas Transmission Company v The Republic of Argentina* (Jurisdiction) (2003) 42 ICSID ILM 788, paras 28 and 29; Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28(2) *The Yale Journal of International Law* 365, 370.

[45] 'EU Finalises Proposal for Investment Protection and Court System for TTIP', European Commission Press Release, IP/15/6059 (12 November 2015).

[46] See Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) *Fordham Law Review* 1521, 1524; Sanjaya Lall and Rajaneesh Narula, 'Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda?' (2004) 16(3) *The European Journal of Research* 447, 448.

International commercial arbitration goes back to the early Greeks.[47] According to Born, the ancient Greeks used the arbitration mechanism to resolve disputes between States.[48] Nussbaum also argues that international arbitration was a phenomenon of Greek history, used to resolve disputes. He further states that after the death of Alexander the Great (323 BC), during the Hellenistic period, cooperation among countries took place (as a 'league') and these countries sought to resolve their disputes through compulsory arbitration.[49]

The *1781 Articles of Confederation* codified rules for the arbitral procedure to settle disputes among American states in the 18th century.[50] After the USA became an independent State, these Articles facilitated relations between the American states. The first investment treaty of this nature in the modern era can be found in the Amity, Commerce and Navigation **(**ACN)[51] Treaty signed in 1794 by the US and England. It is said that BITs emerged in the 18th century from this treaty.[52] The US and Mexico entered into a treaty, titled the Treaty of Guadalupe Hidalgo, in 1948 to govern their disputes through arbitration. This Treaty provided that each side should appoint commissioners to hear disputes.[53]

The Montevideo Convention was the first Convention in modern history to deal with international investment arbitration.[54] This Convention was signed by only a few countries in 1889; hence, its practical impact was less significant. The Convention attempted to introduce a multilateral-level legal framework for international investment arbitration. In

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[47] Gray B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) vol 1, 25; However, Norberg maintains that it goes back to the Roman era. Charles Robert Norberg, 'Recent Developments in Inter-American Commercial Arbitration' (1981) 13(1) *Case Western Reserve Journal of International Law* 107, 107.

[48] 'There are records of 46 separate state-to-state arbitrations between 300 B.C. and 100 B.C., a reasonably impressive figure of one inter-state arbitration every four years.' Born, *International Commercial Arbitration* above n 47, vol 1, 7.

[49] Arthur Nussbaum, *A Concise History of the Law of Nations* (The Macmillan Company, rev ed, 1962) 7 and 8; Tod provides inscriptional evidence to prove that in ancient Greece, disputes were resolved through arbitration. Therefore, arbitration appears to be the oldest method used by nations and individuals for the peaceful resolution of disputes, dating back to ancient times. Marcus Niebuhr Tod, *International Arbitration amongst the Greeks* (Oxford: The Clarendon Press, 1913) 54; Born, *International Commercial Arbitration* above n 47, vol 1, 7.

[50] The *1781 Articles of Confederation* is a written document that formed the USA after being declared independent from England. *Articles of Confederation, 1777-1781*, Office of the Historian, available at <https://history.state.gov/milestones/1776-1783/articles> accessed on 17 February 2018; Born, *International Commercial Arbitration* above n 47, vol 1, 12.

[51] *Treaty of Amity, Commerce, and Navigation, United States of America–Great Britain* (concluded 19 November 1794) (entered into force 29 February 1796); Roger P Alford, 'The American Influence on International Arbitration' (2003) 19(1) *Ohio State Journal on Dispute Resolution* 69, 72.

[52] Franck, above n 46, 1526; Sornarajah, above n 27, 180.

[53] *Treaty of Guadalupe Hidalgo* (2 February 1848) (4 July 1848) article XXI.

[54] *Treaty Concerning the Union of South American States in Respect of Procedural Law* signed at Montevideo (entered into force 11 January 1889).

1899, the Hague Peace Conference established the Convention for the Pacific Settlement of International Disputes.[55] At this Convention, it was recognised that arbitration was the most powerful and fair system for settling disputes among States.[56] The 1899 Convention was able to establish a Permanent Court of Arbitration (PCA).[57] This Convention provided the structural framework for the establishment of inter-State arbitral tribunals.[58] It provided rules for resolving international disputes through good offices, mediation, and international commissions of inquiry and arbitration.[59]

The 1899 Convention was revised in 1907 and subsequently gave impetus to the Permanent Court of International Justice (PCIJ)[60] and the International Court of Justice (ICJ).[61] The objective of this Convention was twofold: to avert conflict among States and to resolve conflicts among States through arbitration in order to ensure peace. However, this Convention did not consider an enforcement mechanism for arbitral awards. A significant feature of the Convention is that it allowed parties to select co-arbitrators and the presiding arbitrators were appointed by agreement.

5.2.3 Emergence of Investment Arbitration

At the beginning of the 19th century, wealthy countries, such as the UK, Germany and Italy, sent their warships to the coastal areas of countries which had expropriated properties of their investors until investors were sufficiently compensated.[62] Known as 'gunboat diplomacy', this was practised by Western countries to protect investors and to obtain compensation for the expropriation of properties by host States. This was evident in 1902 when Venezuela failed to pay a foreign debt.[63] This 'gunboat diplomacy' was criticised by Carlos Calvo, an Argentine jurist, who subsequently introduced a principle which came to

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[55] *1899 Convention for the Pacific Settlement of International Disputes* (*1899 Hague Convention*) (entered into force 4 September 1900) articles 15 and 16.
[56] Ibid article 16.
[57] Ibid article 20.
[58] Ibid articles 15 and 30.
[59] Ibid articles 2, 3, 9, 10, 15 and 16.
[60] *1899 Convention for the Pacific Settlement of International Disputes* (*1899 Hague Convention*) (entered into force 4 September 1900) article 24; *Hague Convention (18 October 1907) for the Pacific Settlement of International Disputes* (entered into force 26 January 1907) article 42.
[61] *Statute of the International Court of Justice*, opened for signature 26 July 1945 (entered into force 24 October 1945).
[62] Alan Redfern, Martin J Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (London and Maxwell, 4th ed, 2004) 562; Blackaby, Hunter, Partasides and Redfern, *International Arbitration* above n 11, 441.
[63] The UK, Germany and Italy sent their warships to Venezuelan ports to exert pressure on their subjects until investors' claims were met by Venezuela. Yanying Li, 'Playing Sovereign Debt Creditors' Orchestra: Inter-Creditor Issues in Sovereign Debt Restructuring' available at <http://ssrn.com/abstract=2200306> accessed on 20 November 2017, 1, 2.

be known as the Calvo doctrine. Most of the developing countries adopted the Calvo doctrine.[64] This doctrine provided jurisdiction to courts to order host states to pay compensation to investors where the investment property had been expropriated.[65] It encouraged equitable treatment as between foreigners and nationals of host States and prohibited diplomatic protection for foreigners' property.[66] Investment arbitration began to take shape in the context of the tension between developed and developing countries, the latter being mostly colonies, with regard to the expropriation of foreign properties in the 19th century.[67]

By the end of the 19th century, economic development was such that countries were urged to establish an organised system for the settlement of commercial disputes (trade and investment). This appeal paved the way for the establishment of the International Chamber of Commerce (ICC) in 1919, with the ICC playing a significant role in shaping and strengthening a legal framework for international investment arbitration. As an initiative of the ICC, the Geneva Protocol on Arbitral Clauses on Commercial Matters (Geneva Protocol) was introduced.[68] This Protocol required that countries recognise foreign arbitral awards and the enforcement of foreign arbitral awards.[69] In fact, the Geneva Protocol laid the foundation for commercial arbitration worldwide and contained the basis for the Avery Clause in arbitration.[70] The Pacific Settlement of International Disputes in 1925,[71] and the 1928 Geneva General Act for the Pacific Settlement of International Disputes, introduced a wide range of arbitration rules for compulsory arbitration for the settlement of disputes among States.[72]

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[64] Wenhua Shan, 'From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2007) 27(3) *Northwestern Journal of International Law and Business* 631, 632.
[65] *Black's Law Dictionary* (2nd ed); Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration* above n 62, 562.
[66] Shan, above n 64, 632; *Black's Law Dictionary* (2nd ed).
[67] Blandford, above n 40, 302.
[68] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (27 LNTS [League of Nations Treaty Series] 158 (entered into force 28 July 1924).
[69] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) articles II, III, IV and V.
[70] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) article IV; The Avery Clause is a clause in a commercial contract referring a potential dispute to arbitration, instead of instituting cases in national courts of the host State. If the matter is referred to a court, the court should not hear the case unless and until the matter is referred to arbitration. *Arbitration Act of No. 11 of 1995* (Sri Lanka) section 5.
[71] *Geneva Protocol for the Pacific Settlement of International Disputes*, Official Journal, Spec. Supp. No. 21, at 21 (25 June 1925).
[72] *Geneva General Act for the Pacific Settlement of International Disputes* (1928) 93 UNTS [United Nations Treaty Series] 343 (entered into force 16 August 1929).

Article III of the Geneva Protocol provided rules to make an arbitral award in one country and to recognise and execute it in another country.[73] The Geneva Protocol, while recognising party autonomy, made the rules on procedure and the constitution of arbitral tribunals subject to the seat of arbitration.[74] In other words, the laws relating to arbitral procedure and the appointment of arbitrators were governed by the seat of arbitration.[75]

The Geneva Protocol was expanded and modified in 1927 by the Geneva Convention for the Execution of Foreign Arbitral Awards.[76] This Convention established rules for the execution of foreign arbitral awards in two places, namely: where the award was given and where the execution of the award was sought.[77] The Geneva Convention's salient feature was that it restricted the extensive review of the merits of awards.[78] This was lacking in the Geneva Protocol. The enforcement process comprised: the award-winning party ('award-creditor') who had to prove that a valid arbitration agreement existed; the arbitral award, which was made on the subject matter that could be arbitrated in the seat of arbitration (arbitrability); and the arbitration, which was conducted in accordance with the procedure.[79] The arbitral award was to be consistent with the public policy of the enforcing State.[80] This resulted in an inquiry being conducted in the courts of the enforcing State before enforcement was allowed. Due to its cumbersome requirements the Geneva Convention for the Execution of Foreign Arbitral Awards made it difficult to enforce foreign arbitral awards.[81]

The Geneva Convention established several basic principles with regard to international investment arbitration, such as rules relating to arbitral agreements, parties' autonomy to choose laws that were applicable to their contract, and enforcement of arbitral awards.[82]

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[73] 'Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the proceeding articles.' *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) article III.

[74] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) article II.

[75] Ibid.

[76] *Geneva Convention on the Execution of Foreign Arbitral Awards* ("Geneva Convention") 92 LNTS 302 (entered into force 25 07.1929).

[77] Ibid articles I to IV.

[78] Ibid article I (e); Gary B Born, *International Commercial Arbitration* above n 47, vol 1, 66.

[79] *Geneva Convention on the Execution of Foreign Arbitral Awards* ("Geneva Convention") 92 LNTS 302 (entered into force 25 July 1929) article I (b) and (c).

[80] Ibid article I (c).

[81] Markie R P Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 3.

[82] *Geneva Convention on the Execution of Foreign Arbitral Awards* ("Geneva Convention") 92 LNTS 302 (entered into force 25 July 1929) article III.

Article III of the Geneva Convention allowed member countries to apply their own laws to enforce foreign arbitral awards. This meant that when it came to recognising and enforcing a foreign arbitral award, the laws of the seat of arbitration were not applicable but the laws of the enforcing State were. This Article tried to achieve two purposes: to preserve the sovereignty of members and to oblige members to enforce the award. Article III was not clear on whether the court of a member country recognised an arbitral award when the award-debtor did not have money. The award-creditor had to prove that the award was not repugnant to public policy of the enforcing State,[83] that it was not *res judicata* and that it was a final award.[84]

The Geneva Convention for the Execution of Foreign Arbitral Awards was replaced by the New York Convention (NYC) which entered into force in 1958. Replacing the Geneva Convention with the NYC was a major concern of countries as international investment was expanding at a rate too rapid to address the breaches that might occur. The NYC was an important treaty for international investment because it attempted to provide for an enforcement mechanism for international arbitral awards. Subsequently, in 1965, the International Centre for the ICSID was established to facilitate the settlement of investment disputes.[85]

The ICSID Convention was introduced while the NYC was still in force because the ICSID Convention not only provided a mechanism for enforcement of arbitral awards but also introduced the adjudicatory procedure for the investment arbitration in an *ad hoc* manner. A significant feature of this Convention is that it is exclusively devoted to investment disputes.[86] As of 2019, this Convention has been signed by 163 countries.[87] The Convention provides for the amicable settlement of disputes and for arbitration as a method of resolving disputes. The ICSID Convention is applicable to parties to the dispute if they agree to ICSID arbitration by consent or through a clause in the arbitration agreement.[88]

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[83] Born, *International Commercial Arbitration* above n 47, vol 1, 67.
[84] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 80; *Travaux preparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, United Nations Economic and Social Council 21st sess. Item 8 UN Doc E/2822 (31 January 1956) 19.
[85] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 1.
[86] Ibid, Preamble.
[87] *ICSID Annual Report 2019*, 10.
[88] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) Preamble and article 25.

The NYC and the ICSID Convention were not adequate for providing rules for investment arbitration. The NYC does not deal with the applicable law, and made the enforcement of arbitral awards subject to the public policy of the enforcing States,[89] while the ICSID Convention does not define investment (definition of investment is important to determine the host State's measure is introduced for regulatory purposes and its legality) and its awards are subject to States' immunity.[90] As a result, the importance of a CIIA was discussed in the United Nations (UN). In 1974, developing countries that were UN members tried to establish the Commission on Transnational Corporations (UNCTS)[91] to regulate foreign investment.[92] Most newly independent developing countries had formerly been colonies[93] and they wanted to formulate rules to control foreign capital invested during the colonial era.[94]

Developed countries rejected the draft code and it did not become a reality. This draft failed mainly because developed countries wanted to apply international law for investment. Developing countries opposed this approach on the ground that the customary international law relating to investment was created when they were colonies. Furthermore, the customary international law did not protect host countries' interests because it was designed to protect investors and did not balance the regulatory autonomy of host countries. In addition, these rules did not provide binding obligations and developing countries wanted to establish rights and commitments through a treaty for investment law.[95] This paved the way to discuss an investment agreement under the UN.

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[89] Albert Jan van den Berg, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) *ICC International Arbitration Bulletin* 1, 2.

[90] Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *Journal of International Arbitration* 1, 5.

[91] *The Impact of Multinational Enterprises on the Development Process and International Co-operation: Activities of the Economic and Social Council,* 195th sess., UN Doc GB.195/10/5/2 (February-March 1975) paras 1 and 4; the UNCTS was created in 1974 and was terminated in 1993 when its work coalesced with that of the UN Conference on Trade and Development (UNCTAD). *The UN and Transnational Corporations, UN Intellectual History Project* (Briefing Note No. 17, July 2009) 1.

[92] *World Bank Legal Framework for the Treatment of Foreign Investment, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment* vol II Guidelines Report No. 11415 (1992) 2; *The UN and Transnational Corporations, UN Intellectual History Project* (Briefing Note No. 17, July 2009).

[93] Sornarajah, above n 27, 237.

[94] *Permanent Sovereignty over Natural Resources,* GA Resolution 1803 (XVII) (14 December 1962) ('*Permanent Sovereignty*') paras 2, 3 and 4.

[95] Sornarajah, above n 27, 249.

5.2.4 Objective of UN Commission on Transnational Corporations (UNCTS) Draft Code

The UNCTS Draft Code provided rules to prevent bribery to host State officials,[96] and gave host States the power to control multinational corporations on social, economic and financial matters.[97] In addition, host States could make rules on performance requirements (technology, restraining fair and open competition, labour issues, environmental issues and consumer protections).[98] The UNCTS draft provided rules relating to the improvement of economic development of host States and control of the monopolies of transnational corporations. In the draft, rules were introduced to prohibit the political interference of host States. In fact, the UNCTS draft dealt with the conduct of transnational companies. The UNCTS was drafted not only with a view to protecting investment, but also to prevent misconduct and abuses by transnational companies.

The objective of the UNCTS Draft Code was to maximise the socio-economic development of host States.[99] This meant that transnational companies should contribute to the economic growth of host States, especially those that were developing countries.[100] This was a significant forward-looking step for host States in the international investment sphere. Furthermore, the Draft Code continued by stating that host States should not apply measures that would have a negative effect on the business activities of these companies. The Preamble tried to balance the competing interests of the host State and investors. There was no agreement on the definition of transnational companies because developed countries wanted to include State enterprises in the definition which was opposed by developing countries. On the other hand, developing countries wanted only private enterprises to be within the definition of transnational corporations, fearing that State enterprises would be subjected to BITs which would undermine the host State's regulatory authority.[101]

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[96] Joel Davidow and Lisa Chiles, 'The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices' (1978) 72(2) *The American Journal of International Law* 247, 250.
[97] Sornarajah, above n 27, 247.
[98] Ibid, 248.
[99] *Draft United Nations Code of Conduct on Transnational Corporations* (1983 version) articles 9, 12 and 26; World Bank Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment, Legal Framework for the Treatment of Foreign Investment Report No. 11415, vol II Guidelines (1992) 9.
[100] *Draft United Nations Code of Conduct on Transnational Corporations* (1983 version) article 26.
[101] Sornarajah, above n 27, 243.

The Draft Code simultaneously placed some limits on host States and investors. Host States and investors had a duty to act in good faith in accordance with the agreement they had arrived at with investors.[102] In the Draft Code, rules provided for the renegotiation of a contract in the event of supervening circumstances.[103] This was a progressive effort with the Draft Code attempting to bring in the law of frustration under Article 12. The Draft Code prohibited multilateral companies from becoming involved in the domestic affairs of host States and in any regime change.[104] Article 6 of the UNCTS Draft Code stated that transnational companies should respect the sovereignty of host States, while Article 7 stated that they should obey the host States' rules and regulations.[105] Transnational companies were also prevented from engaging in any act that could jeopardise the host State's development objectives. The Draft Code stated that multilateral companies should desist from corrupt practices.[106] It required that multilateral corporations divulged to the public their operation, activities and objectives.[107]

As the UNCTS Draft Code did not become a reality, the United Nations Commission on International Trade Law (UNCITRAL)[108] published arbitration rules in 1976, with these rules revised in 2010.[109] The UN introduced the UNCITRAL Model Law for International Commercial arbitration in 1985; it was amended in 2006[110] and again modified in 2010.[111] This time, the UN was successful in the adoption of UNCITRAL because UN member States found that they wanted a procedural mechanism for the 'harmonization and unification of international' trade law for all countries.

Even though investors and host States select UNCITRAL rules for arbitration, however, the UNCITRAL rules do not guarantee transparency because BITs can opt out of the

[102] *Draft United Nations Code of Conduct on Transnational Corporations* (1983 version) article 11.
[103] Ibid article 11.
[104] Ibid articles 15, 16.
[105] Ibid articles 6, 7.
[106] Ibid article 20.
[107] Ibid article 44.
[108] The UN General Assembly, in 1966, adopted Resolution 2205 (XXI) to establish the recommended commission UNCITRAL G.A. Res. 2205, UN GOAR, 21st Sess., Annex II, S 1, at 41, 42, UN Doc A/6394/Add.1/Add.2 (1966); *United Nations Commission on International Trade Law* (*UNCITRAL Arbitration Rules*) (adopted by the UN General Assembly 15 December 1976) GA Res 31/98.
[109] *United Nations Commission on International Trade Law* (*UNCITRAL Arbitration Rules Revised in 2010*) GA Res 65/22.
[110] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*.
[111] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 and revised in 2010 and adopted in 2013*.

applicability of transparency rules. In addition, the UNCITRAL provisions are ambiguous.[112] For example, the applicable law is the law agreed by the parties, but if the parties have not agreed, the applicable law is determined by the tribunal. The question of how the criteria for the applicable law are determined is not clear: neither is it clear whether the law of conflict rules are to be applied in such a situation.[113] Furthermore, the UNCITRAL rules are not a CIIA and they do not provide substantive law for international investment disputes or an enforcement mechanism. If the parties agree, they can have recourse to the UNCITRAL rules for arbitration.[114]

The proliferation of international investment treaties has taken place at an unprecedented rate. Although the number of BITs has escalated, countries have been unable to establish a CIIA due to disagreement regarding the treatment of foreign investment and the rules for safeguarding investment. Countries have undertaken several initiatives to establish a CIIA, but they have been unable to reach an agreement owing to divergent opinions between developing and developed countries.[115] In particular, developed countries wanted to protect investors – an approach that was rejected by developing countries.[116] Subsequently, non-governmental organisations (NGOs), such as the Corporate Europe Observatory (CEO) and the Transnational Institute (TNI), also became involved in this debate.[117] Their major concern was that any potential CIIA should address environmental protection and labour rights violations that might arise in connection with the investment. Developing countries wanted to control the multilateral corporations, fearing that these corporations would undermine their sovereign rights. Both developed and developing countries wanted to preserve their respective regulatory authority. Several efforts were made in this regard, starting with the Havana Charter, to draft a multilateral agreement on investment (MAI). This was followed by the WTO Singapore (1996), Doha (2001) and Cancun (2003)

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[112] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)* United Nations (2015) available at <www.uncitral/en/uncitraltexts/abitration/2014Transparency.htm> accessed on 8 February 2019, article 1; Matthew Carmody, 'Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be Applied to International Commercial Arbitration?' (2016) 19 *International Trade and Business Law* Review 96, 152.

[113] *UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (with new article 1, para 4 as adopted in 2013) (United Nations, New York, 2014) article 35.

[114] *UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (with new article 1, para 4 as adopted in 2013) (United Nations, New York, 2014) article 1.

[115] Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations' (2015) 16(1) *The Journal of World Investment and Trade Law* 11, 56.

[116] Susan D Franck, above n 46, 1526; Sornarajah, above n 27, 236.

[117] Karl P Sauvant and Federico Ortino, 'Improving the International Investment Law and Policy Regime: Options for the Future' (Ministry of Foreign Affairs of Finland 15 December 2013) 7, 44, footnote 77.

Ministerial Conferences which sought to establish a CIIA,[118] and the draft TTIP: Trade in Services, Investment and E-Commerce (Chapter I).[119] All attempts failed due to divergent interests and heterogeneous member States. Given this background, it is necessary to investigate the manner in which arbitrability, the choice of law, applicable law and seat of arbitration affect, and operate in, the settlement of international investment disputes and the complexity of arbitration.

5.3 Anatomy of International Investment Arbitration

5.3,1 Arbitrability

Arbitrators and courts have to decide whether a subject matter referred to the arbitration is capable of being arbitrated.[120] The NYC and the municipal law have enacted provisions to determine the arbitrability of a subject matter.[121] Arbitrability means that disputes or differences and their subject matter are all capable of being resolved by arbitration.[122] In other words, the subject matter of arbitration should be capable of being arbitrated.[123] The custody of children and other family matters are not within the domain of arbitration. Only those matters that have commercial elements can be arbitrated. The subject matter of arbitration differs from country to country and from region to region according to their political, social and economic policies.[124] For example, a dispute relating to intellectual property rights is not within the purview of arbitration,[125] however, the WTO provides rules and substantive law for disputes relating to intellectual property rights.[126] Likewise, bribery and corruption matters cannot be arbitrated, but in the case of *Mitsubishi Motors Corp v*

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[118] Sornarajah, above n 27, 238.

[119] 'Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to Both States and Investors', European Commission, Fact Sheet, Memo/15/6060 (12 November 2015).

[120] Born, *International Commercial Arbitration* above n 47, vol 1, 559.

[121] *New York Convention* article II; Arbitration Act of Sri Lanka No. 11 of 1995 article 4.

[122] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) article I(b); *New York Convention* (entered into force on 7 June 1959) articles II(1), V(2)(a); *Inter-American Convention on International Commercial Arbitration 1975* (entered into force 16 June 1976) article 5(2)(a); *European Convention on International Commercial Arbitration of 1961* (entered into force on 1 January 1964) article VI(2); *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*, article 34(2)(a).

[123] Laurence Shore, 'Fundamental Observations and Applicable Law, the United States' Perspective on "arbitrability"', in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives, International Arbitration Law* (Kluwer Law International, 2009) 69, 69.

[124] Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration* above n 62, 164.

[125] See Jan Paulsson *The Idea of Arbitration* (Oxford University Press, 1st ed, 2013) 208; However, the US Supreme Court held that, although intellectual property rights could not be arbitrated under domestic law, this matter can be resolved through arbitration if it has international elements. *Scherk v Alberto Culver* 417 US 506, 516 (Ct. App, 1974).

[126] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (entered into force on 1 January 1995) annex 1A ('*Agreement on Trade Related Aspects of Intellectual Property Rights*').

Soler Chrysler-Plymouth Inc.,[127] it was held that international arbitration involving anti-trust disputes can be arbitrated under the US Federal Arbitration Act.[128] Many States such as Australia,[129] the UK,[130] the USA,[131] France, Sri Lanka[132] and Singapore[133] have introduced arbitration rules through legislative acts to facilitate arbitral procedures.

Non-arbitrability can be divided into two parts: non-conditional arbitrability and conditional arbitrability. Non-conditional arbitrability means by law *per se* the subject matter cannot be arbitrated and that arbitration is prohibited.[134] Conditional arbitrability means that if conditions are met, such as the consent to arbitration is not given under a prescribed form and the consent is given after the dispute has arisen, the matter can be arbitrated. For example, the 'time or form' of the arbitration agreements ('cases involving post-dispute arbitration agreements or separately signed arbitration agreements') are examples of conditional arbitration. It excludes the capacity of parties and the validity of arbitration agreements that depend on the laws applicable to arbitration and the public policy of countries, however.[135]

The UNCITRAL Model Law does not recognise the types of disputes that are non-arbitrable. Therefore, a question may arise whether the UNCITRAL Model Law considers any types of disputes that can possibly be resolved through arbitration. It can be argued that the UNCITRAL Model Law deals with commercial matters; therefore, the scope of the UNCITRAL Model Law would be limited to commercial matters. No appropriate international system is in place to identify whether or not a particular dispute can be arbitrated. Non-arbitrability depends on the public policy of each country.[136] For example, gambling is legal in some countries, but in Middle Eastern countries, in particular, it is not legal, while money laundering is illegal in most countries. Therefore, arbitrability depends

[127] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*. 473 US 614,105 S.Ct.3346 (1985).
[128] Ibid 628; Lisa Sopata, 'Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc: International Arbitration and Antitrust Claims' (1986) 7(3) *Northwestern Journal of International Law and Business* 595, 596.
[129] *International Arbitration Act (No. 136) 1974 amended up to Act No. 5 of 2011)* (Australia) articles 15, 18.
[130] *Arbitration Act 1996* (England, 1996 Cap 23).
[131] *The Federal Arbitration Act* (USA).
[132] *Arbitration Act No. 11of 1995* (Sri Lanka).
[133] *International Arbitration Act* (Singapore, Cap 143A, 2002 rev ed).
[134] *Restatement of the Law (Third) The U.S. Law of International Commercial Arbitration Council Draft No. 3 (23 December 2011)* sections 4-17.
[135] Born, *International Commercial Arbitration* above n 47, vol 1, 956; *Restatement of the Law (Third) The U.S. Law of International Commercial Arbitration Council Draft No. 3 (23 December 2011)* 252 sections 4-17.
[136] Born, *International Commercial Arbitration* above n 47 vol 1, 950.

on the public policies of countries.[137] The arbitrability of a case is determined on the basis of the choice of law, the seat of arbitration[138] and the place where the enforcement of the award is sought.[139]

The NYC refers to 'subject matter' that should be 'capable of settlement by arbitration'. This refers to the arbitrability of the subject matter. The enforcing court must determine whether the subject matter of a given award is arbitrable: it is unclear whether the award-debtor must prove that the subject matter is capable of being arbitrable. Furthermore, it is questionable whether the court can investigate *ex mero moto* whether the subject matter is capable of arbitration. However, it can be contended that, according to Article V:I of the NYC, the burden of proof shifts to the award-debtor, once the certified copy of the award and the arbitration agreement have been submitted to the enforcing court.[140] Another question also arises about what law determines if the subject matter is arbitrable. Is it arbitrable under the laws of the enforcing State or the laws of the award-given State?

The Convention is applied only to contracts which have commercial elements. Does this cover investment? The Geneva Protocol of 1923 required member countries to recognise an arbitral agreement if the matter concerned commercial elements but went on to expand it to 'any other matter'.[141] 'Any other matter' can be construed to include investment as it is essentially linked to a commercial element. The UNCITRAL Model Law provided a broader definition of commercial matters that includes investment.[142] Therefore,

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[137] William W Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32(1) *International and Comparative Law Quarterly* 21, 23; Honglin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1(2) *Contemporary Asia Arbitration Journal* 255, 260.

[138] Stavros Brekoulakis, 'Law Applicable to Arbitrability: Revisiting *Lex Fori*' (Queen Mary University of London, School of Law Legal Studies Research Paper No. 21/2009), available at <http://ssrn.com/abstract=1414323> accessed on 9 December 2017, 99, 99.

[139] James Fawcett and Janeen M Carruthers, *Cheshire, North and Fawcett: Private International Law* (14th ed, Oxford University Press, 2008) 658.

[140] Pieter Sanders, 'The Making of the Convention' (Speech delivered at the 'Enforcing Arbitral Awards under the New York Convention: Experience and Prospects'), UN Headquarters, 10 June 1998) 3, 4.

[141] *Geneva Protocol on Arbitration Clauses in Commercial Matters* (Geneva Protocol) 27 LNTS 158 (entered into force 28 July 1924) article I.

[142] 'The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road'. *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*, footnote 1 to article I.

commercial contracts can be defined as contracts that investors, merchants, traders and States have entered into involving or in the course of business or associated with business to regulate their business activities. This definition encompasses investment.

The commercial element is the genesis of investment. Therefore, one may argue that foreign awards relating to investment can be enforced.[143] Consider a situation where a company makes an investment in a country and, while it is conducting business, a gas leak harms many people. In the agreement, a clause provides for arbitration, or the parties subsequently agree to arbitration. Finally, victims can claim damages but the issue that arises is whether the award will be enforced in another country which has signed the Convention. Can this award be enforced? The answer is 'no' because the arbitrated matter does not have a commercial element or is not concerning a commercial transaction.[144] However, during the preparatory stage of the Convention, the Greek government proposed the inclusion of a 'delictual and quasi-delictual obligation (Torts) that may arise from a commercial transaction'.[145] This proposal was not incorporated in the Convention. If it had been incorporated, the hypothetical situation described above could have been addressed and the complicacy in satisfying the commercial element would not have arisen. After deciding the arbitrability, the arbitrators have to consider the applicable law of the arbitration agreement.

5.3.2 Law applicable to Arbitration Agreement

States and investors can decide which law is applicable to their arbitration agreement. An arbitration agreement should be in place to arbitrate when a dispute arises. Berg states that 'no arbitration is possible without its very basis [that is] the arbitration agreement'.[146] At times, the agreement to arbitrate is provided in a clause in the main contract or in a separate

[143] Kofi Annan, 'Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration' (Speech delivered at the 'Enforcing Arbitral Awards under the New York Convention: Experience and Prospects', UN Headquarters, 10 June 1998) 1, 2.
[144] See UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 35.
[145] *Travaux preparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UN Doc E/2822/Add.2, Annex I (14 March 1956) 1; see *European Grain and Shipping Ltd. v Bombay Extractions Ltd.* (1983) High Court of Bombay, India AIR 1983 Bom 36 [12].
[146] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) 144.

contract and, therefore, two different contracts are within the contract (contract within a contract) and the two contracts are autonomous.[147]

Berg argues that, even though the main contract or underlying contract is invalid, the clause stating that parties agree to arbitration does not become invalid on the basis of the doctrine of separability.[148] The reason is that the arbitration clause becomes a separate contract.[149] Separability in a contract means that no other autonomous contract is within that contract. The separability rule applies to a contract when the contract has one part that is illegal or invalid and another part that is valid or legal, with the valid or legal part being able to be enforced in accordance with the blue pencil rule.[150] Berg's view is difficult to accept because if the underlying contract is invalid or *ab initio* void, the terms of the contract or the disputes or rights and liabilities arising from the contract cannot be enforced and the separability principle does not arise.[151] For example, if the underlying contract is entered into due to duress or fraud or by parties not having the capacity to enter into a contract, can such an arbitration agreement or arbitration clause be valid? The answer is 'no', as this defect goes to the root of the arbitration agreement and the grounds used to vitiate the underlying contract invalidate the arbitration agreement.

The arbitration legislation of most countries has not adopted a comprehensive definition of the arbitration agreement in national arbitration laws.[152] The NYC, and the UNCITRAL Model Law do not provide for a comprehensive definition to be used in the national context.[153] Arbitration is a matter of consent given in writing by parties to form a contract that will refer to arbitration of any dispute that may have arisen (after the dispute has arisen,

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[147] Born, *International Commercial Arbitration* above n 47, vol 1, 349 and 350; Ronán Feehily, 'Separability in International Commercial Arbitration; Confluence, Conflict and the Appropriate Limitations in the Development and Application of the Doctrine' (2018) 34(3) *Arbitration International* 355, 356.

[148] Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* above n 146, 145.

[149] Jan Paulsson, *The Idea of Arbitration* above n 125, 63; Born, *International Commercial Arbitration* above 47, vol 1, 470.

[150] Nicholas C Seddon and Manfred Paul Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 9th Australian ed, 2008) 947.

[151] Maria Hook, *The Choice of Law Contract* (Bloomsbury Publishing PLC, 2016) 76; *Fiona Trust Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 [17].

[152] *Indian Arbitration and Conciliation Act*, section 7(1); *Italian Code of Civil Procedure*, article 808; *Chinese Arbitration Law*, article 1; the US *Federal Arbitration Act* defined the term 'arbitration'. *Imad Bakoss v Certain Underwriters at Lloyds, London Subscribing to policy No. 0510135*, US 1, 14 (Supreme Court, 2013); see Born, *International Commercial Arbitration* above n 47, vol 1, chapter 2 footnote 85.

[153] *New York Convention* (entered into force on 7 June 1959) article II; *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*, article 7(1).

parties can agree to arbitrate) or may arise,[154] and the parties agree to impose an obligation to refer their differences to an independent person or persons.[155] As previously stated, this agreement can be either a separate agreement or it can be a clause in the main agreement or underlying contract. The scope of an international investment arbitration agreement can cover all disputes that may arise between parties under the arbitration agreement in relation to breach of contract, validity, termination and existence of the agreement or any matter in connection with the subject matter or arising from it.[156]

5.3.3 Law Governing Arbitration Agreement

The law governing the arbitration agreement is the law applicable to the arbitration. The notion of the law governing the arbitration agreement stems from party autonomy and the notion of separability presumption.[157] The NYC implicitly recognises that an international arbitration agreement is a separate agreement.[158] The law applicable to the arbitration agreement and the underlying contract is not always the same law. Parties may choose the same law for the underlying contract and the arbitration agreement. However, they may also choose a different law for each (e.g. French law for the underlying contract and English law for the arbitration agreement).

Even though parties can choose the law applicable to the arbitration agreement, a limitation exists under the NYC. Article V(I)(a) states that an arbitration agreement is not valid and cannot be enforced if the chosen law of the parties is not recognised by the enforcing

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[154] The arbitration agreement consists of the following elements: (a) consent of the parties to the agreement; (b) resolution of disputes or differences; (c); selection by parties of non-governmental individuals to make a determination of their differences (d) purported agreement to be bound by final decision, subject to challenge in national courts; and (e) agreement to have a quasi-adjudicatory procedure to hear grievances by an impartial third party, unconnected to court or governments. *New York Convention* (entered into force on 7 June 1959) article II(1); *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*, articles 7(1) and 8(1); Wesley A Sturges, 'Arbitration – What Is It?' (1960) 35(5) *New York University Law Review* 1031, 1031; *Sutcliffe v Thackrah* [1974] 1AER 859, 870; *Bakoss v Certain Underwriters at Lloyds of London, WL 4529668* (EDNY [Eastern District of New York], 2011) 1, 11; *Advance Bodycare Solutions v Throne*, 524 F. 3d 1235, 1239 (11th Cir. 2008); *Methanex Motunui Ltd v Spellman* [2004] 1NZLR 95, 141; *Methanex Motunui Ltd v Spellman* [2004] 1NZLR 95, 141 ; *Dworkin v Caledonian Ins. Co*. 226 S.W. 846, 848 (Mo. 1920); Born, *International Commercial Arbitration* above n 47, vol 1, 241, 245.

[155] Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration* above n 62, 10; *Bakoss v Certain Underwriters at Lloyds of London, WL 4529668* (EDNY [Eastern District of New York], 2011) 1, 11.

[156] Born, *International Commercial Arbitration* above n 47, vol 1, 205; *New York Convention* (entered into force on 7 June 1959) article II(1): *Inter-American Convention on International Commercial Arbitration* (entered into force on 16 June 1976) article I; *European Convention on International Commercial Arbitration of 1961* (entered into force on 1 January 1964) article I(2) (a).

[157] See Born, *International Commercial Arbitration* above n 47, vol 1, 473.

[158] See *New York Convention* (entered into force on 7 June 1959) article II(1), II(2) and II(3); *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* articles 7 and 8.

country as a valid agreement.[159] Consider a situation where parties select the applicable law as German law and they agree to have England as the seat of arbitration. In this case, which law would be applicable to the arbitration agreement—the German law, English Law or some other law? Generally, the applicable law in the arbitration agreement would be English law as England was chosen as the seat of arbitration. As the parties, in the given situation, have chosen German law under the facts of the case, the law chosen for the underlying contract can be the law governing the arbitration. A similar issue arose in the *Sonatrach Petroleum Corporation (BHT) v Ferrell International Ltd* case.[160] In this case, the issue was whether to apply English law or Japanese law.[161] The court held that:

> Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement [law governing the arbitration] will normally be governed by the body of law expressly chosen to govern the substantive contract.[162]

Conversely, in the case of *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*,[163] it was held, in the absence of a chosen law for governing arbitration, that the law chosen for the underlying contract was not the law governing the arbitration.[164] The judges applied the implied chosen law test to identify the law governing arbitration. In this case, it was held that the law applicable to the underlying contract was not the law governing the arbitration, but the law of the seat of the arbitration.[165]

In the *Sul America v Enesa Engenharia* case,[166] the Court of Appeal held that Brazilian law would undermine the arbitration agreement.[167] Therefore, judges did not apply Brazilian law as the law governing the arbitration; instead, they applied English law because the parties had chosen London as the seat of arbitration to adjudicate their dispute.[168] In this case, the insurance contract did not state the law that would be applicable to the arbitration

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[159] *New York Convention* (entered into force on 7 June 1959) article V(I)(a); see *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* article 36(1)(a)(i).
[160] *Sonatrach Petroleum Corporation (BHT) v Ferrell International Ltd* [2002] 1AER (Comm) 627.
[161] 'It[The contract] provided for disputes to be determined in the English Courts in accordance with English law or by arbitration in Japan in accordance with Japanese law, depending on the nature of the dispute'. *Sonatrach Petroleum Corporation (BHT) v Ferrell International Ltd* 2002] 1AER (Comm) 630.
[162] *Sonatrach Petroleum Corporation (BHT) v Ferrell International Ltd* 2002] 1AER (Comm) 627, [32].
[163] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.
[164] Ibid [11].
[165] Ibid [14].
[166] *Sul America v Enesa Engenharia* [2012] 1 Lloyd's Law Report 671.
[167] Ibid 680 [31].
[168] Ibid 680 [32].

agreement. The parties, however, agreed that the underlying contract was governed by Brazilian law. In this case, the insurance policy covered hydroelectric facilities in Brazil, with the issue concerning damages.[169] The court refused to apply Brazilian law on the grounds that the close connection of the parties to Brazil had not been established and that the real connection had been established by selecting London as the seat of arbitration. Therefore, the laws of the forum were applicable to the arbitration agreement. In the agreement, Clauses 11 and 12 provided for mediation if a dispute arose; then, after the mediation, the parties could refer the dispute to arbitration. Under Brazilian law, the implied choice of law of contract between parties is the law applicable to the arbitration agreement, in the absence of the applicable law in the arbitration agreement. The court maintained that, if Brazilian law was applied, it would undermine the arbitration agreement. The court applied the validation test because, if Brazilian law was applied, the matter could not be arbitrated due to conditions set out in Clauses 11 and 12 that had not been fulfilled.[170] The validation test is applied to determine the law that would recognise the arbitration agreement.[171]

In the *Hamlyn & Co v Talisker Distillery* case, the arbitration agreement was not valid under Scottish law but was valid under English law because, under Scotland's law, the arbitrators should be named in order for an arbitration agreement to be valid. The intention of the parties was construed to give effect to the arbitration agreement, and English law was applied.[172]

Once the law governing arbitration is decided, it is necessary to decide on the procedure that is applicable to the arbitration. The law governing arbitration is where the law of the seat is applied to procedural measures. These may include: interim measures (stay orders) determining disputes relating to the appointment and constitution of the arbitral tribunal and the laws of the seat relating to the question of misconduct of the arbitrators, such as the issue of the independence and impartiality of the arbitrators;[173] ensuring the equal treatment of all disputant parties; the taking of evidence; pleadings; role of domestic courts; issues

[169] Ibid 671.
[170] Ibid 680 [30].
[171] *Hamlyn & Co v Talisker Distillery* [1984] Ac 202, 207.
[172] Ibid 204.
[173] The duty of arbitrators is to act impartially and independently, to give awards according to the agreed procedure and to apply applicable law to the contract**.** Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' (1982) 16(4) *International Lawyer* 613, 615; Abimbola Akeredolu and Chinedum Ikenna Umeche, ''Arbitrators' Impartiality and Independence: Commentary on Gobowen v AXXIS' (2018) 34(1) *Arbitration International* 143, 146.

relating to jurisdiction and removal of arbitrators; and providing grounds on which an arbitral award is challenged, to name a few.[174] The UNCITRAL Arbitration and ICC rules also provide procedural rules for international commercial arbitration. The ICSID Rules, Article 50 makes provisions for the challenge and interpretation of awards. The ICSID Rules, Article 51 grants parties the right to request a revision of the award.[175] The law governing the arbitration agreement and the law governing the arbitration procedure are also confusing as they differ from country to country. The hearing and taking of evidence as well as dealing with the non-appearance of parties are governed by the procedural rules of the forum with this undermining the harmonisation of procedural laws relating to arbitration. The salient feature of arbitration agreement is that the parties can select law governing arbitration and the law governing the contract.

5.3.4 Choice of Law

The fundamental feature of international arbitration is that parties can choose laws applicable to their dispute.[176] What type of law can be incorporated in the contract? Can any law that parties wish to choose or apply be the law governing the contract or arbitration agreement? The law that has been selected should not be contrary to the public policy of countries. It can be rules from French law, German law, English law or public international law or from any other law that parties may choose. If an applicable law for the underlying contract or arbitration is chosen, no difficulty should then arise when determining the applicable law of the underlying contract or arbitration.[177] Problems arise if an applicable law has not been chosen, or if the chosen law has been challenged by one party, or if the chosen law is not recognised by courts. In these situations, arbitrators and courts have to ascertain the intention of the parties at the time they entered into the contract and bilateral investment treaty (BIT).[178] Sometimes, they have to select the law of the seat of arbitration

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[174] *Smith Ltd v H&S International* [1991] 2 Lloyd's Report 127, 130; Alan Redfern, Martin J Hunter, Nigel Blackaby and Constantine Partasides, *International Arbitration*, (London and Maxwell, 6th ed, 2015) 169; *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol I 840; Albert Jan van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2(2) *ICSID Review – Foreign Investment Law Journal* 439, 443.

[175] *ICSID Convention, Regulations and Rules* (ICSID/15, April 2006).

[176] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 and revised in 2010 and adopted in 2013*, article 35(1); *European Convention on International Commercial Arbitration 1961* (entered into force on 7 January 1964) article VII; Doug Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties' (2014) 26 (Special Issue) *Singapore Academy of Law Journal* 911, 911.

[177] *International Tank & Pipe SAK v Kuwait Aviation Fuelling* Co KSG [1975] Q.B. 224 (CA); *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 2437 (Comm) [2006] 1 Llody's Rep 18; C G J Morse, David McClean and Lord Collins of Mapesbury (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol I, 836.

[178] 'It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed, the intention will be

or they have to consider the most appropriate rule.[179] In doing so, they have to embark on a voyage of discovery and apply conflict of law rules.[180]

As far as investment disputes are concerned, BITs provide rules for the applicable law regarding disputes between parties. For example, the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China states in Article 9(18) that a dispute should be decided by the agreed law of the parties in the agreement and interpreted according to customary international law, and that the tribunal should consider the law of the respondent.[181] This means that investors and States can decide the law that will be applicable to their investment agreement. Article 1131 of the NAFTA Chapter 11 also states that investment disputes should be decided according to their agreed rules and international law. The NAFTA does not refer to the laws of the respondent. Hence, investment disputes under the NAFTA have to be decided according to international law and agreed rules. Agreed rules have not been defined in the NAFTA, thereby creating complexities when applying applicable law to contracts.

Ascertaining the choice of law or the law applicable to a dispute is confusing and complex under the NAFTA,[182] the Australia and China BIT,[183] the UK and Argentina[184] and the ICSID Convention. The ICSID Convention states the applicable law as the law of members. Does the applicable law refer to the plaintiff investors' State laws or the defendant

presumed by the Court from the terms of the contract and the relevant surrounding circumstances.' *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500, 529.

[179] Morse, McClean and Lord Collins of Mapesbury (eds), *Dicey, Morris and Collins on the Conflict of Laws* above n 177, vol I, 837.

[180] Jones, above n 176, 923 paragraph 41.

[181] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (adopted 24 October 2003) (entered into force 20 December 2015); see *Agreement between the Government of the UK of Great Britain and Northern Ireland and the Government of the Republic of Argentina* (entered into force on 11 December 1993) article 8(4).

[182] 'A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992, [1994] CTS 2 (entered into force on 1 January 1994) (Chapter 11, Investment) article 1131:1.

[183] '… the tribunal shall decide the issues in dispute in accordance with this Agreement as interpreted in accordance with customary rules of treaty interpretation of public international law ...' *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (adopted 24 October 2003) (entered into force 20 December 2015) 9.18(1).

[184] 'The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law'. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina* (entered into force on 11 December 1993) article 8(4).

investors' State laws? Or can the ICSID arbitral tribunal apply the laws of other members with whom investors have no connection whatsoever? (see section 5.4.1)

Moreover, investment arbitral tribunals tend to apply international law instead of applying agreed domestic laws. Courts also try to delocalise international arbitration cases, stating that they want to separate international arbitration from national laws. However, no uniform system of law is applicable to international arbitration and arbitrators cannot ignore the parties' autonomy.[185] National courts can function without arbitration but arbitration cannot exist without the national court especially when it comes to the enforcement of awards and interim measures.[186] In the cases of *Compania De Aguas Del Aconquija SA and Vivindi Universal v Argentine Republic*[187] and *SA Copp & Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd*,[188] it was categorically stated that international arbitration was a different system of law and was therefore separate from national laws and applied the international law.

'[I]nternational institutionalised arbitration' and 'unified *lex mercatoria*'[189] were referred to as the *lex specialis* and these words are unclear. Does this refer to an international set of rules derived and developed from *jus gentium*, a commercial practice among foreigners and locals developed since time immemorial?[190] The case of *Compania De Aguas Del Aconquija SA and Vivindi Universal v Argentine Republic* also demonstrated that the ICSID tribunal derived its jurisdiction from BITs and that the tribunal could not avoid applying international law.[191] The tribunal did not apply the municipal laws of the parties as agreed to by the parties. A question also arises as to whether international law refers to the non-discriminatory rules of good faith or to the laws relating to the general principles of

[185] Nicholas Poon, 'Choice of Law for Enforcement of Arbitral Awards' (2012) 24(1) *Singapore Academy of Law Journal* 113, 137.
[186] The Rt. Hon. Dame Elizabeth Gloster DBE, PC, 'Symbiosis or Sadomasochism? The Relationship between the Courts and Arbitration' (2018) 34(3) *Arbitration International* 321, 325.
[187] *Compania De Aguas Del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on Annulment) (ICSID) Case No. ARB/97/3 (3 July 2002) [102].
[188] '… international arbitration, at least as regards certain types of contractual disputes conducted under the auspices of an arbitral institution arbitration, is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them. If the ideal is fully realised, national courts will not feature in the law and practice of international arbitration at all and differences between national laws will become irrelevant.' *SA Copp & Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52.
[189] *SA Copp & Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52.
[190] '… international law, international customs or usages, transnational law, supranational law, *lex mercatoria.*' Croff**,** above n 173, 623; see also Redfern, Martin J Hunter, Nigel Blackaby and Constantine Partasides *Law and Practice of International Commercial Arbitration* above n 62, 129.
[191] *Compania De Aguas Del Aconquija SA and Vivendi Universal v Argentine Republic* (Decision on Annulment) (ICSID) Case No. ARB/97/3 (3 July 2002) [102] and [104].

international law.[192] Therefore, it is a complex process to determine the law applicable to the arbitration agreement in the absence of the establishment of a uniform international applicable law.[193]

Jurisdictional matters, such as arbitrability, choice of law, the forum selected and applicable law are highly controversial issues for parties.[194] The seat of arbitration is also highly contested.[195] A question may arise as to what law is applicable to the law governing arbitration and the underlining contract.[196] Consequently, a question arises as to whether there is an effective mechanism available for countries to litigate investment disputes under a bilateral investment agreement (BIA).[197] The NYC, Article II does not provide express provisions with regard to the choice of law.[198] Instead, it provides directive rules with regard to the validity and enforceability of arbitration agreements. This has often created fierce tension between parties and unnecessary delays. At times, arbitrators determine the relationship of the parties and their connection to the seat of arbitration to ascertain and apply the choice of law. Based on this, arbitrators apply the law of the seat. The 'most connection' rule was provided by the Rome Convention to apply law to a dispute.[199] The most connection rule is determined according to the facts of individual cases. This rule is not satisfactory for arbitral disputes, however. For instance, suppose the automatic application of the law of the seat for the law governing the arbitration agreement and the law governing the underlying contract and, in that scenario, the most connected rule cannot

[192] J Christopher Thomas and Harpreet Kaur Dhillon, 'Applicable Law under International Investment Treaties' (2014) (special issue) *Singapore Academy of Law Journal* 975, 983.
[193] J **C**hristopher Thomas and Harpreet Kaur Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) *ICSID Review* 32(3) 459, 469, 470.
[194] Paul Tan, 'Survey of Singapore Arbitration Case Law on Conflict of Laws Issues in International Arbitration' (2014) 26(1) *Singapore Academy of Law Journal* 1059, 1066.
[195] George A Zaphiriou, 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements' (1978) 3(2) *Maryland International Trade Law Journal* 311, 315; Jack Beatson FBA, 'International Arbitration, Public Policy Considerations, and Conflict of Law: The Perspectives of Reviewing and Enforcing Courts' (2017) 33(2) *Arbitration International* 175, 181.
[196] Fan Yang, 'The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law Compared' (2017) 33(1) *Arbitration International* 121, 126; Lucy Reed, 'Ab(use) of Due Process: Sword vs Shield' (2017) 33(3) *Arbitration International* 361, 364.
[197] *Working Group on the Relationship between Trade and Investment, Consultation and the Settlement of Disputes between Members*, WTO Doc. WT/WGTI/W/134 (7 August 2002) (Note by Secretariat) 3; *Republic of Argentina v NML Capital Ltd* (Discovery Case) 134 S. Ct 2250 (2014); Andrew Friedman, 'Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties in the Global South' (2010) 7(1) *International Law and Management Review* 37, 51.
[198] Gary B Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 (Special Issue) *Singapore Academy of Law Journal* 814, 825.
[199] *EC Convention on the Law Applicable to Contractual Obligations (Rome 1980)* (Rome Convention) article 4; Charles Wild, *Conflict of Laws* (Old Bailey Press, 3rd ed, 2005) 165; Jones, above n 176, 917.

be applied. This is not necessarily always the case as the same law is applicable to both contracts.[200]

Very often, it is necessary to determine what law is applicable to a contract of arbitration.[201] Is it the law of the seat of arbitration that governs the arbitration agreement or the law governing the main contract? French Courts and the US Courts often refuse to accept that party autonomy applies to a choice of law. Instead, they hold that international arbitration agreements are 'autonomous' contracts but that these contracts are subject to public international law principles.[202] The validity of such an agreement 'depends only on the common intention of parties, without it being necessary to make reference to a national law'.[203]

5.3.5 Law Governing the Underlying Contract

The law governing the underlying contract is the law that determines the substantive rights of the contract.[204] The law applicable to disputes can be defined as the choice of law, applicable law or proper law of the contract or law governing the contract.[205] The scope of the substantive law of the contract decides the types of damages that parties can claim, the cause of actions, the terms of the contract, quantum of damages, defences, the burden of proof and the prescription period, if any, to trigger arbitration.

The applicable law plays an important role in deciding the competing interests of parties and arriving at a decision to grant an award. Municipal courts prefer to apply the choice of national law to contractual disputes when they are asked to determine the applicable law. For international arbitration, arbitrators apply private international rules to determine the applicable law. Parties are free to select the applicable law of their choice, and this is recognised by the civil law and common law systems.[206] However, this is not conclusive

[200] Born, 'The Law Governing International Arbitration Agreements: An International Perspective' above n 198, 831.
[201] Ibid 832.
[202] Ibid 844.
[203] Born, *International Commercial Arbitration* above n 47, vol. I, 648 and footnote 74; *Muncipalité de Khoms El Mergeb v Societé Delico*, [French Cour de Cassation civ. 1e] judgement of 20 December 1993 reported in [1994] Rev. arb. 116, 117.
[204] A F M Maniruzzam, 'State Contracts and Arbitral Choice-of-Law Process and Techniques: A Critical Appraisal' (1998) 15(3) *Journal of International Arbitration* 65, 89; *Deutsche Schachtbau und Tiejbohrgellschaft GmbH v R'As al-Khaimah National Oil Co.* [I987] 1 2 Lloyd's Law Reports, 246, 252.
[205] Honglin Yu, 'Choice of Proper Law vs Public Policy' (2008) 1(1) *Contemporary Asia Arbitration Journal* 107, 111; *Compagnie d'Armement Maritime SA v Compagnie de Navigation SA* [1971] AC 572, 603.
[206] Croff, above n 173, 615.

and parties cannot evade basic norms. The applicable law should be legal and selected in good faith.[207]

The law governing arbitration is not always the substantive law of the underlying contract in international commercial arbitration. Parties select a forum that is, at times, unconnected to the substantive law of the underlying contract. In that case, the *lex causae* (law of the seat) or *lex arbitri* or curial law (law governing arbitration) is not as important given parties have selected their laws that are applicable to the underlying contract and arbitration.[208]

The *lex arbitri*, or seat of arbitration, is important if the parties have not selected the applicable law. The seat of arbitration is the place where the dispute is heard.[209] This is known as the forum of arbitration. If the parties have agreed to a particular forum, in the absence of choice of law to govern the underlying contract, the substantive law relating to conflict of laws of the seat is applied.[210] This is termed the *lex causae*.[211] There is no relationship between the law of the seat and the law governing the underlying contract, but the seat of arbitration is considered to be applied for the law governing the underlying contract only in the absence of a choice of law clause in the arbitration agreement. If the parties have not selected the law applicable to the dispute, or there is no clause in the agreement, or the arbitration agreement does not state the law governing the arbitration, what law would be applicable to arbitration? In this situation, arbitrators and courts are asked to determine the issue. For example, a foreign investor from country A invests money in country B. The contract does not state the law that is applicable as the proper law of the contract; hence, the question arises regarding the law that is applicable to the underlying contract. For such instances, tribunals and arbitrators infer the intention of parties from the facts of each case. When the arbitrators or courts investigate the law that is applicable to the case, the arbitrators or courts consider applying the law of the forum where parties have agreed to arbitrate the dispute.

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[207] Redfern, Hunter, Blackaby and Partasides, *International Arbitration* above n 174, 189, 190.
[208] Loukas Mistelis, 'Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"'(2006) 17(2) *The American Review of International Arbitration* 155, 157, 158; *Dicey, Morris and Collins on the Conflict of Laws* above n 183, vol I, 833; *International Chamber of Commerce (ICC) Arbitration Rules* (1 March 2017, version) available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#> accessed on 8 December 2017, article 21.1.
[209] Redfern, Hunter, Blackaby and Partasides, *International Arbitration* above n 174, 171.
[210] *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64; Vitek Danilowicz, 'The Choice of Applicable Law in International Arbitration' (1986) 9(2) *Hastings International and Comparative Law Review* 235, 258.
[211] Mistelis, above n 208, 157.

In the *Woh Hup (Pte) Ltd v Property Development Ltd* case,[212] a similar situation occurred. The issue arise regarding what was the proper law in the Singapore High Court.[213] In this case, the plaintiff agreed to construct a building in Sri Lanka with the defendant, a Sri Lankan company.[214] The contract did not expressly mention the law that was applicable to the contract and for the arbitration agreement. However, it contained a clause stating that any matter arising out of the contract should be referred to arbitration. An issue arose between the parties relating to the construction of the building. The defendant did not appear at the arbitration hearing and the plaintiff was able to obtain an award. The court held that the proper law applicable to this case was Singaporean law as the parties had selected Singapore as the seat of arbitration.[215]

At times, even though parties have selected a seat of arbitration, this does not necessarily mean that the parties intended the law of the seat to be applied to their contract and their choice could have been a mere matter of convenience. The applicable law is not necessarily linked to the seat of arbitration, nor is it automatic or fortuitous.[216] Sometimes, arbitrators and courts apply the most connected rules to ascertain the law applicable to the contract. The Rome Convention also states in its Article 3 that parties can choose the applicable law, and Article 4(1) states that, in the absence of choice of law, the contract should be governed by the law of the country which has the strongest connection.[217] If the arbitration agreement states the law that is applicable to the arbitration agreement, that law in some instances can be applied to the underlying contract, although this is not conclusive and depends on the facts of each case.

5.3.6 Investment Arbitral Tribunals and BITs' Choice of Law Application

Party autonomy permits parties in their investment agreements to choose the law applicable to underlying contract and arbitration agreements.[218] These clauses are embodied in their

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[212] *Woh Hup (Pte) Ltd v Property Development Ltd* [1995] 3SLR 473.
[213] Ibid 474.
[214] Ibid 473.
[215] Ibid 481 and 482 [28, 29, 30].
[216] See Wild above n 199, 144; Jonathan Mance, 'Arbitration: A Law unto Itself' (2016) 32(2) *Arbitration International* 223, 234.
[217] *Rome Convention on the Law Applicable to Contractual Obligations 1980* (entered into force on 1 April 1991); the Rome Convention was replaced by *Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008* (entered into force on 17 December 2009) available at *Official Journal of the European Union* L177/6 (4.7.2008) (The Rome I Regulations) (EC Regulation) article I(e) excludes arbitration and the selection of court; Honglin Yu, 'Choice of Proper Law v Public Policy' (2008) 1(1) *Contemporary Asia Arbitration Journa*l 117, 119.
[218] *International Chamber of Commerce (ICC) Arbitration Rules* (1 March 2017, version) available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#> accessed on 8 December 2017, article 21.1; *UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based*

BITs. Courts and arbitrators should apply these laws to arbitral disputes. These laws can relate to the arbitration agreement, to a breach of terms of BITs or to the underlying contract. In practice, international arbitral tribunals apply international law to resolve disputes.[219] This is revealed in *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* where the parties agreed to exhaust local remedies.[220] In this case, AAP invested money in Sri Lanka under Serendib Seafood Ltd to breed shrimp.[221] The company's hatchery was destroyed when the government conducted a military operation in the locality.[222] Sri Lanka argued that terrorists were operating on the premises and that a special task force had to clear the area of terrorists.[223] As a result, Sri Lanka was unable to afford protection of the investment.[224]

The issue was whether Sri Lanka was liable to pay compensation as it could not protect the investment, thereby violating customary international law minimum standard obligation rules. In this case, both parties had agreed in the contract to be governed by the Sri Lanka–UK Bilateral Investment Treaty (BIT)[225] for applicable rules relating to their disputes.[226] The BIT expressly stated that all domestic remedies should be exhausted.[227] The tribunal held that the choice of law should be constructed in accordance with the intention of the parties and further stated that the protection of investment was an unconditional obligation under international law. Therefore, it applied customary international law to supplement the Sri Lanka–UK BIT rules.[228] This is an example of a case in which the international

Investor-State Arbitration (with new article 1, paragraph 4 as adopted in 2013) (United Nations (UN), New York, 2014) article 35:1.

[219] Phillipe Kahn, 'The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes' (1968) 44(1) *Indiana Law Journal* 1, 8.

[220] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (ICSID) Case No. ARB/87/3 (27 June 1990).

[221] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (ICSID) Case No. ARB/87/3 (27 June 1990) 526, 527.

[222] Ibid.

[223] Ibid 529.

[224] Ibid 526.

[225] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sri Lanka for the Promotion and Protection of Investments* (*Sri Lanka–UK Bilateral Investment Treaty* (entered into force 18 December 1980).

[226] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (ICSID) Case No. ARB/87/3 (27 June 1990) 526, 533.

[227] *Sri Lanka–UK Bilateral Investment Treaty* (entered into force 18 December 1980) article 8(3); *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (ICSID) Case No. ARB/87/3 (27 June 1990) 526, 533 [23].

[228] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (ICSID) Case No. ARB/87/3 (27 June 1990) 526, 533 [21] and 534 [26]; see also Antonio R Parra, 'Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties' (2001) 16(1) *ICSID Review–Foreign Investment Law* 20, 21; *Wena Hotel Ltd v Arab Republic of Egypt* (Decision on Annulment) (ICSID) Case No. ARB/98/4 (5 February 2002) 1, 14, 15 [42].

arbitral tribunal apparently disregarded domestic law in order to apply international law. The outcome of applying customary international law was that the tribunal breached the customary international law of exhaustion of local remedies. The tribunal also did not recognise parties' autonomy when it applied international law.[229] Furthermore, the tribunal was unable to consider the government's action in maintaining law and order as an inalienable right of a sovereign nation. In such an eventuality, the claiming of damages by an investor against a host State is contrary to a host State's legitimate right which is exercised in good faith to protect its national security. The NYC also tries to give some guideline to determine the applicable law but it is not exhaustive.

5.3.7 Article V(1)(a) of the New York Convention and Applicable Law

Article V(1)(a) does not deal with or describe the factors determining which law is applicable to the arbitral agreement or its underlying contract.[230] What test can be used to ascertain the law that is applicable to the parties? What criteria are used by courts? The NYC does not address these questions. First, according to the NYC, Article V(1)(a), the enforcing court has to rely on laws selected by the parties. The applicable law can be either stipulated as a clause in the agreement (expressly) or it can be determined according to the facts of each case (implied). Second, in the absence of express or implied agreement on the choice of law, the court can apply the law of the forum where the award was delivered.[231] However, in *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd*,[232] it was held that if the parties had chosen a law for their underlying contract and they had not chosen a law governing the arbitration agreement, the court can apply the law chosen for the underlying contract.[233] If the parties had not chosen the law for the underlying contract and for the arbitration agreement, then the law of the seat is applicable.[234]

Article V(1)(a) provides for two situations to determine the enforcement of an award: where the applicable law governing the parties render incapacity; and where the arbitration agreement is not valid under the law to which the parties agreed to be subjected. No proper guidance is offered for these situations. Is it determined according to the customary

[229] *Elettronica SPA (ELSI Case) (U.S. v Italy*) (Judgement of 20 July 1989) [1989] ICJ 15, 42 [50]; J Christopher Thomas and Harpreet Kaur Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017) ICSID Review 32(3) 459, 469.
[230] Poon, above n 185, 116.
[231] *New York Convention* (entered into force on 7 June 1959) article V(1)(a); Born, 'The Law Governing International Arbitration Agreements: An International Perspective' above n 207, 825.
[232] *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd* [2002] 1All ER (comm) 627.
[233] Ibid [32].
[234] Ibid; *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC (Comm) (QB) 2437 [76 and 77].

international law rules?[235] Is it determined by the domiciles of the parties?[236] The answer is that courts must infer the intention of the parties according to the facts of each case. Again, the question arises as to how to determine the appropriate law. The factors determining the applicable law are different for civil law countries and common law countries.

In *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd*[237] a question arose regarding the law applicable to the case before the enforcement or arbitral awards was allowed. In this case, Denmark Skibstenisk Konsulenter A/S I Likvidation (DSK) (the plaintiff) wanted to obtain enforcement of the final award granted by the Danish Arbitration Institute against Ultapolis 3000 Investments Ltd incorporated in Italy (the defendant). Ultapolis entered into a contract with DSK to supply a 90-metre yacht.[238] This agreement was subsequently annulled and a new agreement was entered into to provide a 100-metre yacht.[239] A dispute arose for payment of the work done. In the arbitration agreement, a clause provided for the arbitration of any dispute arising from the contract. The contract stated in the standard terms that the law governing the contract was Danish law.[240] In Denmark, the Danish Arbitration Tribunal gave the award in favour of DSK. When DSK tried to enforce the agreement, Ultapolis resisted the enforcement of the award on the grounds that no clause in the contract incorporated an arbitration clause.[241] Therefore, they contended that the referral to arbitration was invalid and it had no force in law.

The court held that there was a valid arbitration agreement and that Danish law was applicable to the parties.[242] They arrived at this decision because Ultrapolis's counsel did

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[235] Customary international law is the law that crystallises into public international law by States' practice. Customary international law, at times, comprises conventions, international customs, general principles of law accepted by countries, judicial decisions and the writings of jurists. See article 38 of the *Statute of the International Court of Justice* (entered into force 24 October 1945*)*; Eric G Jensen, *Introduction to International Law in Sri Lanka* (Open University of Sri Lanka, 1989) 12; Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8(5) *Journal of World Investment and Trade* 691, 692.

[236] Domicile of an investor means where his permanent residence or his principal investment is situated. See Wild above n 199, 69; *Baindail v Baindail* [1946] 1 All ER 342 at 343.

[237] *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661.

[238] Ibid [2].

[239] Ibid [3].

[240] Poon, above n 185, 118.

[241] *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 [4].

[242] Ibid [44, 45, 46].

not make a submission (affidavit) on Danish law on the issue of jurisdiction, but DSK counsel had made a submission (affidavit) explaining the Danish law that was applied.[243] In this case, both the arbitration clause and the law governing clause were disputed by Ultrapolis.[244] Regardless, the court came to the above conclusion on the basis that Ultrapolis were unable to submit evidence contesting the applicability of Danish law.[245]

When one considers the decision of the court, it appears that the court's reasoning is not clear – why did it accept that Danish law was applicable to the parties without considering the intention of the parties when a dispute occurred with regard to the standard choice of law clause?[246] The standard form essentially, and always, does not reflect the intention of the parties and the standard clause is especially at issue. This demonstrates the intricacies involved in ascertaining the law applicable to disputes. However, in one respect, the justification for applying Danish law can be presumed as the parties agreed to settle their dispute in Denmark; therefore, Danish law was applicable. The court did not come to that conclusion. BITs provide parties to select law applicable to the underlying contract and to the arbitration agreement but in practice sometimes arbitrators disregard the choice of law concept making investment law complex.

5.4 Complexity of the ICSID Convention for Investment Arbitration

5.4.1 ICSID Convention and the Substantive Law

The ICSID Convention, Article 42 also provides three laws that are applicable: laws as agreed to by the parties; the conflict of the laws of member countries; or international law as mentioned above. Although this Article is mandatory, it is unclear whether a hierarchical order applies when choosing the applicable law.[247] In that case, can the tribunal totally disregard agreed law or domestic law?[248] Article 42 of the ICSID Convention does have regard to domestic law.[249] A question arises then as to whether international law is the law

[243] Ibid [44, 45].
[244] Ibid [47].
[245] Ibid [52].
[246] Poon, above n 185, 118.
[247] W Michael Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold' (2000) 15(2) *ICSID Review: Foreign Investment Law Journal* 362, 379.
[248] 'The text in its present formulation would indicate if taken literally, simultaneous application of the two laws, but the reference to the law of the State should counsel prudence to arbitrators and guide them to call on the more general rules of international law only where the State law is not well adapted to settlement of the dispute or in case of flagrant violation of the law of nations'. Phillipe Kahn, 'The Law Applicable to Foreign Investments: The Contribution of the World Bank Convention on the Settlement of Investment Disputes' (1968) 44(1) *Indiana Law Journal* 1, 28; Reisman, above n 247, 365.
[249] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 800.

applicable to the contract or BITs despite the applicable law agreed to by the parties.[250] For example, if the tribunal does not apply the agreed law of the parties, can it be challenged at the stage of the enforcing the award, since there is no appellate mechanism to challenge such award?

Again, another situation that could arise concerns the law that will be the governing law of the contract when an inconsistency occurs between the choice of domestic law or international law. Which law would prevail? This question was answered in the case of *Compania del Desarrollo Santa Elina vs Republic of Costa Rica*.[251] In this case, it was held that the objective of the ICSID Convention would become futile if the tribunal did not apply public international law to grant relief to investors to protect their property.[252] It appears that tribunals and courts try to restrict the choice of law for disputes falling under the ICSID Convention.

The ICSID Convention, Article 42 recognises that parties have the right to choose the applicable law. This approach captures the ingrained principle of *pacta sunt servanda* in public international law.[253] The consent of States is of paramount importance when obtaining jurisdiction to hear a case under public international law.[254] The framers of the ICSID Convention thought that host States' laws should be given a priority and that their consent is important in applying the applicable law to investment arbitration.[255]

Countries to the ICSID Convention have agreed to apply domestic law, while the ICSID tribunals try to apply international law. In such a scenario, public international law's exhaustion of the local remedy rule is infringed and the exhaustion of local remedies is entrenched in customary international law.[256] Even though the ICSID Convention, under

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[250] Reisman, above n 247, 380.
[251] 'To the extent that there may be any inconsistency between the two bodies of law, the rules of public international law must prevail'. *Compania del Desarrollo Santa Elina vs Republic of Costa Rica* (Final Award) Case No. ARB/96/1 (17 February 2000) *ICSID Review: Foreign Investment Law Journal* (2000) 15(2) 169, 191 [64].
[252] *Compania del Desarrollo Santa Elina vs Republic of Costa Rica* (Final Award) Case No. ARB/96/1 (17 February 2000) *ICSID Review: Foreign Investment Law Journal* (2000) 15(2) 169, 191 [64].
[253] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 801; Reisman, above n 247, 368.
[254] See *Statute of the International Court of Justice* (entered into force 24 October 1954) articles 36, 38.
[255] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 800.
[256] Reisman, above n 247, 368.

Article 42, provides for the application of international law, this does not mean that the ICSID Convention can oust member States' agreed law that is applicable to their disputes. This viewpoint can be supported by considering the ICSID Convention's preparatory work.

Broches states that it is important to consider the domestic law of countries before applying international law under Article 42 of the ICSID Convention, stating that the Draft ICSID Convention referred to 'national law or international law' and that the word 'or' was changed to 'and'; therefore, the agreed law should be the primary choice of law for the contract.[257] This idea was supported by the Chinese delegation who suggested an amendment to incorporate 'first' into Article 42 to apply the national law of host States.[258]

Parties to the dispute should agree on the substantive law applicable to their investment dispute. If they have not reached agreement, the question arises as to what law should be applicable to the dispute. Article 42(1) states that parties can apply the conflict of law to the members with international law as the applicable law. In practice, it is difficult to identify which law is applicable to the dispute. This is further aggravated by the vagueness and insufficient clarity of the substantive principles of law relating to investors and host States.[259] For example, it is uncertain whether the law governing arbitration is applied to the underlying contract or the law of the forum or the international law. Again, a question may arise whether the private conflict of law of a State is applicable in the absence of a law clearly agreed by the parties. This position becomes further complicated due to the ambiguity of more equitable treatment and the NT principles because these terms are not defined to balance investors and host States' rights in BITs. In contrast to the uncertainty in investment disputes as to the applicable law, the DSU has established the applicable law (covered agreements) to the trade disputes which avoid the complexity and uncertainty and provide predictability to the multilateral trading system (detailed discussion of the trade law dispute resolution under the DSU is undertaken in Chapter 7 to demonstrate the

[257] '… the laws of the host country would be of primary importance and that international law itself would in the first place refer to them. The principles of international law which might be brought into play would be such as *pacta sunt servanda*'. *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 800.

[258] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 804.

[259] Stephan W Schill, 'Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) *Journal of International Economic Law* 649, 671.

predictability of the WTO legal system).[260] The ICSID procedure becomes more complex due to the fact that, unlike the WTO covered agreements (applicable law), it fails to codify the applicable law to investment disputes.. Therefore, substantive law for investment differs from case to case and it is tainted by uncertainty.[261] Moreover, investment law does not protect the regulatory autonomy of host states and arbitrators consider it is their duty to protect investors.[262] They do not try to establish a uniform jurisprudence for international investment arbitration.[263] Investment law is further complicated due to the fact that the ICSID Convention does not define dispute and investments, and more often arbitrators have to grapple with the interpretational issues.

5.4.2 ICSID Convention and Investment Dispute

Article 28(2) of the ICSID Convention uses the term 'issues in dispute' and Article 25 refers to 'any legal dispute'. The question arises then whether these two are the same or if any differences can be attributed to these two terms. At the negotiations of the ICSID Convention, States admitted that this term refers to legal rights, that is, the legal rights emanating from the investment.[264]

Nationality is used in investment-related issues mainly due to the notion of investment protection for reparation in the case of expropriation of investment by a State. Does this mean that ICSID disputes can be confined only to investment protection, compensation, interpretation of investment agreements and violations of the national treatment principle?[265] Currently, investment is not confined to investment protection and compensation. Investment has broader perspectives. It is linked to sustainable economic development, protection of environment, sovereignty, and the protection of the regulatory

[260] See 'The rules and procedures of this Understanding [DSU] shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")'. DSU article 1:1; 'The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail'. DSU article 1:2.

[261] Martini Camille, 'Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting' (2017) 50(3) *International Lawyer* 529, 529.

[262] Ibid 530.

[263] Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3(1) *Journal of International Dispute Settlement* 31, 36.

[264] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part I, 54.

[265] David A Lopina, 'The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s' (1998) 4(1) *Ohio State Journal of Dispute Resolution* 107, 114.

autonomy of countries to achieve social justice (political economy), contribution to the rule of law and, finally, economic development.[266] To achieve these objectives, investment is a must.[267] Therefore, investment disputes cannot be confined only to investment protection and compensation but should relate to protection of the regulatory autonomy of States to make laws for sustainable economic development.

Jurisdiction is vested in the ICSID Convention, Article 25, and parties (investors' States and host States) to the dispute must be parties to the ICSID Convention. Article 25 provides wider jurisdiction stating that '… any legal dispute arising directly out of an investment dispute …'. This means any dispute relating to international investment. The ICSID Convention does not define 'any' dispute. As a result, it is a complex issue to determine what disputes are envisaged by the ICSID Convention, whether these disputes are concerned with direct expropriation or indirect expropriation or any measure that makes it difficult for investors to conduct their business. Another question arises as to whether discriminatory measures introduced by a State come under 'any dispute'. States should be able to introduce measures to protect the environment and ensure the welfare of their citizens. It is unclear whether these measures are considered issues of dispute under Article 25. Therefore, Article 25 is ambiguous with ICSID tribunals often requested to determine jurisdictional issues. This demonstrates a major shortcoming of the Convention. In these situations, tribunals should consider whether they have jurisdiction to hear the case.[268]

During the drafting of the ICSID Convention, member States were asked to consider and suggest definitions for 'dispute', 'investor's nationality' and 'investment'. Member States were unable to agree on the precise definitions of these terms, however.[269] Broches states that the ICSID jurisdiction was optional and, therefore, the inclusion of these definitions was unnecessary.[270] The argument put forward by Broches is difficult to accept because

[266] Gabrielle Kaufmann-Kohler, 'Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or Appeal Mechanism' (Geneva Centre for International Dispute Settlement [CIDS], 3 June 2016) 1, 7; *Investment for Sustainable Development* (OECD and Post-2015 Reflections Element 11, Paper 3) 1.1.
[267] UNCTAD *World Investment Report 2017: Investment and the Digital Economy*, United Nations Publication, Geneva (2017) 12.
[268] Stephanie Mullen and Elizabeth Whitsitt, 'ICSID and Legislative Consent to Arbitrate: Question of Applicable Law' (2017) 32(1) *ICSID Review* 92, 94.
[269] Christoph Achreuer, 'Commentary on the ICSID Convention' (1996) 11(2) *ICSID Review: Foreign Investment Law Journal* 318, 325.
[270] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 831, 936.

uncertainty has now arisen due to the lack of precise definitions of 'investment', 'disputes' and 'nationality'. Once jurisdiction has been determined, tribunals must deal with the main issues.

The ICSID Convention, Article 25 is the trigger for proceedings with the Convention not providing any substantive law relating to investment. The substantive law is provided by the BITs which have been agreed to by parties. These BITs differ from one another, resulting in uncertainty and unpredictability regarding international investment. As a result, the world has no international investment law regime. The ICSID tribunals acquire jurisdiction upon the consent of parties under Article 25. Without the consent of parties, the ICSID process cannot be initiated. The consent of parties can be incorporated in a clause of a contract or the parties can agree to submit a dispute to ICSID after the dispute has arisen or they can agree to be governed by a BIT. However, the BIT may state that when any dispute arises, it should be referred to the ICSID dispute settlement procedure.[271] For example, the NAFTA Chapter 11 states that investors can initiate their claims under the ICSID Convention.[272]

However, if consent is not manifestly clear, or one-party claims that consent has not been given for the ICSID arbitration, a question then arises concerning the methodology that should be applied to determine the consent of parties. In *PNG Sustainable Development Program v Independent State of Papua New Guinea,*[273] the issue was wrongful expropriation of investment due to the cancellation of the majority shareholding of an investor.[274] The claimant, in this case, instituted the ICSID proceedings under the 1992 Investment Promotion Act (IPA)[275] and the 1978 Investment Disputes Convention Act (IDCA) of Papua New Guinea.[276] In this case, counsel, on behalf of the investor, argued that they satisfied the consent in writing under the ICSID Convention, Article 25.[277] Papua New Guinea argued that no written consent was given and the investor was not a foreign

[271] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 956; Mullen and Elizabeth Whitsitt, above n 268, 92.
[272] *North American Free Trade Agreement* (NAFTA) signed by the US, Canada and Mexico 17 December 1992 [1994] CTS 2 (entered into force on 1 January 1994) (Chapter 11, Investment) article 1120: 1(a and b).
[273] *PNG Sustainable Development Program v Independent State of Papua New Guinea* (Award) (5 March 2015) ICSID Case No. ARB/13/33.
[274] Ibid [37].
[275] *Investment Promotion Act of No. 8 of 1992* (Papua New Guinea).
[276] *Investment Disputes Convention Act of 1978* (Papua New Guinea) (Cap 346).
[277] *PNG Sustainable Development Program v Independent State of Papua New Guinea* (Award) (5 March 2015) ICSID Case No. ARB/13/33 [41].

investor. Therefore, the ICSID tribunal did not have jurisdiction.[278] The IPA, section 39 and the IDCA, section 2 state that an investment dispute should not be referred to the ICSID unless it relates to a dispute regarding a principal issue. In this case, the tribunal held that a State can give consent to arbitration 'in a statement on a website' or even in 'investment promotion literature' and granted relief to the investor.[279]

The tribunal applied interpretative methodology by interpreting the intention of the legislature.[280] In this case, Papua New Guinea agreed to refer the dispute to the ICSID if the dispute was fundamental to investment. In a situation where parties do not tacitly agree to refer to ICSID arbitration, can the website or investment promotion material be used to infer the intention of the parties? The ICSID tribunals should be cautious when inferring the intention to ascertain the consent of a State when the wording of a treaty or legislative act is ambiguous.[281]

The difficulty of ascertaining consent in the absence of conditions expressly laid down in the BITs is revealed in the case of *Brandes Investment Partners LP v Bolivarian Republic of Venezuela*.[282] In this case, an issue arose between Venezuela and an investor. The dispute was referred to the ICSID arbitration, and Venezuela objected on the grounds that it had not consented to be governed by the ICSID arbitration. The investor argued that Venezuelan Foreign Investment law, Article 22[283] and the Constitution of Venezuela, Article 258 encouraged arbitration and that the Venezuelan legislature intended and consented to the ICSID arbitration.[284]

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[278] Ibid [49].
[279] Ibid [369].
[280] Ibid [90].
[281] 'It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous.' *Plama Consortium Limited v Republic of Bulgaria* (Decision of Jurisdiction) (8 February 2005) ICSID Case No. ARB/03/24, 1.63 [198].
[282] *Brandes Investment Partners LP v Bolivarian Republic of Venezuela* (Award) (2 August 2011) ICSID Case No. ARB/08/3.
[283] 'Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable'. *Brandes Investment Partners LP v Bolivarian Republic of Venezuela* (Award) (2 August 2011) ICSID Case No. ARB/08/3 [32].
[284] *Constitution of the Bolivian Republic of Venezuela*.

The tribunal held that their duty was to interpret Venezuelan law according to the parameters of Venezuela's legal system and public international law: according to the tribunal, Venezuelan Foreign Investment law, Article 22 was ambiguous.[285] Therefore, the tribunal upheld the Venezuelan submission, stating that ICSID had no jurisdiction to hear the case. However, the tribunal did not indicate what public international law principles were relevant when considering the implied consent of parties.[286] Once an ICSID tribunal accepts that parties to a dispute have given consent to ICSID jurisdiction, the next issue is to consider whether the dispute in question relates to investment. If the dispute does not concern investment, tribunals have no jurisdiction. Complexity arises to define what constitutes an investment as the ICSID Convention does not define investment.

5.4.3 Definition of Investment under the ICSID Convention

Arbitrators are facing serious controversy due to different interpretations given by the ICSID tribunals when required to define 'investment'.[287] This creates uncertainty in investment law. Moreover, the ICSID Convention is a procedural law and does not create substantive law. The first draft of the ICSID Convention defined investment; however, the final draft did not include the meaning of investment.[288] A question arises whether the ICSID tribunals are ready to rely on the definition of investment in the municipal law of a country or in provisions in the BITs, and whether they should consider economic activities or assets as an investment. Again, a question may arise regarding the types of economic activities or assets that come under investment. Moreover, is it necessary to consider investment as essentially contributing to the host State's economy? This uncertainty is explicit in the case of *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco.*[289] The issue in this case was that Morocco refused to pay money that was due to an investor

[285] *Brandes Investment Partners LP v Bolivarian Republic of Venezuela* (Award) (2 August 2011) ICSID Case No. ARB/08/3 [37], [116, 117, 118].
[286] Mullen and Whitsitt, above n 268, 98.
[287] *Patrick Mitchell v The Democratic Republic of Congo* (Annulment Proceedings Regarding the Award) (1 November 2006) ICSID Case No. ARB/99/7, 1, 10; Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) *Harvard International Law Journal* 257, 268; Felix O Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development In Host States' (2014) 13(2) *Richmond Journal of Global Law and Business* 217, 218.
[288] '"Investment"' means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years'. *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol I, 116; *Draft ICSID Convention* article 30.
[289] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (*Salini*) (Decision on Jurisdiction) (23 July 2001) ICSID Case No. ARB/00/4 Reprinted in (2003) 42(3) *International Legal Materials* 609, 624.

for highway construction.[290] The parties agreed to ICSID arbitration.[291] Morocco contended that the contract entered into between Morocco and the investor did not come under the purview of investment and that it was a breach of a clause in the contract.[292] Morocco relied on the Italy–Morocco BIT.[293]

The ICSID tribunal had to define whether the dispute was an investment dispute. The tribunal held that the contract between the investor and Morocco was an investment agreement according to the four stipulations of the ICSID Convention Article 25, and that a contract that lasted for more than two years can be construed as an investment.[294] The salient feature of the *Salini* case is that the tribunal tried to give a wider interpretation to the definition of investment. *The Salini* case went beyond the definition in the first draft of the ICSID Convention and the tribunal was unable to investigate the investor's actual contribution to the host State's economy. The tribunal took the view that the investor's contribution was an additional condition but that the investor made no actual contribution to the host State's economy.[295] In the *Salini* case, it was held that the result of investment is not necessarily related to development but that it is an additional condition that contributes to economic development.[296] Tribunals have not accepted that the development of the economy of a host State is an inalienable requirement of a State but it is considered a consequence of an investment that contributes to the development of a country.[297] This ignores the ICSID Convention's Preamble. The tribunal did not give an adequate interpretation of the Italy–Morocco BIT and the contract at issue. This was mainly because the ICSID tribunal wanted to give protection to the investor. The tribunal's definition of investment was an attempt to cover those activities that would come under the umbrella of investment, although it was unable to provide a substantive definition of investment.

[290] Ibid 610 [5].
[291] Ibid 611 [7].
[292] Ibid 619.
[293] *Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the Reciprocal Promotion and Protection of Investments* (entered into force 26 April 2000) article I.
[294] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (*Salini*) (Decision on Jurisdiction) (23 July 2001) ICSID Case No. ARB/00/4 Reprinted in (2003) 42(3) *International Legal Materials* 609, 623.
[295] Ibid; Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) *Harvard International Law Journal* 257, 273.
[296] *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (*Salini*) (Decision on Jurisdiction) (ICSID Case No ARB/00/4 (23 July 2001) [52].
[297] *Quiborax SA Non-Metallic Minerals SA and Allan Fosk Kaplun v Plurinational State of Bolivia* (*Quiborax v Bolivia*) (Decision on Jurisdiction) (ICSID Case No ARB/06/2 (27 September 2012) [220].

In the *Patrick Mitchell v The Democratic Republic of Congo* case,[298] it was held that the assets of the law firm came under the definition of investment according to the ICSID Convention.[299] The tribunal considered the ICSID Convention and the BIT entered into between the Congo and the US[300] and the Vienna Convention of the Law of Treaties, and held that the assets of the law firm were an investment.[301] The Congolese military forces had seized the Patrick Mitchell law firm and the tribunal held that this was an illegal expropriation of investment.[302] The Congo applied for an annulment of the award under the ICSID Convention Article 50. The annulment tribunal decided that the award tribunal, in determining that it had jurisdiction, had exceeded the authority of the tribunal and annulled the award.[303] The annulment tribunal held that, even though the legal firm was funded by foreign capital and had existed for a long time, it did not qualify as an investment within the meaning of the ICSID Convention.[304] The tribunal stated that the law firm did not contribute to the economic development of the Congo. In this case, the economic test was applied to define investment.

The economic test applied in the *Patrick Mitchell* annulment case was further modified in *Malaysian Historical Salvors SDN, BHD v Malaysia*.[305] This case introduced the notion that a significant contribution to the economy of the host State was a crucial factor in determining whether or not it was an investment under the ICSID Convention.[306] In this case, the tribunal conceded that Salvors, to a certain extent, was able to provide technological knowledge and financial benefits to the Malaysian economy.[307] However, the tribunal held that the contract between Malaysia and Salvors was not an investment contract under the ICSID Convention.[308]

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[298] *Patrick Mitchell v The Democratic Republic of Congo* (Award) (26 January 2004) ICSID Case No. ARB/99/7.
[299] Ibid [55].
[300] *Treaty between the Government of the United States of America and the Government of the People's Republic of the Congo Concerning the Reciprocal Enforcement and Protection of Investment* (entered into force 13 August 1994).
[301] *Patrick Mitchell v The Democratic Republic of Congo* (Award) (26 January 2004) ICSID Case No. ARB/99/7 [55].
[302] Ibid 1, 21.
[303] *Patrick Mitchell v The Democratic Republic of Congo* (Annulment Proceedings Regarding the Award) (1 November 2006) ICSID Case No. ARB/99/7 [67].
[304] Ibid [38].
[305] *Malaysian Historical Salvors SDN, BHD v Malaysia* (Jurisdiction) (17 May 2007) ICSID Case No. ARB/05/10.
[306] Ibid [132].
[307] Ibid [132, 133].
[308] Ibid 1, 49.

In the absence of a definition for investment in the ICSID Convention, arbitrators have failed to consider the purpose and aim behind the introduction of the ICSID Convention. Neither have they given a broad interpretation to the definition of investment under the ICSID Convention, Article 25.[309] Although Article 25 states 'investment', the type of investment is not illustrated. This has created an anomaly in investment arbitration which is further complicated by arbitrators. This can be seen from *Quiborax SA Non-Metallic Minerals SA and Allan Fosk Kaplun v Plurinational State of Bolivia* (*Quiborax v Bolivia*),[310] in which the issue of defining investment arose as a jurisdictional issue. In this case, the claimant, Quiborax SA, a Chilean company, had been allowed to exploit mineral resources in Bolivia.[311] The respondent was the State of Bolivia. The complaint before the arbitrators was that Bolivia violated Article III of the BIA as they alleged that Bolivia did not protect Quiborax's investment interest.[312] Arbitrators held that investment 'means any kind of assets or rights related to as "investment" made in accordance with the "laws and regulations" of the host State'.[313] This is a narrow interpretation, because if the host State does not recognise any rights relating to investment, then the investor has no remedy.

The important point is that arbitrators are focusing on municipal laws of the host State to give validity to the definition of investment. A possible scenario is a situation in which a State has not comprehensively defined the term 'investment' in its domestic laws, thus meaning that complexity may arise for arbitrators to define the term 'investment'. Investment laws differ from one country to another.[314] Again, arbitrators have included shares in corporations in their definition of investment. If the portfolio investment is included in the definition, this intrudes into the national security and sovereignty of a country, as governments have control of their country's share market and treasury bonds. The aforementioned cases indicate the necessity of having a coherent definition of investment which is absent in current investment law.

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[309] Julian Davis Mortenson, 'Case Comment: Quiborax SA et al v Plurinational State of Bolivia; The Uneasy Role of Precedent in Defining Investment' (2013) 28(2) *ICSID Reviews* 254, 254; Felix O Okpe, 'Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development In Host States' (2014) 13(2) *Richmond Journal of Global Law and Business* 217, 220.

[310] *Quiborax SA Non-Metallic Minerals SA and Allan Fosk Kaplun v Plurinational State of Bolivia* (*Quiborax v Bolivia*) (Decision on Jurisdiction) (ICSID Case No ARB/06/2 (27 September 2012) [51].

[311] Ibid [1].

[312] Ibid [19].

[313] Ibid [51].

[314] See *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (*Salini*) (Decision on Jurisdiction) (ICSID Case No ARB/00/4 (23 July 2001) [38].

5.5 Conclusion

This chapter discussed the historical evaluation of international arbitration procedure and international investment settlement mechanisms that exist in the world. It identified the difficulty of introducing a CIIA due to the diverse interest of countries. The chapter has examined the difficulty of the adjudication of international investment disputes among host States and investors. Issues such as arbitrability, choice of law, seat of arbitration and applicable law concepts, and uncertainty of the definition of dispute and investment, further exacerbate the existing uncertainty in investment arbitration. This chapter has demonstrated the difficulty of resolving international investment dispute through arbitration due to lack of a CIIA.

The substantive law relating to investment is mainly derived from the public international law concept of protection for investors. This body of public international law relating to the substantive rights of investors and host States, to a greater extent, was superseded by BITs. The BITs prohibit the expropriation of foreign investment without compensation, and introduce the minimum standard of protection principle, MFN principle and NT principle, as well as FET and good faith principles. Arbitrators are grappling with interpretation of the above principles and the selection of applicable law. It is not clear whether arbitrators should decide the abovementioned principles according to customary international law, private international law of conflict, or *lex mercatoria*. The determining criteria are very thin and sometimes overlap; as a result, no uniform system applies to the settling of international investment disputes.

Any future CIIA must be built on the principles of FET, the MFN and the NT, legitimate expectation, injury, reparation and regulatory autonomy, and the abovementioned principles need to be crystallised into international customary law. Therefore, this chapter contributes to the literature by suggesting that there should be an applicable uniform substantive law for investments through a WTO-covered agreement, and that it should be based on international rules of law. Moreover, when there is a gap, the law of the seat of arbitration or enforcement of States' laws or conflicts of laws should be used as a gap filling.

This chapter revealed that the ICSID Convention does not provide the substantive applicable laws to investment disputes and the non-binding nature of selecting the applicable law by parties to the investment disputes creates uncertainty in investment law.

After deciding whether the ICSID tribunal has jurisdiction, the tribunal then hears the parties and pronounces the award. A difficulty again arises as to whether the ICSID awards are binding and enforceable when it comes to their execution. Awards made under the New York Convention can be refused enforcement on public policy grounds. Chapter 6 discusses the enforcement difficulties of arbitral awards under NYC and the ICSID Convention.

Chapter 6: Enforceability of International Investment Arbitral Awards

6.1 Introduction

No CIIA exists in the world to adjudicate international investment disputes with an Appellate Mechanism.[1] The NYC and the ICSID Conventions do not provide substantive law for investment,[2] nor do these conventions have uniform and adequate rules for the settlement of investment disputes and there is no effective mechanism to enforce the arbitral awards under these two Conventions.[3] Difficulty of enforcing arbitral awards and high cost of litigation are debilitating factors in investment law.[4] The NYC and the ICSID Convention do not define terms such as 'investment' and 'dispute', creating uncertainty in investment law as observed in Chapter 5.[5] This chapter examines the complexity of enforcing arbitral awards under NYC[6] and the ICSID Conventions to establish a compelling case for introducing a CIIA.[7]

The chapter argues that an effective, rules-based, international investment dispute settlement mechanism needs to be established to address the shortcomings of the current

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[1] *Note by the Secretariat, Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)* 50th session UN Doc. A/CN.9/917 (20 April 2017) paras 14 and 15; *Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS)Appellate and Multilateral Court Mechanisms, United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform* 38th session UN Doc. A/CN.9/WG.III/WP.185 (29 November 2019) paras 6 and 7; Sardinha, Elsa, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) *ICSID Review* 503, 506.

[2] *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session* (Vienna, 27 November–1 December 2017) 51st session UN Doc. A/CN.9/930 (19 December 2017) para 20; Rudolf Dolzer, and Christoph Schreuer, *Principles of International Law* (Oxford University Press, 2012) 75.

[3] *Submission from the European Union and its Member States, Possible reform of investor-State dispute settlement* (ISDS) *United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform*) 37th session UN Doc A/CN9/WG.III /WP.159 /Add.1(24 January 2019) paras 30, 31 and 32; Albert Jan van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2(2) *ICSID Review – Foreign Investment Law Journal* 439, 456; Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' (1995) 28 (1 and 2) *New York University Journal of International Law and Politics* 175, 176; *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October-2 November 2018) UN Doc. A/CN.9/964 (6 November 2018) para 32.

[4] Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed' (2014) 29(2) *ICSID Review* 372, 386, 409.

[5] Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) *Harvard International Law Journal* 257, 259.

[6] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (entered into force on 7 June 1959*) (*New York Convention*).

[7] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (ICSID Convention); *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform)* 36th session (29 October-2 November 2018) UN Doc.A/CN.9/964 (6 November 2018) paras 32 and 33.

system for enforcement mechanism of investment awards.[8] It demonstrates the shortcomings of the NYC, UNCITRAL Model Law and the ICSID Convention in enforcing international investment arbitral awards.[9]

A State may refuse to enforce an ICSID award on the ground of State Immunity and due to lack of transparency of the arbitral process.[10] The provisions of the NYC are also vague, and this position is established when Articles II, III, IV and V of the NYC are discussed. In addition, an arbitral award under NYC can be refused enforcement on the ground of Public Policy, but the public policy is not defined in the Convention, creating uncertainty of the enforcement of arbitral awards.[11] Arbitrators have no authority to enforce awards and enforcement remains with the enforcing court.[12]

The awards under the ICSID Convention are subjected to the execution laws of the enforcing States and States' immunity.[13] As a result, it is difficult to enforce an award even under the ICSID Convention. The major drawback of the NYC is that it does not define the terms 'recognition and enforcement' providing opportunity to the domestic courts to review the awards.[14] Therefore, it is difficult to enforce awards under NYC.[15] The NYC and the

[8] The existing BITs, the NYC and the ICSID and the UNCITRAL Model Law do not provide adequate rules for the enforcement of investment awards. *Report of the United Nations Commission on International Trade Law* 50th session UN Doc. A/72/17 (3-21 July 2017) paras 243, 244 and 245; *United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed, 38th session* UN Doc. A/CN.9/1004/Add.1 (28 January 2020) para 30.

[9] Johannes Koepp and Agnieszka Ason, 'Án Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) *Journal of International Arbitration* 157, 157.

[10] Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11' (2005) 25(2) *Northwestern Journal of International Law and Business* 279, 291; Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23(1) *Journal of International Arbitration* 4 and 5; John T. Schmidt, 'Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v Government of Jamaica' (1976) 17 (1) *Harvard International Law Journal* 90, 105.

[11] Nicholas Poon 'Choice of Law for Enforcement of Arbitral Awards: A Return to the *Lex Loci Arbitri*?' (2012) 24(1) *Singapore Academy of Law Journal* 113, 115.

[12] Abimbola Akeredolu and Chinedum Ikenna Umeche, 'Arbitrators' Impartiality and Independence: Commentary on Gobowen v AXXIS' (2018) 34(1) *Arbitration International* 143, 146; Jay E Grenig, 'After the Arbitration Award: Not Always Final and Binding' (2014) 25(1) *Marquette Sports Law Review* 65, 74.

[13] Choi, above n 3, 183.

[14] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 9; Berg, Albert Jan Van Den, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) *ICC International Arbitration Bulletin* 1, 25; Marike R.P. Paulsson *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 105; Arbitral awards should include not only final awards but also partial awards because arbitrators have to make final awards as well as interim orders, for example, cost awarded the determination of a jurisdictional issue.

[15] *Brace Transport Corporation of Monrovia, Bermuda v Orient Middle East Lines Ltd. and Others* [1994] AIR (Supreme Court of India) [13]; Paulsson, *The 1958 New York Convention in Action* above n 14, 9.

ICSID Conventions have no special rules to protect States' regulatory autonomy of States.[16] The contribution of this chapter is to establish the need for a CIIA to adjudicate the investment disputes among host States and investors which balances the competing interests among them to achieve sustainable economic development and to bring predictability to the international investment law.

6.2 New York Convention and Enforcement of Arbitral Awards

The New York Convention (NYC) was introduced to address the shortcomings in the existing investment arbitration process for international trade and commerce as discussed in Chapter 1.[17] The Convention is the foundation on which international arbitration was built. It states that countries should reciprocally recognise and enforce arbitral awards.[18] The objectives of the Convention are embodied in Article I which tried to establish a legal regime for the enforcement of arbitral awards of international commercial arbitration which, at that time, was lacking in commercial arbitration. The NYC attempted to ensure that parties to the Convention should honour the arbitration agreement and that the awards should be enforced irrespective of whether the award was given in the seat of arbitration or elsewhere.[19]

The Draft Report of the Convention stated the purpose of its introduction, indicating that a convention was necessary to enforce foreign awards for commercial disputes and to provide the smooth functioning of business activities. However, the NYC failed to achieve its objective of enforcement of foreign arbitral awards.[20] For instance, NYC, Article II, while acknowledging that countries should recognise foreign arbitral awards, states that the subject matter should be capable of being arbitrated. According to this Article, the arbitral agreement should be in writing. However, countries are not bound to enforce it if it is 'null and void' [and] 'inoperative or incapable of being performed'.[21] The Convention does not define the above-mentioned terms.[22] Does this mean that an investment agreement is *ab*

[16] *Comments by the Government of Indonesia, United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform*) 37th session UN Doc. A/CN.9/WG.III/WP.156 (9 November 2018) para 10 and 14.
[17] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 ed) 1.
[18] *New York Convention* (entered into force on 7 June 1959) article I(3).
[19] Ibid article I.
[20] *Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its Meeting of 13 March 1953* reproduced in 9(1) *ICC International Court of Arbitration Bulletin* (1998).
[21] *New York Convention* (entered into force on 7 June 1959) article II(3).
[22] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) 155.

initio void? Or does it cover any matter that parties agreed if that matter subsequently becomes voidable? Article III states that signatories to the Convention should enforce the arbitral award as if it were a domestic arbitral award. The wording suggests that the enforcement is mandatory, but it is subject to NYC, Article V (see section 6.2.4).[23] Article V enumerates grounds on which an arbitral award can be refused enforcement. Article IV sets out the procedural and substantive law requirements: the original or a certified copy of the award and the arbitral agreement should be presented for the award's enforcement.[24]

The NYC does not create an adequate legal regime for investment arbitral awards.[25] Nor does it lay down rules relating to arbitrability, choice of law or the forum in which a case should be heard. The Convention's sole aim is to provide rules relating to the enforcement of a foreign award. This is a major shortcoming of the Convention. The first draft of the NYC Convention, introduced by the ICC in 1953, was devoted entirely to the enforcement of arbitral awards by denationalising arbitration procedures and awards; however, negotiating countries did not agree to it.[26] Signatories to the NYC agreed to a uniform legal regime for the enforcement of arbitral awards, but they were unable to agree on the seat of arbitration and the validity of the arbitration agreement.[27] This is clearly explained by Berg:

> Originally, it was the intention to leave the provisions concerning the formal validity of the arbitration agreement and the obligatory referral to arbitration to a separate protocol. At the end of the New York Conference of 1958, it was realised that this was not desirable. Article II [of the New York Convention] was drafted in a race against time, with [as] a consequence, the omission of an indication as to which arbitration agreements the convention would apply.[28]

The NYC provides rules for the recognition of arbitration agreements and the enforcement of foreign arbitral awards worldwide.[29] This Convention does not deal with the rules

[23] *New York Convention* (entered into force on 7 June 1959) article III.
[24] Ibid article IV (1) (a and b).
[25] Arjit Oswal and Balaji Sai Krishnan, 'Public Policy as a Ground to Set Aside Arbitral Award in India' (2016) 32(4) *Arbitration International* 651, 656; Sir Jack Beatson FBA, 'International Arbitration, Public Policy Considerations, and Conflict of Law: The Perspectives of Reviewing and Enforcing Courts' (2017) 33(2) *Arbitration International* 175, 177.
[26] *Report of the Committee on the Enforcement of International Arbitral Awards*, United Nations Economic and Social Council, 19th sess, item 14 UN Doc E/2704, E/ac.42/4/Rev. 1 (28 March 1955) paras 12, 20, 21, 22; Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) vol 1, 99.
[27] Born, *International Commercial Arbitration* above n 26, vol 1, 100, 101; Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) 19.
[28] Berg, *The New York Arbitration Convention of 1958* above n 27, 56.
[29] *Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters* does not apply to arbitration (entered into force 1 March 2001) article 2(d), recast by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters* available at *Official*

relating to arbitral proceedings or choice of law. In the *Scherk v Alberto-Culver Co* case, it was stated that the purpose of the Convention '... was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards …'.[30] Therefore, the NYC tried to establish a uniform system for the enforcement of arbitral awards, but whether it is successful or not can be ascertained from discussing the NYC, Articles II and V.

6.2.1 Scope of the New York Convention

The scope of the NYC is the 'recognition and the enforcement' of arbitral awards. The major flaw is that it does not define the terms 'recognition and enforcement', resulting in the difficulty of enforcing awards.[31] The Convention has two streams: recognition and enforcement. This means that enforcing courts should recognise that it is a valid award (binding) and thereafter they should enforce it. In *Brace Transport Corporation of Monrovia, Bermuda v Orient Middle East Lines Ltd. and Others*,[32] the Delhi Supreme Court held that recognition is essential for the enforcement of an award.[33]

The NYC does not control or limit member States' freedom to deal with an arbitral agreement or award, but it facilitates the recognition and enforcement of awards.[34] The Convention, Article I sets out its scope, stating that it applies to non-domestic awards dealing with commercial matters which have been determined according to foreign law.[35] According to Article I(2), arbitration is not confined to ad hoc arbitration bodies but also includes permanent arbitral bodies.

On the one hand, Article I (3) imposes restrictions on its application by introducing reservations. The first reservation is reciprocity. This means that reciprocal enforcement can be effected between two or more members. On the other hand, Article I (1) of the Convention considers the situation where an award is made in the territory of a non-

Journal of the European Union L12/1 (20 December 2012); *Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008* (entered into force on 17 December 2009) available at *Official Journal of the European Union* L177/6 (4 July 2008) (The Rome I Regulations) (EC Regulation) article I(e) excludes the selection of court.

[30] *Scherk v Alberto-Culver Co* 417 US506 No. 73-781 (Ct App 1974) footnote 15.

[31] Paulsson, *The 1958 New York Convention in Action* above n 14, 117.

[32] *Brace Transport Corporation of Monrovia, Bermuda v Orient Middle East Lines Ltd. and Others* [1994] All India Law Report (Supreme Court of India).

[33] Ibid [13].

[34] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 2.

[35] Paulsson, *The 1958 New York Convention in Action* above n 14, 33.

member. The Geneva Convention of Arbitral Awards states that in order to enforce an award, both the award-creditor and the award-debtor should be citizens of member countries.[36] Therefore, the NYC provides a broad application to awards. The second reservation is a 'commercial reservation'. This means that a country can declare at the time of signing the Convention, that the Convention be applied to commercial matters which are recognised under the domestic law of that country.[37] The NYC is further complicated due to the ambiguity of Article II of the NYC.

6.2.2 NYC Articles II and V and their Impact on Arbitration Agreements

The NYC, Article II (1) states that signatories to the NYC shall recognise an arbitration agreement if it is in writing. Having said that, it is mandatory to enforce an award although Article V places restrictions on Article II. Therefore, the language used in Article II must be interpreted subject to Article V. As a result, countries do not have an obligation to enforce the award, if the conditions enshrined in Article V of the NYC are not fulfilled. Furthermore, the NYC simply refers to the 'parties'. Article II does not define who the parties to the agreement are. Does this refer to the contracting States, does it include investors or private contractors, or does it include agents or parties who obtain rights through novation of the contract or assignment? The NYC does not answer these questions and is silent on the definition of parties.[38]

The definition of 'cause of action' is also vague in the Convention. For instance, Article II(1) states 'all or any differences which have arisen or which may arise'. This is also very difficult to construe due to the ambiguity of the language. Does this relate to any dispute of arbitration agreement or arbitral clause, or to the underlying contract? A question may arise regarding whether the term 'all or any differences' must be essentially determined according to the laws of the seat of arbitration, creating uncertainty and complexity in investment law.

6.2.3 Validity of the Arbitration Agreement and Enforcement

Article V(1)(a) of the NYC states that the enforcement of an arbitration agreement is possible only if the agreement is in writing and, at the time of the award that arbitration is

[36] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 8.
[37] *New York Convention* (entered into force on 7 June 1959) article I(3).
[38] Paulsson, *The 1958 New York Convention in Action* above n 14, 62.

sought to enforce, it should stand valid where it was made. If the arbitration agreement is not in writing, it cannot be enforced. Does 'in writing' mean that if the arbitral agreement is not in writing then the validity of the arbitral agreement cannot be construed? A question may arise regarding whether, through a series of documents, an intention to resort to arbitration can be established. In the modern technological world, commercial (including investment-related) contracts are constituted through e-mails and electronic documents. Electronic commerce has emerged and created a commercial village. The scope of the Convention does not include this issue.

Article II (2) does not include an arbitration clause in writing only because the Article states that '… writing shall include an arbitral clause in a contract or arbitration agreement…'. Can this be constructed to include the conduct of parties and their intention expressed in letters, e-mails, et cetera in connection with, and in the course of, establishing an arbitration agreement? Suppose a situation arises where an investor or host State enters into an agreement in writing to invest money to manufacture goods. By omission, they were unable to include a referral to arbitration of potential disputes arising out of the agreement, so the investor sends a letter that any dispute arising out of the contract should be referred to arbitration, but the host State does not sign the document. Can this letter come under the purview of Article II(2)? Article II(2) requires that such an agreement should be signed by the parties, meaning that it is necessary that parties to the agreement state their intention not only in writing, but also that they should sign an authorisation that any dispute arising out of the contract should be arbitrated: only then will the award be recognised by the enforcing courts. Article II(2) accepts letters or telegrams as forms of writing.

According to the law of contract, when a letter is sent and the other party does not accept it, it cannot be construed as that party's written agreement regarding arbitration because only acceptance constitutes whether it should be referred to arbitration (theory of offer and acceptance).[39] Are electronic signatures valid? The NYC does not address this question. However, it can be contended that, if the seat of arbitration or the enforcing country recognises electronic signatures, then the issue of the validity of electronic acceptance to construct an arbitration agreement can be resolved.

[39] Nicholas C Seddon and Manfred Paul Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis Butterworths, 9th Australian ed, 2008) 114.

Article II(1) provides that courts of signatory States 'shall' recognise an arbitration agreement if it is not contrary to Article II. This provides that courts presume the validity of an arbitration agreement until the award-debtor disproves this. That means there is a rebuttable presumption to consider an arbitration agreement as valid. Courts are reluctant to question the validity of the arbitration agreement unless it is void or inoperative in law. For instance, consider a situation where an arbitration tribunal refused an objection whereby a party challenged that it had no jurisdiction, and decided to hear the case and awarded cost. The cost awarded in determining that it had jurisdiction to hear the matter cannot be considered as an award according to NYC and therefore it cannot be enforced.[40] Awards under the Convention do not include interim orders.[41] This position is clearly laid down in the case of *Resort Condominiums International Inc. v Ray Bolwell and Resort Condominiums, Pty. Ltd*.[42] In this case, an issue arose whether an interim order is an award within the meaning of the NYC. The NYC cannot be applied to set aside an arbitral award.[43] This complexity is further aggravated due to non-enforceable grounds introduced by Article V of the NYC.

6.2.4 Non-Enforceable Grounds of Arbitral Awards

The following are substantive grounds on which countries are not bound to enforce arbitral awards. This applies if:

(1) the arbitration agreement is not valid or if the applicable law does not govern the parties;[44]
(2) the party who wants to obtain enforcement of the arbitral award fails to ensure that proper notice of the arbitral procedure was given to the other party;[45]
(3) the award deals with outside issues that have not been provided for in the arbitration agreement;[46]
(4) it cannot be established that the parties followed arbitral procedure in accordance with the agreement or if the arbitration award is contrary to the laws of the seat of arbitration;[47]

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[40] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 15 and 16.
[41] Ibid 17.
[42] *Resort Condominiums International Inc. v Ray Bolwell and Resort Condominiums, Pty. Ltd*., (1983) Supreme Court of Queensland, Australia.
[43] *Shenzhen Nan Da Industrial and Trade United Co. Ltd. v FM International Ltd.* (1992) HKHC No. MP 1249.
[44] *New York Convention* (entered into force on 7 June 1959) article V(1)(a).
[45] Ibid article V(1)(b).
[46] Ibid article V(1)(c).
[47] Ibid article V(1)(d).

(5) the award has been set aside by a competent court of the seat of arbitration. At the time that the award was requested to obtain enforcement, it should be binding;[48]

(6) the matter cannot be settled by arbitration according to the laws of the enforcing State;[49]

(7) the enforcement of the award is repugnant to the public policy of the enforcing State.[50]

The Convention does not define the above concepts, resulting in difficulties in implementing awards due to various objections raised by award-debtors. However, the salient feature is that the burden of proof has shifted to the resisting party (judgement-debtor) to prove that the award which the award-creditor is seeking to have enforced is invalid (removed 'double *exequatur*').[51] Enforcement of arbitral awards is difficult as the NYC, Article V grants discretionary power to enforcing courts to refuse to recognise and enforce an award as it states that courts 'may' recognise and enforce the award.[52] The grounds enshrined in Article V on which enforcement of an arbitral award can be refused are exhaustive and courts cannot add to or diminish any grounds other than those embodied in that Article. As the grounds are not defined, courts have the discretion to give wider interpretations to these grounds of non-enforcement if objections are raised by the award-debtor and the enforcing courts can refuse to enforce an arbitral award.

6.3 Recognition and Enforcement of Arbitral Awards

6.3.1 Public Policy and Recognition and Enforcement of Foreign Awards

One of the grounds for an arbitral award not being recognised and being refused enforcement is public policy.[53] The term 'public policy' has not been defined in the NYC.[54] This has resulted in the difficulty of recognising and enforcing arbitral awards. What are the criteria used to determine public policy?[55] Is it the notion of moral issues or justice?[56]

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[48] Ibid article V(1)(e).
[49] Ibid article V(2)(a).
[50] Ibid article V(2)(b).
[51] Ibid article III: 5; Born, *International Commercial Arbitration* above n vol 1, 102.
[52] UNCITRAL Secretariat, *Guide on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)* UN Doc (2016 Edition) 125; Paulsson, *The 1958 New York Convention in Action* above n 14, 159.
[53] *New York Convention* (entered into force on 7 June 1959) article V (2) (b); *French Code of Civil Procedure*, section 1514.
[54] Oswal and Krishnan, above n 25, 658.
[55] Berg, 'New York Convention of 1958: Refusals of Enforcement' above n 14, 18.
[56] 'Exceptionally, the English court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law. The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom or contrary to justice or morality' (*Halsbury's Laws of England*, 4th ed, vol 8, para 418).

Does it differ from State to State? Can a distinction be made between domestic public policy and international public policy? What is the threshold that a court should consider? These questions can be answered by analysing case law. Article V(2) of the NYC has two limbs which determine that a country is not bound to enforce an arbitral award on the grounds of public policy:

(a) if the subject matter cannot be arbitrated under the laws of the enforcing country;

(b) if it is repugnant to the public policy of the country where recognition and enforcement are sought.[57]

Both try to protect the sovereignty of the enforcing State and the above Article V(a and b) can be interpreted to protect regulatory autonomy of States. Paulsson argues that if members had failed to introduce Article V(2), the NYC would not have become a reality.[58] This became the deal-making factor for the NYC as negotiating countries did not want to give up their sovereign rights.[59] The Draft Convention stated that if the award was contrary to the 'fundamental principles of the law' of the enforcing country, the award should not be enforced.[60] However, this position was not acceptable to some countries and, therefore, they adopted 'public policy' as a means of determining whether an award was enforceable. The reason was that, at the negotiation of the draft NYC, countries considered the terms 'order public' or 'fundamental principles of law' and found that these terms had different legal meanings which could have led to different interpretations by different jurisdictions, thereby negating the NYC's expected objective.[61]

The American Court of Appeal for the Second Circuit in *Parsons & Whitemore Overseas Co. Inc v Société General De L'industrie Du Papier (Rakta) and Bank of America* (*Parsons & Whitemore*)[62] held that, according to the NYC, the court should give a narrow definition to the term 'public policy'. In other words, the court wanted an arbitral award to be recognised unless it was against morality and justice. According to judges of this case:

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[57] *New York Convention* (entered into force on 7 June 1959) article V(2)(b); *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* article 34 (1)(b)(ii).
[58] Paulsson, *The 1958 New York Convention in Action* above n 14, 217.
[59] *Report of the Committee on the Enforcement of International Arbitral Awards*, United Nations Economic and Social Council, 19th sess. item 14 UN Doc E/2704, E/ac.42/4/Rev. 1 (28 March 1955) para 14.
[60] Ibid para 36; Paulsson, *The 1958 New York Convention in Action* above n 14, 223.
[61] *Report of the Committee on the Enforcement of International Arbitral Awards*, United Nations Economic and Social Council, 19th sess. item 14 UN Doc E/2704, E/ac.42/4/Rev. 1 (28 March 1955) paras 48 and 49; Paulsson, *The 1958 New York Convention in Action* above n 14, 223.
[62] *Parsons & Whitemore Overseas Co. Inc v Société Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969 (Ct. App, 1974) (23 November 1974).

> The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement.[63]

Therefore, 'they held that [the] Convention's [the New York Convention] public policy defence should be construed narrowly'.[64] In the Indian Supreme Court case in *Renusagar Power Co. Ltd v General Electric Co*. (*Renusagar Power*),[65] it was held that contrary to public policy means that: 'fundamental policy of Indian Law'; 'the interests of India'; and 'justice and morality'.[66] When one looks at the US Court of Appeal decision in the *Parsons & Whitemore* case, the judgment was based on the concept of public policy, but in the Indian Supreme Court, the term 'public policy' was interpreted more broadly than in the US court, thus widening the concept of public policy.[67] The US Court adopted a narrow interpretation to grant relief to the judgment-creditor, whereas the Indian courts in *Renusagar Power* took a broader interpretation with the Supreme Court requested to interpret the concept of public policy when enforcing an arbitral award.

It appears from the Indian case of *Renusagar Power* that it laid down additional principles such as 'the fundamental policy of Indian law',[68] 'the interests of India' and 'justice and morality' which encompass a wider connotation than in the US case (*Parsons & Whitemore*). In the US case, the definition of public policy was confined only to 'justice and morality'. The terms 'justice and morality' are difficult to define and the arbitrators and courts must apply the subjective test instead of the objective test.

The decision in the Indian *Renusagar Power* case expanded the public policy definition.[69] What is meant by 'the interests of India'? In this case, it was not defined. Does it have any commercial elements? In the *Renusagar Power* case, the Indian court allowed the enforcement of the award in India.[70] *Power Electrical* supplied mechanical instruments,

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[63] Ibid [8]
[64] Ibid [9].
[65] *Renusagar Power Co. Ltd v General Electric Co* [1994] AIR 860 1994 SCC Supl. (1) 644 (Supreme Court of India).
[66] Ibid [66]; Oswal and Krishnan, above n 25, 652.
[67] *Renusagar Power Co. Ltd v General Electric Co* [1994] AIR 860 1994 SCC Supl. (1) 644 (Supreme Court of India) [66].
[68] Alan Redfern, Martin J Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (London and Maxwell, 4th ed, 2004) 543, footnote 41.
[69] *Renusagar Power Co. Ltd v General Electric Co* [1994] AIR 860 1994 SCC Supl. (1) 644 (Supreme Court of India [66].
[70] Ibid (Supreme Court of India) [145].

spare parts and freight-related services to *Renusagar* to build a thermal power plant[71] but *Renusagar* did not pay the amount as agreed.[72] Arbitration for the *Renusagar Power* case was conducted in France. *Renusagar Power* sought a stay order from the Bombay High Court.[73] This application was refused: *Renusagar Power* then went to the Court of Appeal and the Supreme Court of India. Both Courts rejected the *Renusagar Power* appeal.[74] In this case, the arbitral tribunal did not accept *Renusagar Power*'s contention that awarding compensatory damages contravened public policy and held that *Renusagar Power* should pay delinquent interest.[75] This was upheld by both the Court of Appeal and the Supreme Court of India.

In *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* (*Saw Pipes*)[76] Saw Pipes argued that the supply of raw materials was delayed due to a strike by steel mill employees in Europe even after an extension was given for the supply of the materials. The tribunal held that the delay in supply of raw materials could not be attributed to the general strike and it was not a *force majeure*.[77]

At the same time, the arbitral tribunal expressed the opinion that Oil and Natural Gas Corporation Ltd was unable to establish 'real damage' due to the delayed supply of raw materials. Against this decision, Oil and Natural Gas Corporation Ltd questioned the validity of the award on public policy grounds. The Supreme Court of India quashed the award on the grounds of public policy and went beyond the case of *Renusagar power*, adding yet another ground for public policy as the award was 'patently illegal'. In this case, the Supreme Court of India held that Saw Pipes Ltd had failed to deliver the goods at the stipulated time and this was a breach of contract. Therefore, Oil and Natural Gas Corporation Ltd was entitled to liquidated damages as stipulated in the contract and the

[71] Ibid [3].
[72] Ibid [6 and 7].
[73] Ibid [13].
[74] Oswal and Krishnan, above n 25, 653.
[75] *Renusagar Power Co. Ltd v General Electric Co* [1994] AIR 8601994SCC Supl. (1) 644 (Supreme Court of India) [12].
[76] *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* [2003] 5 SCC 705 (Supreme Court of India).
[77] A *force majeure* is a legal concept where a party to a contract is exonerated from liability upon breach of a condition or warranty of a contract which was not contemplated at the time when the contract was entered into. See Mahmound Reza Firoozmand and Javad Zamani, 'Force Majeure in International Contracts: Current Trends and How International Arbitration Practice is Responding' (2017) 33(3) *Arbitration International* 395, 395.

Court held that the arbitrators should 'uphold the sanctity of the [contract] which forms the basis of civilized society …'.[78]

A question arises in this case as to whether the Supreme Court of India considered the negotiation history of the NYC. The NYC's primary aim is to recognise and enforce foreign commercial arbitral awards.[79] The judgement delivered in this case challenges the effectiveness and conclusiveness of commercial arbitration as a means of settling disputes among parties. In the *Oil and Natural Gas Corporation Ltd* case, the arbitrators did not interpret the contractual terms according to the contract laws. Therefore, the Supreme Court of India had to intervene at the stage of the enforcement of the arbitral award and interpreted public policy according to the *Indian Contract Act*[80] and the Indian Constitution. Two question that have arisen, however, from the two above-mentioned cases have not been answered: Is Indian public policy confined to Indian public policy or does it extend to laws applicable to the underlying contract or the laws of the forum and international public law policy? What is meant by 'patently illegal'?[81] 'Patently illegality' is not defined in the *Renusagar* case and again it has to be decided depending on the facts of each case. For instance, if the contract is entered into induced by fraud or illegality, then the enforcing court is not obliged to enforce the award.

In the case of *Sinocore International Co Ltd v RBRG Trading (UK) Ltd*, Sinocore entered into a contract to sell 14,50 MT of 'coils' to Metalloyd Limited.[82] An issue arose with regard to the amendment to the letter of credit and an allegation that the bills of lading were forgeries.[83] In this case, it was held that if the underlying contract was entered into in order to induce bribery, it was contrary to English public policy and as a result, the award was unenforceable.[84] In *Soleimany v Soleimany*[85] carpets were brought from Iran in contravention of Iranian revenue and export laws. The dispute arose between a father and son and they agreed to refer the matter to arbitration. In this case, the Jewish law was applied as the applicable law.[86] Under Jewish law, an illegal purpose does not invalidate a contract and the arbitrator made an award. An attempt was made to enforce this in England,

[78] *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* [2003] 5 SCC 705 (Supreme Court of India) [10].
[79] *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2017] EWHC 251(Comm) (QB) [27].
[80] *The Indian Contract Act, 1872*.
[81] Redfern**,** Hunter, Blackaby and Partasides, above n 68, 543, footnote 41.
[82] *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2017] EWHC 251(Comm) (QB) [4].
[83] Ibid [10].
[84] Ibid [36].
[85] *Soleimany v Soleimany* [1999] QB 785.
[86] Ibid; Redfern, Hunter, Blackaby and Partasides, above n 68, 542.

but the English Court held that an illegal contract could not be enforced according to England's public policy.[87]

Redfern et el. argue that public policy under the NYC is confined only to the public policy of the State in which recognition and enforcement of the award is sought, not the seat of arbitration.[88] However, this is not always the case because enforcing courts try to link domestic public policy and international public policy, thereby complicating and making difficult the enforcement of an award.[89]

To illustrate this point, let us consider a situation where a US investor goes to Trinidad to open a gambling casino and enters into a contract with Trinidad officials. According to this contract, any dispute arising out of the contract should be referred to arbitration, and the law governing both arbitration and the underlying contract is English law. Parties agree that the seat of arbitration will be Hong Kong. The investor does not pay the income tax. The parties agree that this issue be referred to arbitration and the tribunal rules in favour of Trinidad. The investor's assets are in Saudi Arabia which is a country that forbids gambling. Is this award able to be enforced according to the proposal of Redfern et al. that accepts the public policy of the State which has been asked to recognise and enforce the arbitral award? Therefore, it cannot be rigidly laid down as a principle that the award-enforcing State's public policy should conclusively determine whether enforcement of an award is possible. The accepted view is that the court should determine the policy of public international law and whether or not an award is recognised in order to have a uniform system of rules for the enforcement of awards.

The UNCITRAL Model Law also recognises that, if an arbitral award is contrary to the public policy of the State which has been asked to recognise and enforce that award, it is not necessary for that State to recognise and enforce it.[90] The ICSID Convention was introduced to overcome the difficulty of enforcing commercial arbitral awards under NYC. After deciding whether the ICSID tribunal has jurisdiction, the tribunal then hears the parties and pronounces the award. A difficulty again arises as to whether the ICSID awards

[87] *Soleimany v Soleimany* [1999] QB 785; Redfern, Hunter, Blackaby and Partasides, above n 68, 542; *AJU v AJT* [2011] 4 SLR 739; Paul Tan, 'Survey of Singapore Arbitration Case Law on Conflict of Laws Issues in International Arbitration' (2014) 26(1) *Singapore Academy of Law Journal* 1059, 1064.
[88] Redfern, Hunter, Blackaby and Partasides, above n 68, 542.
[89] Oswal and Krishnan, above n 25, 654.
[90] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* article 34(2) (b) (ii).

are binding and enforceable when it comes to their execution.[91] The ICSID Convention states that parties to the Convention (including the Federal governments) should recognise a foreign arbitral award as the final judgement of its own courts.[92] A member State can refuse to recognise and enforce an arbitral award only if it has been revised or quashed by an ICSID-established annulment procedure (no appeal lies) on the following grounds:

(a) the establishment of the tribunal is not in accordance with the agreement;
(b) the award is *ultra vires*;
(c) the award is obtained by bribery;
(d) failure to adhere to the procedural rules; or
(e) the court does not give a reason for arriving at its decision.[93]

An arbitral award cannot be enforced if it is contrary to the public policy of host States. The ICSID Convention, Article 54 requires countries that have signed the ICSID Convention to stamp the ICSID award as if it were the final judgement of a domestic court. Therefore, it can be contended that the ICSID Convention does not recognise a State's public policy to refuse enforcement of a foreign award.[94] The NYC Article V(2)(b) and the UN Commission on International Trade Law (UNCITRAL) Model Law, Articles 34(2)(b) and 36(1)(b) state that courts can set aside an arbitral award if it is repugnant to public policy.[95] It is apparent now that the ICSID Convention does not place any limitations on enforcement under Article 54 and talks about binding arbitral awards. On the other hand, the NYC and the UNCITRAL Model Law permit the public policy grounds for refusing to enforce an award if the arbitral award is deemed contrary to public policy. This again indicates a lack of uniformity in procedural law on investment, with the result that arbitral awards are tied up with national jurisdiction. For instance, In the *Yukos Capital SarL v OJSC Oil Company* case, Simon J reiterated that an arbitral award can be set aside on the grounds of the violation of 'honesty, natural justice and [the] domestic concept of public policy'.[96]

In the *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* (Dallah), *Dallah* being a real estate and tourism Saudi

[91] Choi, above n 3, 183.
[92] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (ICSID *Convention*) articles 53(1) and 54(1).
[93] Ibid article 52(1).
[94] Ibid article 54.
[95] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006*.
[96] *Yukos Capital SarL v OJSC Oil Company* [2014] EWHC 2188 (Comm) (03 July 2014) [20].

Arabian holding company, entered into a contract with Pakistan, the Awami Hajj Trust, to provide pilgrim service in Saudi Arabia. The contract failed due to the expiration of Presidential Order which gave rights to the Awami Hajj Trust. Government of Pakistan was not a party to the agreement but Dallah referred the matter to arbitration under the arbitration clause. Arbitration was held in France and the award was given in France; however, the parties did not agree that the law governing arbitration was the law applicable to the contract.[97] They entered into a contract with the trust society, Awami Hajj Trust, which was established by Pakistan and promulgated by Ordinance No. VII.[98] An attempt was made to enforce the award in England. In the *Dallah* case, Lord Mance held that the NYC did not state that the arbitral award could be challenged and set aside only by the country where it was made.[99] In other words, his Lordship sought to emphasise the fact that the seat of arbitration is not certain in an investment arbitration agreement, and that the parties challenge the seat of arbitration more often. Lord Collins, in the same case, stated that the NYC was silent on whether the courts of the seat of arbitration have precedence over other jurisdictions to challenge an arbitral 'award on the ground of the non-existence of an arbitration agreement'.[100] Their Lordships held that the English court was entitled to set aside an arbitration award on the basis that no binding arbitration agreement existed in the seat of arbitration.[101]

According to the UK Supreme Court, challenging an arbitral award is possible either in the court of the seat of arbitration or in the court of another country where the enforcement was sought. In the *Dallah* case, the parties did not agree on the law that was applicable to their case. Another issue was whether the government of Pakistan was a party to this case. The UK Supreme Court held that the government of Pakistan was not a party to this case by considering the intention of the parties at the time the contract was entered into.[102] Contrary to this judgement, the French court held that the government of Pakistan was a party to the arbitration agreement under French law and rejected the jurisdictional issue. They wrongly

[97] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (Judgement) (3 November 2010) [28]; Beatson FBA, above n 25, 191.
[98] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (Judgement) (3 November 2010) [2].
[99] See ibid [28]; Beatson FBA, above 25, 191.
[100] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (Judgement) (3 November 2010) [103].
[101] Ibid [104, 105].
[102] Ibid [162].

applied the NYC, Article IV to rationalise the use of French law without considering the objective of the contract.[103]

Pinkham and Peng identified 'institutional voids' in the area of choice of laws and enforcement of commercial arbitration in international joint ventures (IJVs).[104] They suggested 'binding international commercial arbitration (BICA) to borrow institutions to overcome weak enforcement in the host market'.[105] However, these authors have not spelt out the contours of such a system. Simultaneously, they admitted that BICA is not State-to-State arbitration, but a private commercial dispute resolution mechanism. What they discussed in their article is nothing new as, in accordance with the NYC, a winning party can go to domestic courts and obtain enforcement of the award. The crux of the problem is enforcement. At times, the cost of enforcement can be a debilitating factor.[106] Ghori, responding to the EU suggestion on the international investment court system, argued for the desirability of such a system; however, without amending the ICSID Convention and without recognition of States' regulatory autonomy, it is difficult for this to become reality.[107]

The consideration of public policy regarding the enforcement of a foreign arbitral award should be further narrowed down by the court and confined only to fraud and illegal activities of the enforcing State's laws or the seat of arbitration. The recognition and enforcement of the arbitral award is further complicated if a State invokes State immunity.

6.3.2 State Immunity and Enforcement of Arbitral Award

An investor can request for the enforcement of an award after the compensation is awarded. The question arises whether, under the ICSID Convention and the NYC, an effective mechanism is provided for enforcing an award. An ICSID arbitration award is binding on the parties according to Article 53 of the ICSID Convention. The ICSID Convention provides two means of enforcing ICSID awards. The first is that members can accept the ICSID award as a final judgment of its courts. Therefore, investors can submit a certified

[103] Beatson FBA, above n 25, 191; Jonathan Mance, 'Arbitration: A Law unto Itself' (2016) 32(2) *Arbitration International* 223, 232.
[104] Brian C Pinkham and Mike W Peng, 'Overcoming Institutional Voids via Arbitration' (2017) 48(3) *Journal of International Business Studies* 344, 348.
[105] Ibid, 345.
[106] Christopher R Drahozal, 'Arbitration Costs and Contingent Fee Contracts' (2006) 59(3) *Vanderbilt Law Review* 729, 758.
[107] Umair Ghori, 'The International Investment Court System: The Way Forward for Asia?' (2018) 21 *International Trade and Business Review* 205, 206.

copy of the award to the municipal court of a member and have it enforced.[108] Under the ICSID arbitration, municipal courts have a role to play in the execution of an award which is conducted according to the laws of the award-executing State.[109] This means that invocation of State immunity can prevent enforcement of the award and apart from the State immunity, the execution laws of the award executing State can delay the enforcement of an ICSID award. The second is that the investor's home State may take legal actions against the State which does not comply with the award.[110] This is not new and is prevalent in traditional public international law where individuals are recognised as the object of international law, and a State must take up the case of its national before an international forum, as discussed in Chapter 5.

A State also has access to two types of legal action: recourse to diplomatic protection, and making an international claim before the International Court of Justice (ICJ).[111] Diplomatic protection again involves negotiations and the facilitation of a negotiated settlement. Therefore, enforcement of an arbitral award under the ICSID Convention is difficult if a State refuses to abide by that award. For instance, citing empirical evidence, Mistelis and Baltag stated that, increasingly, States were reluctant to comply with the orders of investment tribunals.[112] In 2007, Bolivia withdrew from the ICSID Convention: according to the then President Morales of Bolivia, multilateral corporations were favoured in ICSID cases by arbitrators.[113] Ecuador withdrew from the ICSID Convention to prevent ICSID jurisdiction over disputes relating to its natural resources;[114] Nicaragua threatened to withdraw from the ICSID Convention;[115] and Venezuela withdrew from the ICSID Convention to avoid litigation before the ICSID arbitration.[116] As indicated, another process is available if a State does not comply with the enforcement of an award. Moreover,

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[108] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 54(1).
[109] Ibid article 55(3).
[110] Ibid article 27.
[111] Ibid article 27.
[112] Loukas Mistelis and Crina Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices' (2008) 19 (3-4) *The American Review of International Arbitration* 320, 361; Stephan W Schill 'Difference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2013) 3(3) *Journal of International Dispute Settlemen*t 577, 578.
[113] James M Roberts, 'If the Real Simon Bolivar Met Hugo Chavez, He'd See Red' (No. 2062, Executive Summary, Backgrounder, The Heritage Foundation, 20 August 2007) 1, 11 and 12; Eric De Brabandere, ''Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims' (2012) 3(3) *Journal of International Dispute Settlement* 609, 611.
[114] *Nicaragua Threatens Withdrawal from ICSID: Implications for Investors* (24 April 2008) available at <https://files.skadden.com/sites/default/files/publications> accessed on 22 January 2018.
[115]Ibid.
[116] *Venezuela's Withdrawal from the ICSID: What It Does and Does Not Achieve* (ICSID Investment Treaty News, 13 April 2012).

if the diplomatic channel has failed, investor States can go to the ICJ and a second litigation process commences. If a country becomes successful before the ICJ, then it can resort to countermeasures.

One of the impediments to the recognition and enforcement of commercial arbitral awards is State immunity,[117] which is an important characteristic of State sovereignty. In customary international law, it has been established that courts should not invoke jurisdiction against foreign States to hear or enforce an award because courts recognise the sovereignty, independence, equality and nobility of a State.[118] Courts do not make any orders to seize assets or execute a judgement or award against a foreign State.[119] This is the traditional view. However, a State can submit to the jurisdiction of the court and abandon the doctrine of immunity.[120] With the increase in global commercial development, States began to be involved in commercial activities. This took place initially among States: subsequently, it expanded to States and multilateral companies and individuals due to increased economic activities. Therefore, a State's immunity was subsequently limited to that State's activities which had no commercial elements. This is categorised according to *jure gestionis* and *jure imperii*.[121] *Jure gestionis* refers to those acts of States involving contracts which have commercial elements. *Jure imperii* refers to States' acts which are related to activities of a public nature.

The distinction between *jure gestionis* and *jure imperii* is now made by analysing States' commercial acts and governmental acts. This is called a 'purpose test'.[122] Due to the rapid development of commercial activities, State immunity is not a barrier to parties entering into contracts with States agencies, or to agreeing to refer any disputes to arbitration.[123] The US enacted the *Foreign Sovereign Immunity Act of 1976* (FSIA) which has vested: 'sole

[117] Redfern, Hunter, Blackaby and Partasides, above n 68, 549; Adriana T Ingenito and Christina G Hioureas, 'Carving Out New Exceptions to Sovereign Immunity: Why the NML Capital Cases May Harm U.S. Interests Abroad' (2015) 30(1) *Maryland Journal of International Law* 118, 119.
[118] Hersch Lauteerpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) *British Yearbook of International Law,* Vol 28, 220, 221.
[119] Ibid 222.
[120] Ibid 243.
[121] Ibid 227; Rosalyn Higgins, 'Certain Unresolved Aspects of the Law of State Immunity' (1982) *Netherlands International Law Review* 265, 267.
[122] Higgins, above n 121, 267; *National American Corporation v Federal Republic of Nigeria* [1978] 448 Supp. 622.
[123] See *English State Immunity Act 1978* (UK) Chapter 33, s 9; Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration* above n 68, 550.

and exclusive Standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State Courts…'.[124]

However, problems arise in the enforcement of a foreign judgement or award. For example, Company A enters into an agreement to invest money with a host State to manufacture fabrics for army uniforms. This is an investment agreement. A dispute arises with relation to the payment of money. The host State alleges that the fabric supplied is not of good quality and, therefore, that Company A has violated a condition of the contract. Company A denies this allegation. As agreed, the matter is referred to arbitration in Singapore, and Company A receives the award in its favour. When this matter comes up for award execution, the host State claims immunity. This is evident in *Alcom Ltd v Republic of Colombia (Barclays Bank Plc and Another, garnishees)*.[125] In this case, the plaintiff obtained a garnishee order to seize a current account belonging to the Colombian government in a dispute over claims regarding the sale of goods. The Colombian government made an application to the High Court to vacate the order, stating that their account could not be seized under the *State Immunity Act of 1978* (UK).[126] The Colombian government gave an affidavit stating that the account at issue was used for governmental purposes. The House of Lords held that they should accept this position unless the contrary was proven by the award creditor, particularly that the account is used to pay money solely arising out of commercial transaction.[127] This is the position of the UK on the doctrine of State immunity. The Australian *Foreign Sovereign Act of 1985* has provided that the assets of a foreign State are not subject to any proceeding in Australian courts and that assets of foreign States are not liable to the execution or satisfaction of a foreign judgment or arbitral award.[128]

The NYC and ICSID Convention do not provide answers to this issue as these conventions do not guarantee the enforcement of the awards. Conversely, the WTO has created a trade

[124] Section 1604 states that '[a] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607'. *Foreign Sovereign Immunity Act of 1976* (FSIA); John Fellas and Pavlos Petrovas, 'Case Comment Diag Human SE v Czech Republic Ministry of Health: A Broad Interpretation of the 'Arbitration Exception' of the Foreign Sovereign Immunity Act' (2017) 32(2) *ICSID Review* 259, 259.
[125] *Alcom Ltd v Republic of Colombia* [1984] 2 AER 6.
[126] *English State Immunity Act 1978* (UK) Chapter 33, section 13(2)(b).
[127] *Alcom Ltd v Republic of Colombia* [1984] 2 AER 6, 11.
[128] *Foreign States Immunities Act 1985 amended by Act No. 196 of 1985 and amended by Act No. 08 of 2010*, section 30.

regime and a legal regime for international trade.[129] That the doctrine of State immunity does not apply to trade disputes is pertinent. Even though the ICSID Convention has ruled that signatories to the Convention should treat an ICSID award as a final judgement of that State,[130] a member State can nullify this rule by claiming State immunity.[131] However, Article 55 of the ICSID Convention and section 13(2) (b) of the *State Immunity Act of 1978* (UK) do not apply if the assets are used or expected to be utilised for a commercial transaction.[132]

In the US, courts held the same view in the case of *Liberian Eastern Timber Company (LETCO) v Government of the Republic of Liberia*,[133] which was also an ICSID arbitration case. In 1970, Liberia entered into an agreement with LETCO (which was registered under French law) to cultivate timber on about 400,000 acres,[134] with this work commenced by LETCO in 1972. In 1980, Liberia was not happy with the work conducted by LETCO in connection with the conservation and utilisation of timber, and the government reduced the area to 270,000 acres. Subsequently, Liberia annulled the contract.

Thereafter, LETCO went to ICSID arbitration as agreed to by the parties in the contract. Liberia nominated an arbitrator but did not appear to proceed with the case and it became *ex parte*. The arbitral tribunal gave an award of US$8,793,280 with interest in favour of LETCO.[135] LETCO sought to enforce this judgement in the US. The Southern District Court of New York issued a writ of execution to seize Liberian properties in the United States (US). Liberia argued that the award could not be executed under the *Foreign Sovereign Immunities Act* (FSIA). The Court then held that Liberian assets could not be seized as they belonged to a sovereign State. The US Court came to the above conclusion considering the Liberian bank account does not involve in commercial transactions.

[129] William J Davey, 'The WTO and Rule-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17(3) *Journal of International Economic Law* 679, 680.
[130] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 53.
[131] Ibid article 55; *English State Immunity Act 1978* (UK) Chapter 33, section 13(2)(a and b).
[132] *English State Immunity Act 1978* (UK) Chapter 33, section 13(4); *Alcom Ltd v Republic of Colombia* [1984] 2 AER 6.
[133] *Liberian Eastern Timber Company (LETCO) v Government of the Republic of Liberia* 650 F. Supp. 73 (SDNY 1986).
[134] *Liberian Eastern Timber Company (LETCO) v Government of the Republic of Liberia* 650 F. Supp. 73 (SDNY) published in 1987 2(1) *ICSID* 188, 188.
[135] Ibid 189.

The enforcement of awards is further complicated if the award-debtor State does not have assets in the enforcing State. For example, if a dispute arose between a plaintiff and a defendant upon a breach of contract, assets of the award-debtor State must be located. In this hypothetical scenario, the plaintiff filed a case for the recovery of money. The case was heard by the District Court that pronounced a judgement in favour of the plaintiff. If no appeal is made, the plaintiff becomes the judgement-creditor. The defendant who is liable to pay the money (losing party) becomes the judgement-debtor. If the judgement-creditor cannot ascertain the assets of the judgement-debtor, an application should be made to ascertain the judgement-debtor's property. An inquiry should then be undertaken to find properties belonging to the judgement-debtor.[136] This is common to all jurisdictions and includes disputes of both States and of investors.

The complexity of ascertaining assets and recovering money from a State-debtor is illustrated in the case of *Republic of Argentina v NML Capital Ltd*.[137] In this case, Argentina defaulted on its debt to NML Capital Ltd and other creditors. NML Capital Ltd filed an action in the Southern District Court of New York and obtained a decree. In order to execute the writ, NML Capital sought an application to discover Argentina's property. The District Court issued a subpoena to find properties that could be appropriated to recover the decreed amount. Argentina argued that the order of the District Court to discover Argentina's assets to satisfy the debt was contrary to the FSIA. The District Court ruled in favour of NML Capital Ltd.

Subsequently, the matter went to the US Supreme Court. Seven justices held that NML Capital Ltd was entitled to discover the extra-territorial assets of Argentina.[138] The FSIA does not specifically deal with this situation and is silent on the extra-territorial discovery of assets of other countries. Despite this, the US Supreme Court decided that NML Capital Ltd could make an application to discover Argentina's overseas assets under the US Civil Procedure Code.[139] The salient feature of this case is that the US government made an *amicus curiae s*ubmission on behalf of Argentina. They argued that if the Court allowed

[136] See Sri Lanka Civil Procedure Code section 241; the US Federal Rules of Civil Procedure section 69(a)(2) provides rules to ascertain third-party information about assets of the judgement-debtor.
[137] *Republic of Argentina v NML Capital LTD (Discovery Case)* 134 S. Ct 2250 (2014); Mathew D McGill and Alexander N Harris, 'NML Capital v Argentina: Enforcing Contracts in the Shadow of the Foreign Sovereign Immunities Act' (2015) 30 *Maryland Journal of International Law* 3, 4.
[138] See Amanda Tuninetti, 'Limiting the Scope of the Foreign Sovereign Immunities Act after Zivotofsky II' (2016) 57(1) *Harvard International Law Journal* 215, 227.
[139] *Federal Rule of Civil Procedure* sections 26(b)(1) and 69(a)(2); *Republic of Argentina v NML Capital Ltd (Discovery Case)* 134 S. Ct 2250 (2014).

the discovery of assets of foreign countries within or outside the US, this would undermine the sovereignty of a State and affect its sovereign immunity.

Justice Ginsburg, in passing the dissenting judgement, stated that the Court should confine the discovery to those Argentinian properties within and outside the US which were connected to commercial transactions. The dissenting judgement underlined and confined the discovery of a State's assets to those that had links with or were used or expected to be utilised for commercial transactions. From the dissenting judgement, it is unclear how a specific order can be given to identify assets which have a commercial connection, without giving a general guideline.

The above-mentioned cases demonstrate the difficulties and complexities underlying the implementation of commercial arbitral awards. Therefore, it can be questioned whether the present system that prevails throughout the world provides an effective mechanism for the enforcement of a foreign arbitral award, especially against States which have not expressly waived their immunity.[140]

6.4 Monism and Dualism and Enforcement of Arbitral Awards

Whenever a uniform legal system for the enforcement of awards is discussed, the concepts of monism and dualism should be revisited. Monism is a legal concept whereby civil law countries recognise that international law is a part of a country's municipal laws. France and the US follow this system, with the courts of these two countries giving effect to international treaties.[141] International commercial arbitration rules or investment arbitration laws are considered to be part of the laws of civil law countries.[142] This position is evident from the *General National Maritime Transport Co. v Gotaverken Arendal* case.[143] In this case, the Paris Court of Appeal did not set aside an award made by the International Chamber of Commerce (ICC), although the seat of arbitration was in Paris. In fact, the

[140] This position is clearly explained by Delaume (even though expressed in 1990, this position remains valid): 'First, it is only to the extent that a court has jurisdiction over the parties and the subject-matter of the dispute that it needs to decide whether to entertain jurisdiction or to decline it on the ground of sovereign immunity. Second, transnational jurisdictional rules in existence are highly diversified and complex. The danger thus exists that, unless the parties have addressed the jurisdictional issue at the outset, they may have to argue issues of immunity in unexpected fora'. Georges R Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations' *ICSID Review* (1990) 5(2) 232, 233.

[141] A F M Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist' (2001) 12(2) *European Journal of International Law* 309, 311.

[142] Roy Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17(1) *Arbitration International* 19, 25, 26.

[143] *General National Maritime Transport Co. v Gotaverken Arendal* [Paris Court of Appeal] 21 February 1980, Rev. deI'rab. 107 (1981) 6 YB Comm. Arb 221; Goode, above n 142, 26, footnote 16.

parties did not have any connection to the seat of arbitration (Paris), nor had they chosen French law and, moreover, they had no connection whatsoever with France. This indicates that civil law countries consider that an international arbitral award has no boundaries.[144]

In France and Germany, an international arbitration procedure was included in the respective Civil Procedure Codes.[145] Their procedure is applied in two situations: firstly, at the time when the arbitral tribunal has been apprised of the dispute and, secondly, where an arbitral tribunal has not yet been constituted. This means that arbitrators have unfettered authority to hear cases. This is known as 'competence–competence', meaning that arbitrators can determine both the question of the validity of the contract and its jurisdiction to hear the dispute.[146]

Consider a situation where the arbitral tribunal has no jurisdiction to determine a matter; nevertheless, it assumes jurisdiction. The question is whether the arbitration can proceed or the national courts can interfere if there is a patent lack of jurisdiction, or an award would be nullified, or a party wants the court's intervention to address these issues. In this scenario, French courts do not intervene until the award is given. Can the award be enforced after the award is given? This is difficult to predict.[147]

Common law countries consider that international arbitration is detached from a national system of law (dualism). Dualism does not recognise international law as part of a State's laws. International law becomes part of these countries' laws only when their legislature introduces international laws as Acts of Parliament. This position is explicitly laid down in *Bank Mellat v Helliniki Techniki SA*.[148] The Arbitral Tribunal states that:

> Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence [common law] does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law ...[149]

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[144] Goode, above n 142, 26; William W Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32(1) *International and Comparative Law Quarterly* 21, 26; Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30(2) *International and Comparative Law Quarterly* 358, 366; see also Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 1st ed, 2013) 58.
[145] Redfern, Hunter, Blackaby and Partasides above n 68, 102.
[146] Jan Paulsson, *The Idea of Arbitration* above n 144, 60.
[147] Poon, above n 11, 141.
[148] *Bank Mellat v Helliniki Techniki SA* [1984] QB 291.
[149] Ibid 301.

When one considers the above statement, to a certain extent it can be accepted since the question of the validity of the arbitration agreement, the law governing arbitration and the enforceability of arbitral awards have to be resolved within a localised system.[150] Party autonomy cannot be usurped by existing conflict of laws while, as there is no CIIA, party autonomy should be aligned with existing rules. International investment arbitration should be free from national courts and it should have its own system of substantive law, procedure and a dispute settlement mechanism. This is currently lacking in the world. A question arises regarding the threshold that should be used to determine the extent to which municipal courts are relevant and not relevant. This is something that is difficult to determine.

The crux of the problem is that international investment arbitration cannot be sustained without a uniform system of law, while investment arbitration cannot exist without national courts until a uniform system, such as the WTO DSU, is established for investment arbitration.[151] Redfern and colleagues, as well as Poon, argue that national courts are necessary to conduct international arbitration.[152] Their argument is difficult to accept because if a set of substantive international investment arbitration laws and procedures is established, it becomes a *lex specialis.* Municipal courts then either have no role or only a small role to play.[153] Until a special law is introduced, municipal courts can play a supporting role (relay race), for example, interim measures.[154]

The above discussion indicates that national courts play a participatory role in the enforcement process of arbitral awards under the NYC and the ICSID Convention. In contrast with the investment law position, the enforcement of the WTO (Trade Law) remedies does not have any connection with the national courts; therefore, the issue of enforcement does not arise. Under investment arbitration, there is no institutionalised implementation mechanism of awards, as is the case with the WTO. The WTO compliance procedure is monitored by a compliance panel which is a significant feature of trade law remedies (discussed in Chapter 7).

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[150] Hans Smit 'A National Arbitration' (1989) 63(3) *Tulane Law Review* 629, 631; Poon above n 11, 136.
[151] Redfern, Hunter, Blackaby and Partasides, above n 68, 389; Poon, above n 11, 137.
[152] See Redfern, Hunter, Blackaby and Partasides, above 68, 609; Poon, above n 11, 137.
[153] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25(4) *Michigan Journal of International Law* 903, 908.
[154] See *Dicey, Morris and Collins on The Conflict of Laws* (Sweet and Maxwell, 15th ed, 2012) vol I, 840.

6.5 Conclusion

The above discussion has revealed that the NYC and the ICSID Convention do not provide substantive law for investment. The ICSID Convention provides rules for international investment disputes, while the NYC facilitates the execution of arbitral awards. These two conventions are not adequate for dealing with investment disputes and the Conventions do not provide rules for applicable law. The terms 'disputes' and 'investment' have not been defined in the NYC and the ICSID Convention, and the discussion in this chapter revealed the diverse interpretations given by arbitrators which lead to fragmentation of investment law. After selecting the forum, applicable law, choosing arbitrators and resolving jurisdictional issues, investor or State may obtain an award. Most of the time award is given in one country and assets are found in another country; then a question may arise how the award creditor enforces the award. This chapter demonstrated the complexity and difficulty of enforcing the arbitral awards.

According to Article V of the NYC, an enforcing State can refuse to enforce an arbitral award on public policy ground. The *Renusagar Power* and *Parsons & Whitemore Overseas Co. Inc* cases discussed in this chapter revealed the difficulty of enforcing an arbitral award on the ground of public policy. Additionally, the *Yukos Capital SarL* case considered that the violation of honesty and natural justice is repugnant to public policy. Public policy differs from country to country and it creates anomalies in enforcing arbitral awards and erodes the predictability of the investment dispute settlement system.

Further, this chapter revealed the difficulty of enforcing awards made under the ICSID Convention if the State invokes State immunity, illustrated by discussion of the LETCO case. If any system is to succeed as an effective legal system, it should have a rules-based legal foundation. The next chapter considers the structure of the WTO DSU and it compares this with the ICSID Convention to establish that the WTO DSU has created a rule-based trade regime and argues that the DSU should be used as an exemplar for the introduction of a legal regime for investment.

Chapter 7: Proposition for an International Investment Dispute Settlement Mechanism within the WTO

7.1 Introduction

The objective of this chapter is to lay a theoretical foundation for an international investment dispute settlement understanding (IIDSU) to bring predictability to investment law to balance host States' rights and investors' rights for sustainable economic development purposes in line with the trade law regime. The WTO DSU has established an effective rules-based dispute settlement mechanism for trade-related disputes worldwide. It examines how the WTO DSM can be used as an exemplar to establish a comprehensive investment dispute settlement mechanism for investments.

This chapter revisits the existing WTO DSM with its four-tier procedure: as the fast-track mediation and consultation; the panel; the Appellate Body; and the WTO remedies, to demonstrate the increasing legalisation of the WTO DSU.[1] The chapter establishes that the panel and the Appellate Body apply the WTO law as enshrined in the covered agreements and interpret these agreements in accordance with the rules of customary international law for the interpretation of treaties, thus forming a coherent and consistent adjudicatory system.

The chapter demonstrates that the existing investment arbitration process is far behind the requisites for an international legal regime, and reveals the dissimilarities between the WTO DSM and investment dispute settlement under ICSID Convention. In doing so, it identifies the need to develop an IIDSU based on the DSU for investment-related disputes. The chapter contributes to the literature of an IIDSU model through an integration of the WTO DSU with novel features that provide security and uniformity to investment law.

At the Uruguay Round of trade negotiations, the significant contribution by WTO members was that they were able to introduce a judicialized dispute settlement system under DSU to

[1] Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' (2000) 94(2) *American Journal of International Law* 335, 338; Gregory Shaffer, 'What's New in EU Trade Dispute Settlement? Judicialization, Public-Private Networks and the WTO Legal Order' (2006) 13(6) *Journal of European Public Policy* 832, 846; John P Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System' (1999) 14(4) *American University International Law Review* 1173, 1182.

resolve disputes that may arise under WTO agreements.[2] The WTO DSU overhauled the GATT dispute settlement system,[3] developing it into a more advanced dispute settlement system under the DSU.[4] The WTO members abolished the consensus decision-making process of the GATT system (where, if there was no consensus, the GATT panel reports could not be enforced), and introduced the panel and the Appellate Body with the authority to provide binding decisions.[5]

Power politics were replaced through the DSU which preserves rights over might.[6] The achievement of the compulsory nature as opposed to the voluntary dispute settlement is significant in the context of the modern history of the resolution of disputes between States.[7] Under the WTO DSM, the panel is automatically established if the dispute cannot be resolved through consultation which is lacking in other dispute settlement systems.[8] The

[2] *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (dispute settlement understanding) (hereinafter referred to as DSU) article 3; *WTO/GATT Ministerial Declaration on the Uruguay Round* (Punta del Estate Declaration) (September 1986); William J Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' (2014) 17(3) *Journal of International Economic Law* 679, 680; Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8(1) *Minnesota Journal of Global Trade* 1, 3; Edwini Kessie, 'The "Early Harvest Negotiations" in 2003' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement 1995-2003* (Kluwer Law International, 2004) Vol 18, 114, 115; Gracia Marin Duran, 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organization Post-Lisbon: A Competence/Remedy Model' (2017) 28(3) *The European Journal of International Law* 697, 698; Brooks E Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' in Jorge A Huerta-Goldman and Antoine Romanetti (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 45, 53; Constantine Michalopoulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries' (Working Draft, 28 February 2000) 13; Michael Patrick Tkacik, 'Post Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weaknesses, and Causes for Concern' (1997) 9 *International Legal Perspective* 169, 179; Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (Europen University Institute Working Paper No 2017/11, 2017) 1; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22(4) *Journal of International Economic law* 655, 658; Kumar Ingnam, 'Making WTO Dispute Settlement System Useful for LDCs' (2018) 6(1) *Kathmandu School of Law Review* 117, 117.

[3] H E Julio Antonio Lacarte, 'Policy Conclusions (2002)' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement 1995-2003* (Kluwer Law International, 2004) vol 18, 99, 99.

[4] Ibid.

[5] Davey, 'The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges' above n 2, 685; Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) *Journal of International Economic Law* 427, 428; Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J Schott, '18-5 The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' Peterson Institute for International Economics (PIIE), Policy Brief, March 2018, 1.1; DSU articles 1 and 3:2 ; *WTO Agreement* (opened for signature 15 April 1994), 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (dispute settlement understanding) (hereinafter referred to as DSU); Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 1, 336.

[6] Julio Larcarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal Dispute Settlement System: A View from the Bench' (2000) 3(3) *Journal of International Economic Law* 395, 401.

[7] Andrew L Stoler, 'The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?' (2004) 3(1) *World Trade Review* 99, 107.

[8] DSU article 6(1), states that 'the Dispute Settlement Body (DSB) shall establish a panel unless the DSB decides by consensus not to establish a panel'; Pauwelyn, 'Enforcement and Countermeasures in the WTO:

DSU has legalised the multilateral trading system[9] which diminishes uncertainty and expands opportunities for international trade disputes to be resolved effectively when compared to GATT 1947.[10] The notable feature of the DSU is that the panel and the Appellate Body recognise the regulatory autonomy of members and embedded socio-economic liberalism[11] when they interpret the covered agreements, both of which are lacking in investment arbitration.[12]

Both WTO Members and non-members enter into trade and investment agreements to resolve their disputes due to the lack of a CIIA.[13] These agreements are known as PTAs,[14]

Rules are Rules – Toward a More Collective Approach' above n 1, 336; Jennifer Hillman, 'Moving Towards an International Rule of Law? The Role of GATT and the WTO in its Development' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015) 60, 66; Louise Johannesson and Petros C Mavroidis, 'The WTO Dispute Settlement System 1995–2016: A Data Set and Its Descriptive Statistics (2017) 51(3) *Journal of World Trade* 357, 358; Jacob Wood and Jie Wu, 'The Sustainability of the WTO Dispute Settlement System: Does It Work for Developing Countries?' (2020) 54 (4) *Journal of World Trade* 531, 532.

[9] Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 1, 338; Gregory Shaffer, 'What's New in EU Trade Dispute Settlement? Judicialization, Public-Private Networks and the WTO Legal Order' above n 1, 846; John P Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System' above n 1, 1182; See Marc L Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' (2003) 37(4) *Journal of World Trade* 719, 719; Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO' (Issue Paper No 4, International Centre for Trade and Sustainable Development, 2008) 1; Moonhawk Kim, 'Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures' (2008) 52(3) *International Studies Quarterly* 657, 657; James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' 2004 11(3) *Review of International Political Economy* 542, 543; Marc L Busch and Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) 24 (1&2) *Fordham International Law Journal* 158, 158; see Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) *Cornell International Law Journal* 383, 388; M Rafiqul Islam, *International Trade Law of the WTO* (Oxford University Press, 2006) 453; Fuzhi Cheng, 'The WTO Dispute Settlement Mechanism and Developing Countries: The Brazil–U.S. Cotton Case' (Case Study #9-4, 'Food Policy for Development in the Global Food System Program', Cornell University, 2007) 1, 1.

[10] See Kim Van der Borght, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate' (1999) 14(4) *American University International Law Review* 1223, 1224; Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' above n 5, 429.

[11] See Gregory Shaffer and Joel Trachtman, 'Interpretation and Institutional Choice at the WTO' (2011) 52(1) *Virginia Journal of International Law* 103, 133; John Gerard Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36(2*) International Organization* 379, 385, 386; Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-) Construction of NAFTA Chapter 11' (2005) 25(2) *Northwestern Journal of International Law and Business* 279, 279.

[12] Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS2/AB/R (29 April 1996) 30; *Joseph Charles Lemire v Ukraine* (Decision on Jurisdiction and Liability) (14 January 2010) ICSID Case No ARB/06/18, [381], [383] and [500].

[13] Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005) 26 (1) *Northwestern Journal of International Law & Business* 95, 101.

[14] Petros C Mavroidis and Andre Sapir, 'Dial PTAs for Peace, the Influence of Preferential Trade Agreements on Litigation between Trading Partners' (2015) 49(3) *Journal of World Trade* 351, 351.

FTAs and BITs. These BITs do not create a coherent legal system.[15] In addition, the BITs could complicate or even threaten the very existence of the WTO multilateral system due to different rules, different applicable laws and various procedural laws[16] leading to the deferral from forum to forum of making investment law, which would then be enshrined in BITs. In contrast to this position, the DSU adds predictability to the multilateral trading system as neither forum convenience nor applicable law issues are involved in the trade dispute settlement mechanism.[17]

Any legal system, to become effective, is dependent on its authority to implement a *stare decisis* principle but this is lacking in investment law.[18] However, as far as trade law is concerned, the decisions of the Appellate Body have a persuasive effect on subsequent panels.[19] This provides the predictability in the WTO legal system and these decisions are part of the WTO's source of law.[20] An investment court system with an appellate mechanism has not been established: if in place, this would allow host States and investors to adjudicate their disputes when an investment dispute arises.[21] This chapter depicts the historical development of the DSU, followed by a comparative analysis of the structure of the DSU with the ICSID dispute settlement mechanism, and trade law and investment law remedies, to demonstrate that the DSU is an effective rules based legal system for resolving trade disputes. This chapter then compares the approach of the WTO panels and the Appellate Body and the investment arbitrators with regard to the regulatory autonomy and the reform of the investment law.

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[15] Akshat Agarwarl, 'Rethinking the Regulation of International Investment Law: The Recent Development of Brazil, South Africa and India' (2019) 10 *The Indian Journal of International Economic Law* 1, 3.
[16] Rudolf Adlung and Martin Molinuevo, 'Bilateralism in Services Trade: Is There Fire behind the (BIT) Smoke?' (World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2008-01, 16 January 2008) 1, 1.
[17] DSU articles 3.2 and 23.
[18] Felix David, 'The Role of Precedent in the WTO-New Horizons?' (Maastricht Working Papers, Faculty of Law, October 2009-12) 1, 16; Agarwarl, above n 15,3.
[19] Appellate Body Report, *United States -– Final Anti-dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [158]; The Role of Precedent at the WTO available at <http://opiniojuris.org/2008/05/02/the-role-of-precedent-at-the-wto/> accessed on 27 May 2020.
[20] David Palmeter and Petros C Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92(3) *The American Journal of International Law* 398, 400.
[21] 'EU Finalises Proposal for Investment Protection and Court System for TTIP', European Commission Press Release, IP/15/6059 (12 November 2015); Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) *ICSID Review* 503, 506.

7.2 GATT Dispute Settlement Procedure

Articles XXII and XXIII of the GATT 1947 provide rules for GATT disputes.[22] Article XXIII provides rules for a party (whose rights were infringed) to make a written request to the country which was responsible for nullification and impairments. If the country which violated the GATT obligation failed to rectify the inconsistent measure, the aggrieved party could refer the matter to the GATT Working Party for it be examined with recommendations made.[23] In addition, Article XXIII:2 of the GATT permitted the aggrieved party to suspend tariff concessions but it is ineffective when resolving disputes.[24]

The GATT dispute settlement procedure can be categorised into three stages. In the first stage, a member could lodge a complaint with the GATT Chairperson who was bound to give a ruling on the matter.[25] The second stage was the establishment of small negotiation bodies which comprised the parties involved in the dispute, the parties with an interest in the dispute and members from neutral countries.[26] The third stage was the establishment of the GATT Dispute Settlement Body (DSB). The GATT DSB consisted of five members, namely, one party each from the two disputant parties and three neutral parties to hear the dispute.[27] This DSB was similar to a WTO panel and was known as a working party.[28] The GATT working party decisions were not binding,[29] and the members were unable to create a rules-based legal system[30] as no procedure existed for implementing the GATT DSB's recommendations.[31] At the Tokyo Round and the Geneva Ministerial Meeting, members

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[22] GATT 1994, Articles XXII and XXIII. Article XXII of the GATT contains provisions dealing with consultations and Article XXIII deals with nullification and impairment.

[23] Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (Butterworth Legal Publishers, 2nd ed, 1990) 77.

[24] See Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2nd ed, 2008) 149; Lisa Sue Klaiman, 'Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution'(1990) 11 (3) *University of Pennsylvania Journal of International Business Law* 657, 664.

[25] Hudec, *The GATT Legal System and World Trade Diplomacy* above n 23, 76; Philip M Nichols, 'GATT Doctrine' (1996) 36 (2) *Virginia Journal of International Law* 379, 393; Lowenfeld, *International Economic Law* above n 24, 151.

[26] Hudec, *The GATT Legal System and World Trade Diplomacy* above n 23, 78; Nichols, above n 25, 393; Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, 2nd ed, 2008) Lowenfeld, *International Economic Law* above n 24, 151.

[27] Hudec, *The GATT Legal System and World Trade Diplomacy* above n 23, 78; Nichols, above n 25, 394; Robert Howse, *The World Trading System: Critical Perspectives on the World Economy* (Routledge, 1998) vol II, 3.

[28] See GATT Panel Report, *Australian Subsidy on Ammonium Sulphate* 2 BISD 188 (1950); Hudec, *The GATT Legal System and World Trade Diplomacy* above 23, 79; Nichols, 'GATT Doctrine' above n 25, 379, 394.

[29] Hudec, *The GATT Legal System and World Trade Diplomacy* above n 23, 10.

[30] *Multilateral Trade Negotiations, the Uruguay Round, Negotiating Group on Dispute Settlement, Note by the Secretariat,* Meeting of 6 April 1987 MTN.GNG/NG13/1 (10 April 1987) [6].

[31] Miquel Montana I Mora, 'A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes' (1993) 31(1) *Columbia Journal of Transnational Law* 104, 121; 'Any party to the dispute could at any stage block the process. There were no deadlines for the settlement process, for example on how

submitted proposals to reform the GATT dispute settlement system to remove the above weaknesses and tried to introduce a time frame to resolve trade disputes.[32] Difficulties faced by the GATT members in implementing the GATT DSB's recommendations were highlighted at the Tokyo Round and Geneva Ministerial Meeting.[33] At the Uruguay Round, members wanted to establish a rules-based dispute settlement system and this became a reality as a major outcome of the Uruguay negotiations.[34]

7.3 Judicial Power and Legalisation of the DSU

Former Director General of the WTO Mike Moore hailed the WTO dispute settlement process as 'the backbone of the multilateral trading system'.[35] Pascal Lamy stated that the DSU is a 'unique legal order or system of law'[36] and it was 'neither entirely vertical nor entirely horizontal'.[37] The 'vertical nature' of the DSU is its mandatory jurisdiction, while the 'horizontal nature' of the DSU comprises the rights given for trade remedies against members who refuse to comply with decisions of the panel and the Appellate Body.

The WTO dispute settlement system is a great success in the context of the modern history of the resolution of disputes between States.[38] After consultation has failed, the DSU has

long consultations should last. The binding nature of the rulings could be disputed and their quality was often considered inadequate'. Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 25, 26.

[32] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* L/4907 (adopted in 28 November 1979); *Multilateral Trade Negotiations the Uruguay Round, Negotiating Group on Dispute Settlement, Note by the Secretariat, Meeting of 6 April 1987* MTN.GNG/NG13/1 (10 April 1987) [5]; *Commission of the European Communities COM (82) 678 Final Brussels, 15 October 1982, GATT Ministerial Meeting, Information Note Submitted by the Commission to the Council*, 10.

[33] For example, in the *European Economic Community – Payments and Subsidies Paid to Processors and Producers of OilSeeds and Related Animal-Feed Proteins* (*Oilseeds*) case, the EC introduced a subsidies programme for oilseed producers to make oilseeds cheaper to curtail imports. The US thought it would cut down their share in the EU market. The dispute went to the GATT panel and it was held that the EC violated GATT Article III:4. The EC tried to block the adoption of the panel report on the basis of consensus requirement. The US tried to impose unilateral sanctions under section 301 of the *US Trade Act* (under section 301 the US can impose restrictions on imported products). Ultimately, the EC agreed to implement the panel report. GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins(Oilseeds*), GATT Doc L/6627-37S/86 (14 December 1989) [14, 41 and 155]; *United States Trade Act of 1974*, 19 USCA, S2411 (1974) section 301; Tkacik, above n 2, 178. See also GATT Panel Report, *Uruguayan Recourse to Article XXIII* GATT Doc. L/1923-11S/95 (adopted on 16 November 1962); Thomas A Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation' (2005) 60 (1) *Swiss Review of International Economic Relations* 27, 36.

[34] Zimmermann, above n 33, 35; Joseph H H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35(2) *Journal of World Trade* 191, 191.

[35] Mike Moore, 'WTO's Unique System of Settling Disputes Nears 200 Cases in 2000' (Press Release 5 June 2000) available at <http://www.wto.org/english/news_e/pres00_e/pr180_e.htm> accessed on 28 December 2017.

[36] Pascal Lamy, 'The Place and Role of the WTO in the International Legal Order' (2006) 17(5) *European Journal of International Law* 969, 970.

[37] Ibid.

[38] Andrew L Stoler, above n 7, 107.

compulsory jurisdiction to hear disputes arising under covered agreements,[39] but it has not been empowered to hear FDI-related disputes.[40] The decisions of the panel and the Appellate Body are not frustrated by State immunity (State immunity frustrates arbitral awards) and the DSU has the exclusive jurisdiction to hear trade disputes.[41] The jurisdiction for WTO disputes is invoked by States, with private parties not being involved.

The WTO adjudication process can be divided into three components: the consultation; the panel; and the Appellate Body. If the consultation fails, a panel is appointed, with the ruling of this panel able to be challenged in the Appellate Body. After the determination of the issue, the panel gives a ruling and the aggrieved country can lodge an appeal to the Appellate Body, while the country that lost the case should comply with the ruling.

The jurisdiction of the DSB derives from the covered agreements listed in Appendix 1 of the DSU. Article I:1 of the DSU provides a WTO member with recourse to the DSU for nullification or impairment of any benefits accrued to it from 'covered agreements' by another member or members.[42] The 'covered agreements' are embodied in the WTO agreement and these covered agreements are the WTO's substantive law and provide jurisdiction.[43] This means that the applicable law for trade is embodied in the 'covered agreements' and the DSU applies these laws as the substantive law for disputes. In addition to the special rules and procedures laid down in the 'covered agreements', the DSU also applies its rules and procedures to disputes.[44] When a difference exists between the DSU's

[39] DSU article 4; Lacarte-Muro and Gappah, 'Developing Countries and the WTO Legal Dispute Settlement System: A View from the Bench' above n 6, 401.

[40] This is a blind spot found in the literature which has not identified the importance of an IIDSU under the WTO. It is therefore questionable whether domestic courts will provide sufficient guarantees to foreign investors when a dispute arises between an FDI host State and an investor or investing State. UNCTAD, *Course on Dispute Settlement, International Center for Settlement of Investment Disputes* (UN, New York and Geneva, 2003) (UNCTAD/EDM/Misc.232) 3.

[41] In contrast to the DSU position, investment law is fragmented with no coherent institutionalised system for investment disputes and the ICSID Convention merely provides procedural rules for settling investment disputs. Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109 (4) *The American Journal of International Law* 761, 766; *ICSID Convention, Regulations and Rules* (ICSID/15, April 2006).

[42] DSU article 3.3; Three complaints are available: 'violation complaints' (breach of the GATT obligations and, after the establishment of the WTO, covered agreements); 'non-violation complaints' (this involves nullification or impairment of benefits, eg, the protection of tariff concessions given under Article II of the GATT); and 'situation complaints' (these complaints can be lodged for nullifications or impairments that exist due to any other grounds). Kevin C Kennedy, 'GATT 1994' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer Science + Business Media, Inc., 2005) vol I, 89, 170, 171, 172.

[43] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) ('*WTO Agreement*') hereinafter referred to as the *WTO Agreement,* Annex I.

[44] DSU article 1.2; WTO Agreement Annex 2.

rules and procedure and the special rules and procedure embodied in the 'covered agreements', the DSU rules would prevail.[45]

When a disparity occurs between the special procedures and rules of 'more than one covered agreement' and the parties are unable to agree on the rules and procedure applicable to the dispute, the DSB Chairman decides the applicable special rules and procedures of 'covered agreements'.[46] This demonstrates that the WTO law applicable to trade-related disputes is embodied in covered agreements to remove the uncertainty as to the law applicable to trade disputes.[47] This position is explained by the Appellate Body in the case of *Mexico – Tax Measures on Soft Drinks and Other Beverages*.[48] The Appellate Body held that the panel did not have a legal basis to decide rights and duties outside the WTO's covered agreements.[49] Therefore, the WTO panels cannot hear purely investment disputes unless these cases fall under one of the covered agreements such as the GATS and TRIMs.

The cornerstone of the DSU is that it guarantees predictability, security and uniformity within the WTO trade regime and, in turn, provides speedy resolutions to its members' disputes.[50] This particular theme, as captured by the WTO, cannot be found in the ICSID Convention or the NYC as these Conventions do not effectively identify law applicable to investment law as do the 'covered agreements' in the WTO agreement. Predictability, uniformity and consistency in the interpretation of law and procedure are fundamental requirements of any legal system, whether it is a domestic or an international legal system. The DSU, however, is guarded by the parameters of 'covered agreements' and it can apply customary international law to their interpretation. A salient feature of the DSU is that, in interpreting the 'covered agreements' by using customary international law, it cannot 'add' or 'diminish' obligations undertaken by members in these agreements.[51] This imparts a uniform legal system, a position that is further strengthened by the hierarchical adjudicatory system that the DSU has established.

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[45] DSU article 1.2.
[46] DSU article 1.2.
[47] Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO in Investor-State Arbitration: A Reply to Jurgen Kurtz' (2010) 20(4) *The European Journal of International Law* 1087, 1088.
[48] Appellate Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* WTO Doc WT/DS308/AB/R (6 March 2006).
[49] Ibid [56].
[50] DSU article 3.2; Appellate Body, *United States – Final Dumping Determination on Softwood Lumber From Canada* WTO Doc WT/DS264/AB/R (11 August 2004) [112].
[51] DSU article 3.2.

As mentioned before, the DSU dispute resolution mechanism is based on consultation, panels and rulings of the Appellate Body. If parties agree, good offices, conciliation, mediation and arbitration are available for members as an alternative mechanism.[52] Budnitz stated that commercial arbitration is complex and involves high costs.[53] His argument can be accepted only with respect to commercial arbitration on which his article has concentrated, not on the WTO arbitration. Furthermore, a fast-track procedure is available for developing countries, in accordance with the GATT decision of 5 April 1966 which was given effect under the DSU's Article 3.12.[54] However, the effectiveness of this procedure is difficult to identify since, to date, no country has invoked this procedure under the DSU.[55] As the consultation is a mandatory requirement,[56] developing countries more often resort to consultation.

7.3.1 Consultation under the DSU

When any benefits accrued to a member are impeded by nullification or impairment of a covered agreement, that member may inform the DSB for consultation. Article 4 of the DSU provides the mechanism for consultation, failing mutually agreed solutions. This article empowers members to give sympathetic consideration and reasonable opportunity to another member to adjust the measures that nullify the obligations enshrined in the 'covered agreements' when there is a complaint.[57] If a member requests consultation with another member, the latter member should reply within 10 days unless otherwise agreed. Thereafter, that member should enter into consultation within 30 days in good faith. The DSB and relevant councils should be informed of this consultation. However, if a settlement is not reached within 60 days of receiving the request, the complaining party can request the appointment of a panel.[58] Consultation is a good opportunity for countries to express their views and it assists parties to more broadly accept the solution.

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[52] DSU articles 5 to 25.
[53] Mark E Budnitz, 'The High Cost of Mandatory Consumer Arbitration' (2004) 67(1&2) *Law and Contemporary Problems* 133, 161.
[54] Robert E Hudec, *Developing Countries in the GATT/WTO Legal System* (Gower, 1987) 66, 67.
[55] Haken Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' (2008) 7(4) *World Trade Review* 587, 606.
[56] DSU article 6.2.
[57] DSU article 4.2.
[58] DSU article 4; Furthermore, when a consultation is to occur between two members, another member or members can participate in the consultation within 10 days of request, but only if it can be demonstrated that their substantial trade interest is affected. DSU article 4.11.

7.3.2 Panel Procedure

If the matter leading to the complaint is not settled through consultation, the complainant member is entitled to make a written request to the DSB to appoint a panel. A panel comprised of three members is appointed within 20 days of such a request to hear the case. No permanent panel is established under the DSU, with the DSB appointing panels in an ad hoc manner on a case-by-case basis.[59] A member can request a panel before the 60-day period lapses if the dispute is related to perishable goods.[60] Likewise, if the parties cannot amicably settle the matter, both parties can jointly request the appointment of a panel before the expiry of 60 days.[61] Once the panel is established, the DSB authorises the chairman of the panel to prepare terms of reference in consultation with the parties to the dispute.[62] These terms of reference are circulated to all panel members.[63]

The Secretariat shall suggest panel member names to the parties: if no agreement is reached with regard to the constitution of the panel within 20 days of establishing the panel, at the request of either party, the Director-General, in consultation with the DSB Chairman and the relevant council and committee, appoints the panel members.[64] The parties should submit written submissions to the Secretariat. The panel should communicate its decision to the DSB within six months. However, if the panel is unable to deliver findings within six months, they should be given within nine months. The time period is mandatory and these are features of a compulsory dispute settlement system.[65]

Panel reports are adopted after 60 days of circulation unless there is an appeal or if, by consensus, members agree not to adopt a panel report.[66] The adoption of a decision cannot be blocked. This is a major improvement upon the consensus-based decision of the GATT. Cases are determined by panels according to the procedures of common law and the civil law system (the adversarial and inquisitorial system). For example, DSU's Article 13

[59] The Dispute Settlement Body (DSB) comprises all WTO members who, without exception, have a seat. DSU article 6.1.
[60] DSU article 4.8.
[61] DSU article 4.7.
[62] DSU article 7.1.
[63] DSU article 7.3.
[64] This is done not later than 10 days after receiving the request to appoint a panel. DSU article 8.
[65] Under public international law, the ICJ acquires jurisdiction if parties to the dispute give their consent but, under the WTO dispute settlement mechanism, whether parties like it or not, a panel is appointed unless member countries by consent decide not to establish a panel. DSU articles 4.7 and 6.1.
[66] DSU article 16.4.

provides rules for a panel to seek information from a person or a body.[67] While the panel is adjudicating over the matter, members can again request consultation and an appellate mechanism is also available for trade disputes.

7.3.3 Appellate System

A member that is not satisfied with the panel's finding can lodge an appeal to the Appellate Body which should hear appeals from panels. This is a permanent body which consists of seven persons, three of whom hear each case with cases heard on rotation.[68] The DSB appoints the members to the Appellate Body from time to time and they serve a four-year term.[69] The Appellate Body's decisions are given within 60 days: if a decision cannot be delivered within 60 days, the Appellate Body should inform the DSB of the reasons for this delay. However, a report should be given within 90 days.[70] Parties to the dispute can lodge an appeal.[71] A party that has a substantial interest can submit a written submission and such a party should be allowed to be heard (an *amicus curiae* brief).[72] Article 20 of the DSU states that a matter should be disposed of within 12 months. An appeal can be lodged only on a point of law. Although this mechanism is simple, the most complex cases have come to the panels and Appellate Body, which have effectively dealt with such cases: the result has been to create a valuable jurisprudence and establish a new international order for trade law. There is no similar appellate mechanism for the investment disputes and[73] the aggrieved parties to the investment disputes may refer to the annulment panel and it can only review the matters in disputes (limited to the procedural errors).[74]

The panel and Appellate Body procedure establish a uniform and effective method of solving trade disputes. That is the reason why the WTO's DSU has been praised as a coherent dispute settlement system. The time frame to resolve disputes is significant as the panel and Appellate Body cannot delay or fragment the procedure. Furthermore, this gives predictability to the multilateral trading system. In reality, however, it may take three years

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[67] Gregory Shaffer and Joel Trachtman, 'Interpretation and Institutional Choice at the WTO' (2011) 52(1) *Virginia Journal of International Law* 103, 139.
[68] DSU *article 17.*
[69] DSU *article 17.2.*
[70] DSU *article 17.5.*
[71] DSU *article 16.4.*
[72] DSU *article 10.2.*
[73] Albert Jan van den Berg, '*Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*' (2019) 34(1) *ICSID Review* 156, 157.
[74] Ibid 157 and 167; Noam Zamir and Peretz Segal 'Appeal in International Arbitration—An Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35(1) *Arbitration International* 79, 88 and 90.

for a case to be completed using the DSU.[75] The Appellate Body shall not have links with any government; thereby, it tries to ensure the impartiality, independence and integrity of its members. The independence of the Appellate Body institutionalises credibility within the multilateral trading system, which encourages member States to have recourse to the WTO's DSU to resolve their trade disputes.[76]

The function of the Appellate Body establishes that the DSU has created a hierarchical system to adjudicate over disputes emanating from the violation of WTO obligations.[77] Therefore, the DSU has provided a plenary legal system much like a quasi-judicial system. This hierarchical system provides a procedure that indicates how and in what manner a dispute is brought before the DSB. The Appellate Body provides credibility to the WTO system and is heavily used by WTO members.[78] The DSU judicial mechanism has become an active institution for WTO cases and WTO members broadly accept the Appellate Body rulings.[79]

The Appellate Body contributes to WTO law-making by interpreting treaties.[80] For example, the DSU does not state who should prove a case. Under customary international law and the municipal laws of countries, the one who asserts the claim is the one who should prove it. In other words, the burden of proof lies on the plaintiff. This issue arose in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, where the Appellate Body held that the party that asserted the claim regarding violation by the respondent State of obligations enshrined in a covered agreement should prove the case.[81] In some instances, the burden of proof is shifted to the respondent State, such as in Article XX of the GATT, in the Enabling Clause, in Article XIV of the General Agreement

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[75] Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' above n 31, 34.

[76] However, it is concerning that U.S. President Donald Trump has been blocking the Appellate Body membership by not reappointing a member and has tried to obstruct the WTO which was established at Uruguay Round Negotiations to resolve trade disputes. Tom Miles, 'U.S. Block WTO Judge Reappointment as Dispute Settlement Crisis Looms' *Reuters, World News* (27 August 2018) at 8.54 pm available at <www.reuters.com › article › us-usa-trade-wto › u-s-blocks-wto-judge-> accessed on 19 December 2019.

[77] John H Jackson, 'Part I: The State of International Economic Law – 2005. The Changing Fundamentals of International Law and Ten Years of the WTO' (2005) 8(1) *Journal of International Economics Law* 1, 5.

[78] Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2015 – A Statistical Analysis' (2016) 19(1) *Journal of World Trade* 289, 295.

[79] Ibid 296.

[80] Donald MacRae, 'The Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1(2) *Journal of International Dispute Settlement* 371, 378.

[81] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WTO Doc WT/DS33/AB/R (25 April 1997) (adopted 23 May 1997) [16]; see also Chittharanjan Felix, *Local Remedies in International Law* (Cambridge University Press, 2nd ed, 2004) 11; Michelle T Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' (2006) 9(3) *Journal of International Economic Law* 615, 618.

on Trade in Services (GATS), and in Article 30 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), as these articles provide exceptions to the general obligation of members.[82] Thereafter, the respondent State has to rebut the plaintiff State's *prima facie* case.[83] The WTO Secretariat facilitates the preparation and drafting of panel reports with each panel allocated a legal officer as a staff member.[84] The secretariat provides technical and legal support to panels. The Appellate Body has its own Secretariat to provide assistance and the DSU has exclusive jurisdiction to hear cases, but under the ICSID convention if the parties expressly have not excluded the local remedies, the exhaustion of local remedy rule is applied for investment disputes.[85] Exhaustion of local remedies is a customary international law principle[86] and it should be exhausted before an international proceeding is instituted.[87]

7.3.4 Exclusive Forum for WTO Disputes

The DSU, Article 23 provides exclusive jurisdiction to litigate WTO disputes. As stated in the DSU, Article 23(1), all WTO member States can invoke the DSU jurisdiction upon 'a violation of obligation or nullification or impairment under the covered agreement'. No forum shopping applies for WTO disputes, which are heard by the WTO panels and the Appellate Body.[88] In the ICSID arbitration, often issues are raised concerning jurisdiction and the arbitrators must decide whether they have jurisdiction to hear a case. In contrast, once the matter is before a WTO panel, the panel will not refuse to hear a case on the preliminary grounds. This is evident from the case of *Mexico – Tax Measures on Soft*

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[82] Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' above n 81, 622; Ginevra Le Moli, Parthan S Vishvanathan and Anjali Aeri, 'Whither the Proof? The Progressive Reversal of the Burden of Proof in Environmental Cases before International Courts and Tribunals' (2017) 8(4) *Journal of International Dispute Settlement* 644, 670.

[83] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WTO Doc WT/DS33/AB/R (25 April 1997) (adopted 23 May 1997) [16]; Moli, Vishvanathan and Aeri, above n 82, 668.

[84] *WTO Agreement* article VI.

[85] See DSU article 23; *ICSID Convention* article 26.

[86] Matthew C. Porterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2015) 41 *The Yale Journal of International Law* 1, 3.

[87] 'The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'. *Elettronica Sicula S.p.A.* (*ELSI) (US v Italy)* case (Judgement of 20 July 1989) [1989] International Court of Justice (ICJ) 15, para 50; Amerasinghe, above n 82, 97; Emeka Duruigbo, 'Exhaustion of Local Remedies in Tort Litigation: Implication for International Human Rights Protection' (2005) 29(6) *Fordham International Law Journal* 1245, 1247; *Interhandel* (*Switzerland vs United States*) (ICJ, 6, 21 March 1959); *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* The International Law Commission's Report at 53rd session A/56/10 (2001) article 7.10.

[88] Petros C Mavroidis, 'Dispute Settlement in the WTO: Mind Over Matter' in Kyle Bagwell and Robert W. Staiger (eds), *Handbook of Commercial Policy* (Elsevier B.V., 2016) vol. 1A, 333, 348.

Drinks and Other Beverages.[89] The United States (US) lodged a complaint to the WTO Panel that Mexico had introduced tax measures on soft drinks and other beverages for the use of any sweetener other than cane sugar. They argued that it was a violation of national treatment principle in Article III of the GATT 1994. In this case, Mexico contended that the panel should not hear the case, as this dispute could be resolved under the NAFTA dispute settlement system. The US contended that, if it was making a complaint to the DSU, NAFTA did not place any restriction. The panel rejected Mexico's request on the basis that it was incompatible with the WTO Agreement and particularly with the DSU's Articles 7 and 11.[90] This case illustrates that once a dispute arising from a violation of a covered agreement is referred to the DSB, a decision should be given by the panel instead of staying the proceedings.

In *India – Quantitative Restrictions* the US made a complaint against India for its failure to adhere to obligations in the balance of payments restrictions under Article XVIII: B of the GATT 1994.[91] The Appellate Body held that the US was entitled to make a complaint to the DSU and that it was the proper forum[92] and the DSB has exclusive jurisdiction to hear all disputes relating to the WTO obligations and 'covered agreements'.[93] The WTO Appellate Body hears appeals from panel decisions and has made a significant contribution to WTO jurisprudence which stabilises trade law. It is questionable whether arbitrators have the exclusive jurisdiction for investment disputes because of the wording in Article 26 of the ICSID Convention.

Therefore, it is important to examine whether the international investment agreements, similar to the WTO DSU, also have excluded local remedies, or the municipal courts have jurisdiction to hear investment disputes. Article 26 of the ICSID Convention provides rules

[89] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* WTO Doc WT/DS308/R (7 October 2005).
[90] Article 7 of the DSU vests powers in the panels to examine the matter referred to the DSB by the complaining party and make such findings as will assist the DSB in making recommendations and rulings. Article 11 of the DSU provides that panels shall make '... findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'.
[91] Appellate Body Report, *India – Quantitative Restrictions* WTO Doc WT/DS90/AB/R (23 August 1999) [84].
[92] Ibid [84 and 86].
[93] The DSU's Article 23(1) states that when members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding; see also Kyung Kwak and Gabriella Marceau, 'Overlaps and Conflicts of Jurisdiction between the WTO and Regional Trade Agreements' (Conference on Regional Trade Agreements, World Trade Organization) (26 April 2002) 1, 3; see also Amelia Porges, 'Settling WTO Disputes: What Do Litigation Models Tell Us?' (2003) 19(1) *Ohio State Journal on Dispute Resolution* 141, 151.

to exclude the local remedies but at the same time, it gives members the freedom to agree on the exhaustion of local remedies, bypassing the ICSID facility.[94] However, the non-applicability of exhaustion of local remedies for investment disputes under the ICSID Convention underpins the preparatory work of the ICSID Convention.[95] Broches states that local remedies have no place for the ICSID arbitration.[96] Brinas, who was the Philippines' Representative, recommended that the jurisdiction of the ICSID Convention should be invoked only after local remedies were exhausted but this view was not accepted by the majority of members during preparatory work.[97] UNCITRAL Arbitral Rules do not state that parties to the dispute should exhaust local remedies.[98] The NAFTA Article 1121 expressly excludes local remedies, but AUSFTA Chapters 11 and 21 are silent on the exhaustion of local remedies.[99] This means that investors have to resolve their disputes in municipal courts and questions the exclusive jurisdiction of the ICSID arbitration because of the wording of Article 26.[100]

7.4 Procedure for Settlement of Investment Disputes

The ICSID Convention also provides conciliation and arbitration to resolve investment disputes, and the ICSID Centre[101] facilitates mediation and arbitration to resolve international investment disputes.[102] The Secretary-General is the chief officer responsible

[94] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 958; *Lanco International Inc. v. Argentine Republic* (Preliminary Decision on Jurisdiction) (ICSID Case No. ARB/97/6) (8 December 1998) para 38; William S Dodge, 'National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA' (2000) 23(3) *Hastings International and Comparative Law Review* 357, 363.

[95] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II, part 2, 800, 973.

[96] Ibid 804.

[97] Ibid 757.

[98] See *UNCITRAL Arbitration Rules* (Revised in 2010) General Assembly Resolution 65/22.

[99] See William S Dodge, 'Investor–State Dispute Settlement between Developed Countries: Reflections on the Australia–United States Free Trade Agreement' (2006) 39(1) *Vanderbilt Journal of Transnational Law* 1, 22 and 23.

[100] Martin Dietrich Brauch, 'Exhaustion of Local remedies in International Investment Law' (International Institute for Sustainable Development, January 2017) 1, 8.

[101] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article I(1); Antonio R Perera, 'The Development of the Regulations and Rules of the International Centre for Settlement of Disputes' (2007) 22(1) *ICSID Review – Foreign Investment Law Journal* 55,56.

[102] Ibid article I(2); Vincent O Orlu Nmehielle, 'Enforcing Arbitral Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)' (2001) 7(1) *Annual Survey of International Law and Comparative Law* 21, 22; Ajay Kr Sharma, 'Arbitrators Appointed in ICSID Cases Commencing Since 2001: Data Compilation and Analysis' (2016) 12(2) *Asian International Arbitration Journal* 107, 108.

for administration of the ICSID Centre,[103] which provides facilities for international investment disputes.[104] The ICSID Convention can be amended by unanimous vote of members[105] and the ICSID rules and regulations can be amended by a vote of two-thirds.[106] A notable feature of the Convention is that it tries to provide equal treatment for investors and States. Investors can directly initiate proceedings against a State if an international investment dispute arises.[107] This Convention has taken away the traditional notion of subjects of international law (State-to-State disputes), and the investor, whether legal or natural, has become a subject of international investment disputes.[108] The request made by a party should consist of matters relating to 'issues in dispute', the name of the party or Member State, and the evidence of consent for ICSID arbitration.[109]

The first step of the ICSID dispute resolution is conciliation. The Conciliation Commission was established under the ICSID Convention,[110] with its main objective being to make suggestions to parties to arrive at a solution. The Conciliation Commission should be appointed within 90 days of the registration of the request for conciliation. The Conciliation Commission prepares a report which should be in accordance with Conciliation Rules 30-33.[111] Members of the ICSID Convention and investors can make a request for arbitration if, in their agreement, referring a matter for ICSID arbitration has been agreed. The time frame is not given in the Convention: the implication is that no mandatory time frame is required within which to conclude a case. The first stage in the WTO DSM is the consultation and ICSID provides the conciliation which is not mandatory, however consultation under the WTO DSM is mandatory. Failing the consultation, the panel is established automatically.

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[103] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) article 10(1); Appendix I, Working Paper in the Form of a Draft Convention for the Resolution of Disputes between States and Nationals of Others (5 June 1962) 12(1).
[104] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) *The European Journal of International Law* 387, 395.
[105] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) article 66(1).
[106] Perera, 'The Development of the Regulations and Rules of the International Centre for Settlement of Disputes'above n 101, 57.
[107] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (ICISD Convention) article 28(1).
[108] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (ICISD Convention) article 25(2) (a and b).
[109] Ibid article 28(2); Yaraslau Kryvoi, *International Centre for Settlement of Investment Disputes (ICSID)* (Kluwer Law International, 2010) 33.
[110] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) article 29.
[111] Kryvoi, *International Centre for Settlement of Investment Disputes (ICSID)* above n 109, 34.

Arbitration by the ICSID commences after the registration of a request.[112] This can be refused on the basis of the consent being manifestly wanting.[113] Usually, the ICSID arbitration tribunal consists of three persons.[114] Sometimes, parties to the dispute may ask for a sole arbitrator.[115] If the parties are unable to agree on appointing arbitrators, each party selects an arbitrator and the president of the tribunal is appointed by the agreement of both parties.[116] The arbitration tribunal should be established within 90 days of the request for arbitration and if it is not established within 90 days, parties need to agree on the date. Even one party can frustrate an attempt to resolve a dispute under the NAFTA and the ICSID by not cooperating with the appointment of a panellist, creating uncertainty in investment law and lacking a coherent adjudicatory mechanism.[117] The ICSID Secretariat is confined only to administrative functions and does not provide staff or assistance for arbitrators, with individual arbitrators providing their own assistance. The WTO panels and the Appellate Body are given a mandatory time period to dispose of cases which ensures the predictability of the trade law system, but the ICSID Convention does not give a time period for the completion of cases.[118]

Parties have the freedom to choose an arbitrator of their choice and expect that their arbitrators would protect their interests. As a result, in practice, the influence of the presiding arbitrators has direct bearing on the outcome of a dispute. According to Puig, more than 80% of arbitrators are appointed from developed countries and, therefore, an imbalance is apparent in the process of the appointment of arbitrators to hear disputes.[119] In addition, an individual arbitrator sometimes acts as a 'counsel', 'expert witness', 'power

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[112] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 36(1).
[113] Ibid article 36; Consent is not relevant to invoke the DSU process as the members have undertaken to abide by the covered agreements. DSU, article 6(1), states that the DSB shall establish a panel unless the DSB decides by consensus not to establish a panel; Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 1, 336
[114] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?' (2013) 35(2) *University of Pennsylvania Journal of International Law* 431, 444.
[115] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (ICSID *Convention*) article 37(2) (b).
[116] Ibid article 37(2) (b).
[117] '… notwithstanding the fact that Mexico requested the establishment of a NAFTA arbitral panel in 2000, to date the United States has not appointed panellists and has thus frustrated Mexico's attempt to resolve its grievances under the NAFTA'. Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* WTO Doc WT/DS308/R (7 October 2005) [8.211].
[118] DSU articles 12:9, 17:5; *WTO News, Farewell Speech of Appellate Body Member Ricardo Ramirez-Hernadez (*28 May2018) available at <https://www.wto.org/english/trap_e/dispu_/ricardoramirezfarewellspeech_e.htm> accessed on 21 February 2020; *ICSID Convention, Regulations and Rules* (ICSID/15, April 2006) articles 12, 13, 14 and 15.
[119] Puig, 'Social Capital in the Arbitration Market' above n 104, 405 and 423.

broker' and as a 'presiding arbitrator'.[120] Therefore, it is argued that the appointments of arbitrators to international investment tribunals are biased with no appropriate criteria adopted for their selection and that their decisions are pro-investors and pro-investment.[121] This challenges the legitimacy, transparency and credibility of the investment dispute settlement system.[122] This means a small club of arbitrators are repeatedly selected; they are not accountable to parties who have not nominated them and this hinders the judicial process. Conversely to the above position, under the WTO DSM, more than 65% of panellists appointed to the WTO panels are from larger developing countries and they are not repeat players, although under investment arbitration sometimes arbitrators are repeat players.[123] The DSB appoints a panel once the consultation fails and parties can only oppose the nomination of panel for 'compelling reasons'.[124] Under the ICSID Convention, parties to the dispute can select the arbitrators.[125] The WTO Appellate Body is a permanent body and they are selected in a transparent manner which ensures integrity and impartiality.[126]

The complainant party can file a statement containing relevant facts, facts in issue, and the law relating to issues and submissions.[127] The respondent can admit or deny the facts of the complainant.[128] Parties can submit additional facts, observations and written submissions.[129] They are allowed to make oral submissions.[130] The tribunal can request

[120] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301, 303.
[121] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?' (2013) 35(2) *University of Pennsylvania Journal of International Law* 431, 436; Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus' (2015) 109 (4) *The American Journal of International Law* 761, 763; Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration' above 120, 303; Puig, 'Social Capital in the Arbitration Market' above 104, 423; Sergio Puig, ' Blinding International Justice' (2016) 56(3) *Virginia Journal of International law* 647, 650.
[122] Susan D Frank, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73(4) *Fordham Law Review* 1521, 1546; Sergio Puig, 'Blinding International Justice' (2016) 56(3) *Virginia Journal of International law* 647, 691; Susan D Frank, 'Rationalizing Cost in Investment Treaty Arbitration (2011) 88(4) *Washington University Law Review* 769, 821.
[123] Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus'above n 121, 771; Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration' above n 120, 309.
[124] DSU articles 6 and 8:6.
[125] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 37.
[126] DSU article 17.3.
[127] *International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules* (ICSID/15, April 2006, rule 31(3); Kryvoi, above n 109, 36.
[128] *International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules* (ICSID/15, April 2006, rule 31(1) (b).
[129] Ibid rule 31(1) (c and d).
[130] Ibid rule 32.

parties to produce evidence (witnesses and documents).[131] Under the ICSID Convention, as is the case in the DSU, the onus of proof is on the claimant.[132] In the absence of rules expressly provided in the ICSID Convention, the question arises whether the ICSID tribunals have jurisdiction to grant relief for counterclaims.[133] However, the DSU allows counter claim application by members.[134] Once a decision is given, the member with the violated rights can obtain relief through remedies.

7.5 Remedies under Trade and Investment Law

7.5.1 Compensation

The DSU provides for three remedies, the first of which is the removal of a measure inconsistent with the WTO agreements.[135] The second remedy is to pay compensation, although the compensation is voluntary.[136] As a result the losing member cannot stop the breaches of the WTO Agreements or nullification or impairment, but the parties may discuss compensation for the violation of the WTO obligation under the DSU's Article 22.2.[137] The parties can agree to pay compensation.[138] For example, the losing party can offer enhanced market access or other trade concessions to the winning party as compensation instead of providing monetary compensations.[139] However, the DSU grants compensation only in a situation in which the wrongful measure cannot be immediately withdrawn.[140] The DSU cannot grant compensation for loss or damage incurred in the past by a member due to nullification and impairments.[141] Nor can the DSU grant financial

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[131] Ibid rule 34.

[132] *Tokios Tokeles v Ukraine* (Award) (26 July 2007) ICSID Case No. ARB/02/18, [121]; *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (Final Award) (27 June 1990) ICSID Case No. ARB/87/3,526,549 [56]; see Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa Law, 2017) 207.

[133] According to Rule 40, if the counterclaim is directly relating to the fact in issue, then the ICSID tribunals try to grant relief. In the case of *Alex Genin v Republic of Estonia*,[133] counterclaims were considered but relief was not granted as there was no merit. *Alex Genin v Republic of Estonia* (award) (25 June 2001) ICSID Case No. ARB/99/2, 1, 96 [385(5)].

[134] DSU article 3:10.

[135] DSU article 22.2.

[136] DSU article 22.1; see Monika Butler and Heinz Hauser, 'The WTO Dispute Settlement System: A First Assessment from an Economic Perspective' (2000) 16(2) *Journal of Law, Economics & Organization* 503, 527; Judith Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1999) 90(3) *American Journal of International Law* 416, 417.

[137] See Joel P Trachtman, 'UbRemedium, IbiIus at the WTO' (Working Paper No 754, Bepress [The Berkeley Electronic Press] Legal Service, 2005) 17; *Japan – Alcohol Beverages, Mutually Acceptable Solution on Modalities for Implementation*, WTO Doc WT/DS8/17 (12 January 1998).

[138] See Decision by the Arbitrator, *United States Section 110(5) of the US Copyright Act under Article 25 of the understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS160/R (27 July 2000).

[139] Marco Bronckers and Naboth Van Den Broek, 'Financial Compensation in the WTO Improving the Remedies of WTO Dispute Settlement' (2005) 8(1) *Journal of International Economic Law* 101, 109.

[140] DSU article 3.7.

[141] Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford University Press, 3rd ed, 2009) 85.

penalties on behalf of the winning member.[142] The DSU has no jurisdiction to grant damages computed from the date on which the actual violation or nullification of the WTO agreements took place.[143]

The third remedy is the permission for the suspension of concessions or other WTO obligations,[144] which is referred to as retaliation. If negotiations fail, a successful member may ask the DSB to authorise retaliation.[145] The question of retaliation may arise only when a WTO member fails to bring an inconsistent act into compliance within a reasonable time.[146]

A successful member first has to derogate from an international obligation in the same sector in which the underlying violation occurred.[147] Thereafter, derogation in a different sector is allowed if retaliation in the same sector proves to be impracticable or ineffective.[148] If derogation in a different sector is not adequate, then retaliation is permitted under any other agreement (this is called 'cross-retaliation').[149] If the losing member does not withdraw the measures that nullify and impede the WTO obligations within a reasonable time, the winning party can request that arbitration be established instead of retaliation. Article 21(3)(c) does not define what constitutes a reasonable time. A question arises whether this is dependent on the facts of an individual case. In the case of *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*,[150] Brazil was able to obtain relief for their complaint and the European Communities requested a reasonable time for implementation of the rulings. The arbitrators decided nine months would be a

[142] Ibid 531; Jason Bernstein and David Skully, 'Calculating Trade Damages in the Context of the World Trade Organization's Dispute Settlement Process' (2003) 25(2) *Review of Agricultural Economics* 385, 389; Butler and Hauser, above n 136, 527.
[143] Butler and Hauser, above 136, 527.
[144] See DSU article 22.3.
[145] Retaliation is a countermeasure which involves a derogation from an international obligation: resorting to this measure is justified by a State in response to a wrongful international act by another State. See Facundo Perez-Aznar and Marcelo Kohen, 'Countermeasures in the WTO Dispute Settlement System: An Analysis of their Characteristics and Procedure in the Light of General International Law' (Working Paper, Graduate Institute of International Studies, October 2005) 39.
[146] DSU article 22.
[147] '[T]he general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment', DSU article 22.3(a).
[148] DSU article 22.3(b).
[149] DSU article 22.3(c).
[150] Decision by the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute,* WTO Doc WT/DS269/13/ARB-2005-4/21 (20 February 2006).

reasonable period to implement the decision: in doing so, the arbitrators did not give reasons why they considered nine months as reasonable.[151]

The suspension of concessions is a temporary remedy.[152] The objectives of the DSU remedies are to compel a member to undertake the withdrawal of the measures which caused the nullification or impairment of the WTO obligations. Article 19.1 of the DSU is self-explanatory,[153] stating that the aim of the WTO remedies is to 'preserve future trade opportunities rather than past injuries'.[154] However, this position was not accepted in the case of *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*.[155] In this case, the issue was that Australia did not withdraw the prohibited subsidies after the DSB recommendations.[156] The US requested a panel be appointed under the DSU's Article 21.5. It was held that Article 4.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)[157] contemplated even retrospective losses.[158] The question arises whether Article 19.1 of the DSU permits retrospective remedies.[159] This question can be answered by interpreting Article 19.1 of the DSU and Article 4.7 of the SCM Agreement.[160] The clear meaning of Article 19.1 of the DSU is prospective rather

[151] Decision by the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute*, WTO Doc WT/DS269/13/ARB-2005-4/21 (20 February 2006) [84].
[152] See DSU article 22.8.
[153] 'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations', DSU article 19.1.
[154] Gavin Goh and Andreas R Ziegler, 'Retrospective Remedies in the WTO after Automotive Leather' (2003) 6(3) *Journal of International Economic Law* 545, 555.
[155] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by United States*, WTO Doc WT/DS126RW (21 January 2000).
[156] Ibid [1.4].
[157] 'If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn'. *Agreement on Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) annex 1A, ('*Agreement on Subsidies and Countervailing Measures*') article 4.7.
[158] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by United States*, WTO Doc WT/DS126RW (21 January 2000) [6.27] – [6.49]; see Patricio Grane, 'Remedies under WTO Law' (2001) 4(4) *Journal of International Economic Law* 755, 768.
[159] Petros C Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11(4) *European Journal of International Law* 763, 789.
[160] 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, vol 1155 UNTS (which entered into force on 27 January 1980) art 31.1; '[S]tatutory interpretation, as in constitutional interpretation, must be not for subjective, unenacted intent but for objective, enacted meaning of a legal text'. Laurence H Tribe, 'Judicial Interpretation of Statutes: Three Axioms' (1988) 11(1) *Harvard Journal of Law and Public Policy* 51, 51.

than retrospective, but Article 4.7 of the SCM Agreement is dissimilar because it states that the panel should rule on the time period within which the measure should be withdrawn.[161]

In the case of *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, the panel's interpretation of Article 4.7 being retrospective is contrary to Article 19.1 of the DSU and to the customary practice reflected in GATT/WTO jurisprudence, because Article 19.1 does not contemplate retrospective compensation.[162] An argument can be formulated that the DSU's Article 19.1 is contrary to the SCM Agreement's Article 4.7 in respect to recommending compensation. In such an instance, according to the DSU's Article 1.2, when there is a conflict between a covered agreement and the DSU, the DSU rules prevail. On that basis, it can be contended that the DSU remedies are prospective. This was evident from the case of *United States – Import Measures on Certain Products from the European Communities*.[163] In this case, the panel held that the WTO remedies were prospective.[164] This means that the panels do not grant retrospective remedies even though parties make an application for retrospective remedies.[165] A notable weakness of the WTO remedies is that they are not retrospective,[166] whereas for the ICSID and investment law, the remedies are retrospective and prospective.[167] Furthermore, remedies introduced in the WTO are typically remedies that can be invoked by a State. In contrast to this position, customary public international law remedies are prospective as well as retrospective in awarding compensation in international disputes.[168]

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[161] See Arwel Davies, 'Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?' (2006) 5(1) *World Trade Review* 31, 56.

[162] The United States refused to reimburse Sweden or adopt the GATT Panel Report in the case of *United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, GATT Doc ADP/47 (20 August 1990); see GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico*, GATT Doc ADP/82 (7 September 1992) [6.2]; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 21.5 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/RW/ECU (6 May 1999) [6.105].

[163] Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) [6.106]; Panel Report, *Canada – Measures Affecting the Export of Civil Aircraft under Article 21.5 of the DSU*, WTO Doc WT/DS70/RW (4 August 2000) [5.48].

[164] Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) [6.106]; Mark L Movsesian, 'Enforcement of WTO Rulings: An Interest Group Analysis' (2003) 32(1) *Hofstra Law Review* 1, 8; Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 1, 337.

[165] See Panel Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc WT/DS 60/R (19 June 1998) [8.1 and 8.6].

[166] Davies, above n 161, 55; Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 (3) *Journal of International Economic* Law 505, 505.

[167] Siqing Li, 'Convergence of WTO Dispute Settlement and Investor-State Arbitration: A Closer Look at Umbrella Clauses' (2018) 19(1) *Chicago Journal of International Law* 189, 194.

[168] See John Barker, 'The Different Forms of Reparation: Compensation' in James Crawford, Alain Pellet and Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press, 2010) 599, 604;

Investment law provides for primary and secondary remedies.[169] Primary remedies are the remedies that prevent the present and the future injury which directly result from a host State's action. The secondary remedies are the monetary damages given as compensation which arise where host States are taking over the property of investors for public purposes (see section 7.5.5).[170]

7.5.2 Countermeasures

Customary international law provides countermeasures as a remedy for internationally wrongful acts,[171] which is imposed proportionately.[172] This resembles the WTO countermeasures. Article 22.4 of the DSU permits a corresponding amount of nullification or impairment: this is meant to proportionately remedy the injury suffered by a member due to a violation of a WTO obligation by another member.[173] According to Mitchell, international law countermeasures are determined '... on the harm caused rather than the culpability of the actor or the need to induce compliance'.[174] However, the public international law also provides for proportionality taking into account the injury suffered by a party and the gravity of the fault.[175] A salient feature of the WTO countermeasures is that they can be used for sector withdrawals.[176]

Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 1, 337; *International Law Commission Draft Articles on State Responsibility Adopted on First Reading in 1996*, UN General Assembly Official Records (GAOR), 51st sess, Supp No 10, UN DocA/51/10 (1996) article 42.

[169] Anne Van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 721,724.

[170] Alan 0. Sykes 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34(2) *Journal of Legal Studies* 631, 662.

[171] 'An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two'. Draft Articles on States for Internationally Wrongful Acts adopted by the Law Commission at its 53rd sess. Supp. No. 10 (a/56/10) (2001) article 49(1).

[172] 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. Draft Articles on States for Internationally Wrongful Acts adopted by the Law Commission at its 53rd sess. Supp. No. 10 (a/56/10) (2001) article 51.

[173] See also footnote 9 of Article 4.10 and footnote 10 of Article 4.11 ('[t]he expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited)' of the *Agreement on Subsidies and Countervailing Measures*; Andrew D Mitchell, 'Proportionality and Remedies in WTO Disputes' (2007) 17(5) *The European Journal of International Law* 985, 995.

[174] Ibid.

[175] *Responsibility of States for Internationally Wrongful Acts 2001*, GA Res 56/83 (12 December 2001) and corrected by document A/56/49 (vol. I) Corr.4, article 55.

[176] '… the complaining party should first seek to suspend concessions or other obligations with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment'. DSU, article 22.3(a).

A countermeasure is a remedy which permits retaliation against non-compliance with a decision and has DSB authorisation.[177] International investment arbitration does not provide for countermeasures as a remedy and it is not practicable for this form of remedies as most cases involve States and investors. A remedy available to investors, that is, the seizure of assets, is common for the recovery of money due to judgment against a debtor in a municipal law of a country.

7.5.3 Provisional Measures

Provisional measures are interim orders which prevent the further occurrence of a wrongful act while the case is pending. The DSU does not include provisions for interim orders,[178] and is therefore unable to stay further violation of the WTO agreements[179] while the case is pending.[180] This is evident from the case of *US – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*.[181] Here, Australia challenged the US-imposed safeguard tax on lamb meat imported from Australia and New Zealand to discourage imports. The panel and the Appellate Body held that the US failed to establish a nexus of imports of lamb from Australia and New Zealand which damaged the US lamb industry.[182] The US was able to operate the so-called safeguard measure until the decision of the Appellate Body, losing export revenues for Australia and New Zealand.[183] However, the investment law provides for provisional measures.

The ICSID Convention provides provisional measures, such as stay orders, as a temporary remedy to preserve the status quo of the subject matter such as the withdrawal of assets and to preserve the rights of the commercial transactions of parties under Article 47 of the ICSID.[184] The question arises as to whether the use of the word 'rights' authorises arbitrators to prevent the activities of a State.

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[177] Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' above n 159, 766.
[178] See Davies, above n 161, 57.
[179] See Kessie, above n 2, 142.
[180] See Ibid 142; Butler and Hauser, above n 136, 527; *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc TN/DS/W/15 (25 September 2002) [5].
[181] Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WTO Doc WT/DS177/R (21 December 2000).
[182] Ibid [8]; Appellate Body, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WTO Doc WT/DS177/AB/R WT/DS178/AB/R (1 May 2001) [197].
[183] Islam, above n 9, 454.
[184] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) (*ICSID Convention*) article 47; *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 1, 337.

When interpreting the ICSID Convention's Article 47, the arbitrators should consider the objectives of the Convention and its *Travaux Préparatoires*. The drafters did not include the wording that tribunals may 'prescribe' provisional measures because 'if there was any damage [due to noncompliance with a provisional measure] it could be included in the final award'.[185] Instead, they included the wording that the tribunals may 'recommend' provisional measures. The effect is that host States are not bound by such recommendations.[186] Therefore, the provisional measures recommended under the ICSID Convention's Article 47 are confined only to a State's commercial activities rather than restricting a State's sovereign authority, as the ICSID Convention provides that the role of arbitrators is to 'recommend' provisional measures, and not to 'prescribe'. An argument can be formulated that host States are not bound by provisional measures according to the *Travaux Préparatoires* and Article 54(1) of the ICSID Convention which states that:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[187]

According to the ICSID Convention's Article 54(1) and the *Travaux Préparatoires,* it can be contended that States are not bound to recognise provisional measures and that States shall recognise only awards. Nowhere in the ICSID Convention states that the provisional measure is an award and 'there is no direct sanction for not following the recommendation of the Tribunal'.[188] This view is further supported by Broches who stated that if a State does not accept a recommendation, this could be considered at the final award to enhance the damages.[189] The word 'acceptance' is used in the *Travaux Préparatoires* to establish that members are not bound to follow provisional recommendations. This position is evident from Article 54 of the ICSID Convention which states that the term 'award' covers 'pecuniary obligations'. Furthermore, it is evident that States are not bound by provisional measures from ICSID's Additional Facility.[190] In 1978, members introduced new

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[185] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 813.
[186] Ibid 655.
[187] *Convention on the Settlement of Investment Dispute between States and Nationals of Other States* (entered into force 14 October 1966)(ICSID Convention) article 54.
[188] See *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 813.
[189] Ibid 813.
[190] *ICSID Additional Facility Rules* (ICSID/11 April 2006) article 46(4).

administrative rules by way of the Additional Facility and they agreed to review it in 1983, but in 1984 they did not terminate the Additional Facility.[191] The Additional Facility provides that parties to the dispute can make an application for interim measures in a domestic court for provisional measures[192] with a similar section found in the UNCITRAL Arbitration Rules.[193]

The ICSID Convention is silent on issuing injunctions and rules for specific performance. However, Schreuer, and also Sebastian and Sinclair, argued that arbitrators under the ICSID Convention have the power to issue permanent injunctions and rules for specific performance.[194] Their views are difficult to accept because, in the *Travaux Préparatoires*, States discussed the nature of performance and their view was that it related to damages.[195] This means that the ICSID Convention does not provide rules for specific performance and injunctions, providing only for provisional measures. This is established from the negotiation history of the ICSID Convention. If States had agreed to establish specific performance or injunctive relief under the ICSID Convention, this could have been expressly provided, along with provisional measures. Furthermore, if specific performance or injunctive relief was granted, it would undermine the sovereignty of members.

The member States can have recourse to their sovereignty as a shelter and refuse to perform the recommendation. That is why Article 1135 of the NAFTA Chapter 11 limits tribunals to make awards for monetary damages. Likewise, Article 26(8) of the Energy Charter provides rules for monetary damages if a breach has taken place.[196] It can be argued that, as provisional measures have been introduced by the ICSID Convention, therefore, it is inevitable that injunctive relief should be granted but, in the *Travaux Préparatoires*, this proposition is not supported. Therefore, it is clear that the WTO DSM mechanism does not provide rules for provisional measures but under investment arbitration arbitrators are

[191] *ICSID Annual Report 1984*, 17.
[192] *ICSID Additional Facility Rules* (ICSID/11 April 2006) article 46(4).
[193] *UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration* (with new article 1, para 4 as adopted in 2013) (United Nations, New York, 2014) 26(9).
[194] Christoph Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 20(4) *Arbitration International* 325, 331; Thomas Sebastian and Anthony C Sinclair, 'Remedies in WTO Dispute Settlement and Investor-State Arbitration Contrast and Lessons' in Jorge A Huerta-Goldman and Antoine Romanetti (eds) *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 273, 281.
[195] *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication, 2006) vol II part 2, 991.
[196] *Energy Charter Treaty* (ECT) (entered into force 24 April 1998).

empowered to issue provisional measures and they make awards which can be enforced in national courts but the decisions of the DSB are implemented by States in bringing the measure in compliance with the WTO rules. In contrast to this procedure, the ICSID Convention provides rules for either party to a dispute by informing the ICSID Secretariat of the implementation of an award and there is no binding effect on it as with the WTO remedies. The enforcement of awards under the ICSID Convention are done in national courts as discussed in Chapter 6.[197]

7.5.4 Enforceability of the Recommendations

Under the DSU, enforcement of the recommendations takes the form of the suspension of concessions (tariffs) given to the respondent State. Whether or not the losing party complies with the recommendations is monitored by a compliance panel (more often the original panel), while the time period for compliance is determined by binding arbitration.[198] To make the rulings effective, the WTO members adopt the decisions of the panel and the Appellate Body.[199]

A recommendation is a manifestation of a determination by the panel or Appellate Body (after hearing the parties) that a breach of a WTO obligation has been committed by a member: the recommendation forms part of the decision of the panel and the Appellate Body.[200] The panel or Appellate Body recommends that the losing party becomes compliant with the WTO obligations. However, the losing party has greater freedom in choosing the suitable remedies.[201]

The DSB adopts the recommendations and the recommendations can then be implemented. The recommendations become international obligations for the losing party to obey the WTO obligations.[202] Adoption of the panel and Appellate Body reports can be prevented

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[197] Petr Polasek and Sylvia T Tonova, 'Enforcement against States: Investment Arbitration and WTO Litigation' in Jorge A Huerta-Goldman and Antoine Romanetti (eds) *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International, 2013) 357, 386.

[198] DSU article 21(c).

[199] Louise Johannesson and Petros C Mavroidis, 'The WTO Dispute Settlement System 1995–2016: A Data Set and Its Descriptive Statistics (2017) 51(3) *Journal of World Trade* 357, 358.

[200] Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place'above n 159, 783.

[201] Ibid 779; Bernard M Hoekman and Petros C Mavroidis, 'Policy Externalities and High-tech Rivalry: Competition and Multilateral Cooperation beyond the WTO' (1996) 9(2) *Leiden Journal of International Law* 273, 318.

[202] '... there is a certain sense in which legal obligation may be said to arise ex consensus; the obligations of a contract in civil law, or of a treaty in international law, clearly arise in that way.' Hersch Lauterpacht and C H M Waldock, *The Basis of Obligation in International Law* (Oxford University Press, 1958) 10; Lotus P. (France vs Turkey) (Judgement) [7 September 1927] PCIJ (ser A) No 10; See John H Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) *American Journal of International Law* 60, 60, 61.

only by consensus of member countries, and contrary to this position, the GATT panel decisions are adopted by consensus of all members.[203] Recommendations are formulated in specific terms and, therefore, the question arises as to whether the losing party is bound to implement the recommendations.[204] Jackson and Mavroidis argued that recommendations are binding on the losing member because once recommendations are adopted, they become international obligations. According to these authors, compliance with the recommendations is monitored until they are implemented.[205] Mavroidis and Jackson's views can be accepted on the grounds that the losing member can select an alternative remedy not prescribed in the recommendation made by the panel or the Appellate Body. For example, mutually acceptable compensation,[206] some other form of solution that is mutually acceptable to the parties, or even that the parties can use some other forum such as arbitration to solve the level of nullification.[207]

The WTO panel and the Appellate Body should recommend that a measure be brought into conformity with covered agreements but they do not award damages. They make recommendations for compliance with the WTO obligations. Therefore, one can argue that even the WTO remedies are not binding on the parties. The answer is that, even though the panel and the Appellate Body make recommendations, once these recommendations are adopted, members are bound to comply unless parties mutually agree with a settlement. In contrast to the WTO's position, the investment arbitration does not create a rules-based judicial dispute settlement system for investment. The reason is that often the investment arbitration's award is questioned on the basis of public policy. A State may refuse to enforce an investment award on the ground of the immunity of States or difficulties that may arise at the execution stage, as the law of the enforcing State is applicable to the execution of the award. It is therefore questionable whether domestic courts will provide sufficient guarantees to foreign investors when a dispute arises between an FDI host State and an investor or investing State.[208] There is no appellate mechanism. To establish a rules-based

[203] Jurgen Kurtz, *The WTO and International Investment Law*: *Converging Systems* (Cambridge University Press, 2016) 231.
[204] See DSU articles 21.3(a), (b) and (c).
[205] John H Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) *American Journal of International Law* 60, 61; Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' above n 159, 788.
[206] DSU article 22.2.
[207] DSU article 22.8.
[208] UNCTAD, *Course on Dispute Settlement, International Center for Settlement of Investment Disputes* (UN, New York and Geneva, 2003) (UNCTAD/EDM/Misc.232) 3.

judicial system, there should be an appellate mechanism which is lacking in international investment law.[209]

Despite the above-mentioned weaknesses of the enforcement of arbitral awards, the WTO member States still have not agreed on a CIIA that is similar to the WTO trade agreements with an investment dispute settlement mechanism.[210] Such an agreement would need to be built upon a DSM, as is found within the WTO agreements, such as the GATT and GATS. If the WTO fails to introduce FDI under the WTO and fails to establish a CIIA, it will have failed to meet the demand of most of its member States and will particularly have failed to provide socio-economic justice to LICs. As a result, it is inevitable that the WTO will become an ineffective and irrelevant organisation.[211] Even though there is not a CIIA, the ICSID Convention also has introduced a DSM to provide damages.

7.5.5 ICSID Remedies under Investment Arbitration

Arbitral tribunals can order host States to pay monetary damages. The ICSID arbitration provides for monetary compensation under Article 54(1) of the ICSID Convention, but the Convention does not elaborate on the mechanism for computing damages or compensation. As a result, awarding compensation is controversial, lacks coherence and has no institutional approach for determining damages.[212] Compensation must be determined depending on whether the expropriation of investment property is lawful or unlawful. If the expropriation is lawful, then an investor can recover fair compensation for the investment and interest up to the date of the compensation.[213] However, if the expropriation is determined as an illegal act, then an investor is entitled to full compensation.

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[209] Johanna Kalb, 'Creating an ICSID Appellate Body' (2005) 10(1) *University of California Los Angeles (UCLA) Journal of International Law and Foreign Affairs* 179, 185; G. Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44(5) *Duke Law Journal* 829, 834.

[210] WTO, *Trade and Investment: Technical Information of Agreement on Trade-Related Investment Measures*, <https://www.wto.org/english/tratop_e/invest_e/invest_info.e.htm,1>; 'Trade and Foreign Direct Investment', WTO News: 1996 Press Release, WTO Doc. Press /57 (9 October 1996). <https://www.wto.org/english/news_e/press96_/pr057_e.htm>; Martin Khor, 'The "Singapore Issues" in the WTO: Implications and Recent Developments' (Third World Network (TWIN), November 2004) 1, 2; Tomer Broude, 'Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law' (2013) 9(1) *Jerusalem Review of Legal Studies* 24, 25.

[211] See Walden Bello, *There is a Life after Cancun* (Bangkok Post, 21 September 2003) available at Global South <https://focusweb.org/node/160> accessed on 16 July 2017, 2.

[212] Sebastian and Sinclair, above n 194, 283.

[213] *The Factory at Chorzow* (Claim for Indemnity) (The Merit) *Germany v Poland* (Judgement) [1928] No.13 PCIJ 5, 47.

Consequential damages are also granted by investment tribunals. In the case of *Compania De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*,[214] it was held that, if an investment agreement does not place limits on damages, the investment tribunals have unfettered authority to fully award damages to the affected investor irrespective of the types of investment and the nature of the wrongful act.[215] In this case, the tribunal considered 'liquidation value', 'book value' and the amount invested by the investor to calculate damages.[216] No yardstick is available for determining the damages. This position is further complicated by breaches of the NT clause and the equitable protection of investment clause by a host State. No clear methodology is found in investment law for assessing damages for these breaches.[217] For example, the NAFTA or ICSID does not provide rules to assess damages for breaches of the NT and equitable protection clauses and tribunals are allowed to address these issues on a case-by-case basis.[218] In some cases, arbitrators consider the facts of individual cases (particularly to protect investors' rights) to determine the methodology to adopt for computing damages.[219]

The Draft Articles of the International Law Commission on State Responsibility indicate that if a State does an internationally wrongful act,[220] it is the duty of that State to remedy such a wrongful act by compensation.[221] An international wrongful act has been defined in the Draft Law Commission Report on State Responsibility as an act or omission that could be attributed to a State or a violation of an international obligation.[222] The Draft Articles refers to 'reparation' but it does not define it. It provides three remedies for a breach through an internationally wrongful act, namely: 'restitution, compensation and satisfaction'.[223] The first remedy is to bring the matter to the situation that was in place before the wrongful act

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[214] *Compania De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (Award) (20 August 2007) ICSID Case No. ARB/97/3.
[215] Ibid [8.2.7].
[216] Ibid [8.1.5].
[217] *S.D. Myers Inc. v. Canada* (Second Partial Award) (21 October 2002) [94].
[218] Ibid.
[219] *CMS Gas Transmission Company v The Argentine Republic* (Award) (12 May 2005) ICSID Case No. ARB/01/08 [410] and [422].
[220] *International Law Commission, Draft Article on State Responsibility for Internationally Wrongful Acts* 55th sess, UN Doc Supp.No10(A/56/10 (10 August 2001) article 1.
[221] *International Law Commission, Draft Article on State Responsibility for Internationally Wrongful Acts* 55th sess, UN Doc Supp.No10(A/56/10 (10 August 2001) articles 30 and 31.
[222] The breach of trade law be considered as internationally wrongful act. See DSU article 22:1 and 8.; Sungioon Cho, 'The Nature of Remedies in International Law' (2004) 65(4) *University of Pittsburgh Law Review* 763, 772; *International Law Commission, Draft Article on State Responsibility for Internationally Wrongful Acts* 55th sess, UN Doc Supp.No10(A/56/10 (10 August 2001) article 2; Sebastian and Anthony C Sinclair above n 194, 274.
[223] *International Law Commission, Draft Article on State Responsibility for Internationally Wrongful Acts* 55th sess, UN Doc Supp.No10(A/56/10 (10 August 2001) article 34.

was committed (*status quo ante*).[224] The second remedy is compensation with damages assessed monetarily,[225] while the third remedy is acknowledgment and withdrawal of the wrongful act.[226] These remedies are quite alien to the WTO remedies. It is therefore necessary to investigate the remedies available under investment arbitration and how these remedies deviate from and are different to the WTO remedies and the Draft Law Commission on State Responsibility for Internationally Wrongful Acts.

A remedy of *restitutio integrum* is granted in rare cases under investment arbitration. This is evident from the case of *Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic* (*Limaco v Libya*).[227] In this case, both restitution and damages were sought by the claimant but the ICJ awarded only damages. Domestic courts do not grant restitution as a remedy, which is allowed in exceptional circumstances.

7.6 Development of a Coherent and Predictable Body of Jurisprudence

7.6.1 Rules-Based Investment Law Regime

To establish predictability to investment law and to create a legal regime, it is necessary to have a uniform system of law. Article 3.2 of the DSU is the central element that provides security and predictability to the WTO system, allowing the panels and the Appellate Body to interpret the covered agreements in accordance with the rules of customary international law. The ICSID Convention does not have a similar provision and it does not mention the applicable law to investment disputes (Chapter 5 discussed the applicable law to investment law) as the DSU does. Panels and the Appellate Body endeavour to develop trade law through treaty interpretation. The absence of such framework is one of the major shortcomings in investment arbitration. However, arbitrators have a lack of interest in creating a uniform rationale for decisions and this threatens, and makes it difficult for, host States to enact regulations for sustainable development as these initiatives, at times, might bring with them the liability of a treaty violation because the investment law is investor-friendly.[228] In other words, investment law does not establish a level playing field for host States: if a regulatory measure is introduced, host States do not know what the outcome would be as there is no binding authority from a prior ruling in similar circumstances. The

[224] Ibid article 35.
[225] Ibid article 36.
[226] Ibid article 37.
[227] *Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic* 62 ILR (12 April 1977).
[228] Razeen Sappideen and Ling Ling He, 'Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement' (2012) 40(2) *Federal Law Review* 207, 219.

reason is that investment law differs from case to case and treaty to treaty. This is evident from the case of *Romack SA (Switzerland) v The Republic of Uzbekistan*.[229] In this case, the arbitrators reasoned that their duty was not to establish a uniform legal system, but:

> Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.[230]

The view expressed in the case of *Romack SA (Switzerland) v The Republic of Uzbekistan* indicates that arbitrators in investment cases try to ignore the co-principles of treaty interpretation in a consistent manner and the preparatory work of the treaties, and the result is that investment law has become uncertain.

This inconsistency is further revealed in the case of *Saipem SpA v The People's Republic of Bangladesh*.[231] In this case, it was stated that arbitrators are not bound to follow the previous award and that they can consider the previous decisions only if the principle of 'subject to compelling contrary grounds' is established.[232] This is a strict test which means that rigid rules have been laid down to not follow the previous decisions and according to arbitrators' 'different solution[s]' to 'the same problem', thus making investment law complex.[233] Precedent is not applied to investment cases due to the lack of a hierarchical structure in the investment legal system, with investment cases heard by arbitrators on an ad hoc basis in different localities.[234] In addition, no effective permanent Appellate court

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[229] *Romack SA (Switzerland) v The Republic of Uzbekistan* (Award) (26 November 2009) PCA Case No AA 280.
[230] Ibid [171].
[231] *Saipem SpA v The People's Republic of Bangladesh* (Award) (30 June 2009) ICSID Case No. ARB/05/07.
[232] Ibid [90].
[233] *Note by the Secretariat, Possible Reform of Investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss* (UN Doc. A/CN/WG.III/WP.170 9 August 2019) para 21; *AES Corporation v The Argentine Republic* (Jurisdiction) (26 April 2005) ICSID Case No. ARB02/17 [30].
[234] 'There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals'. *SGS Societe Generale de Surveillance SA v Republic of Philippine*s (Decision of the Tribunal on Objections to Jurisdiction) (29 January 2004) ICSID Case No.ARB/02/6,1,37 para 97; Alec Stone Sweet, Michael Yunsuck Chung and Adam Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration' (2017) 8(4) *Journal of International Dispute Settlement* 579, 583; Richard C. Chen, 'Precedent and Dialogue in Investment Treaty Arbitration'(2019) 60(1*) Harvard International Law Journal* 47, 47.

exists, with this being a pressing need with a plenary jurisdiction.[235] However, while the arbitrators are not bound by precedent, tribunals try to follow the interpretation given by other tribunals, though not as a stare decisis established under international law.[236] In contrast to the above position in investment arbitration, decisions of the WTO panel and the Appellate Body are often considered and binding on subsequent panels.[237] For example, the Appellate Body's report on the case of *Japan – Taxes on Alcoholic Beverages*, stated:

> Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[238]

The trade law does not consider a measure is unjustifiable or discriminatory if the purported measure is introduced for a valid and sustainable economic development purpose (legitimate expectation).[239] For instance, the decisions adopted by panels and the Appellate Body play an important part in influencing the panels and the Appellate Body in subsequent cases. Even panel decisions that are not adopted are important in guiding subsequent panels in the WTO legal system.[240] However, the effectiveness of the binding force of the decisions of panels and the Appellate Body cannot be considered in the context of municipal law.[241] David, Bhala, Palmeter and Mavroidis state that the decisions of the WTO AB have a very strong persuasive authority to create a de facto precedent.[242] This is

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[235] MacRae, above n 80, 384; Albert Jan van den Berg, '*Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions*'above n 73, 157.

[236] Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration *A Citation Analysis of a Developing Jurisprudence*' (2007) 24(2) *Journal of International Arbitration* 129, 158; Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009) 60.

[237] Sweet, Chung and Saltzman, above 234, 582.

[238] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 14.

[239] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS/AB/R (29 April 1996) 17; See GATT Article XX; Andrew D. Mitchell and Caroline Henckelst, 'Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law' (2013) 14(1) *Chicago Journal of International Law* 93 ,99; WTO panels are bound by interpretation given by the Appellate Body on the same legal issues. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [21] and [162].

[240] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 13.

[241] David, above n 18, 18. In the municipal laws of countries, especially those of common law countries, lower courts are bound by the decisions given by the apex courts, if the facts are similar or relevant. The lower courts cannot refuse to follow such binding judgments.

[242] David, above n 18, 6; Raj Bhala, 'Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)' (2001) (4 and 5) *George Washington International Law Review* 873, 876; Palmeter and Mavroidis, 'The WTO Legal System: Sources of Law' above n 20, 401.

because the decisions of the panel and the Appellate Body should safeguard the 'legitimate expectations' of WTO members to protect regulatory autonomy of states.[243] This position is further supported by Articles 3.2, 11 and 19.2. Article 3.2 of the DSU, which indicates that the DSU should ensure 'security and predictability to the multilateral system' in resolving a present dispute.[244] This means that decisions of the panel and Appellate Body should have the effect of precedents and preserve legitimate expectation as enunciated in *US – Gasoline* case.[245]

The panel and Appellate Body decisions have persuasive authority in future disputes according to Article 3.2 of the DSU.[246] Article 11 of the DSU states that it is the duty of the panel to investigate a matter by making an 'objective assessment' to achieve 'conformity' of the 'covered agreements' to 'assist the DSB'. This means that the DSU rules expect that the decisions of the panel and the Appellate Body should form and impart the uniformity and consistency that are common characteristics of a legal system. This is reinforced by the Appellate Body in *US – Stainless Steel*:

> The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[247]

This position is further supported by Article 19.2 of the DSU which does not allow the panel and the Appellate Body to dilute the obligations in the 'covered agreements' through interpretation and this establishes a hierarchical binding authority. The 'covered agreements' therefore infuse lifeline blood to the WTO for its survival as a uniform legal system in the world. This is evident in the *US – Stainless Steel* case where it was held that

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[243] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 14; see also Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 203, 235.

[244] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [160].

[245] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS/AB/R (29 April 1996) 17.

[246] '[The Appellate Body is] deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system …'. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [162].

[247] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [161].

the panel could be prevented from following a previous decision only if there were 'cogent reasons'.[248] There is no such a uniform legal system for investment law since the applicable law differs one case to another as observed in the complexity of investment arbitration discussed in Chapter 5.

Furthermore, it can be argued that the reports of the WTO panel and the Appellate Body have a *de facto* effect and that no *de jure* precedent is applicable to the WTO cases.[249] The decisions of the WTO panel and the Appellate Body cannot be considered as having no binding effect. The Appellate Body has guarded the WTO system as a coherent legal system and has directed panels to follow that role. For example, the panel in the case of *United States – Import Prohibition of Certain Shrimps and Shrimp Products* did not interpret the ordinary meaning of Article XX (b and g) of the GATT in the context of the object and purpose of the exceptions enshrined in Article XX.[250] On appeal, the Appellate Body decided that the panel did not interpret Article XX according to the ordinary meaning[251] and held that the panel had erred in finding the measure introduced by the US to be an unjustifiable discrimination.[252] The Appellate Body also held that the panel did not apply the principles laid down in the *US – Gasoline* case.[253] In the *Gasoline* case, it was held that, when interpreting the paragraphs (a to j) of Article XX of the GATT, due consideration should be given to the object and the purpose of the 'introductory clause of the Article XX' of the GATT.[254] The position is further reinforced in the Appellate Body's introduction of a methodology for anti-dumping cases.

The purpose of discussing zeroing below is to show a predictable development of WTO jurisprudence to establish the rule-based DSM. In determining anti-dumping duties, the Appellate Body deviated from panels' zeroing approach [255] as it was not a fair methodology

[248] Ibid [51].
[249] Raj Bhala, 'Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)' (2001) (4 and 5) *George Washington International Law Review* 873, 876.
[250] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/R (15 May 1998) [7.29].
[251] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [115].
[252] Ibid [116 and147]
[253] Ibid [115].
[254] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc WT/DS/AB/R (29 April 1996) [22].
[255] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* WTO Doc WT/DS264/AB/R [138 and 139].

with which to determine the anti-dumping margin.[256] In the case of *United States – Measures relating to Zeroing and Sunset Reviews* (Japan),[257] the panel refused to follow the adopted Appellate Body report,[258] namely, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") (European Communities [EC]).[259] Zeroing is a method adopted to calculate and identify the margin for the dumping of goods by a country.

The Anti-Dumping Agreement provides a mechanism to compare a like product introduced by a country to another product to determine whether or not it was dumped on the basis of 'export price' and the 'normal value' at which it is sold in the course of trade;'[260] however, it does not elaborate a methodology for how it should be computed.[261] In such a comparison, if the export prices surpass the attributed normal value, then there is a dumping margin.[262] For this comparison, a large amount of transactions are included.[263] Panels have held that the zeroing interpretation is not contrary to Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Antidumping Agreement.[264] The Appellate Body held that 'zeroing applied by panels violated [the] Anti-Dumping Agreement and the GATT

[256] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/AB/R (18 April 2006) [86]; Bernard Hoekman and Jasper Wauters, 'US Compliance with WTO Rulings on Zeroing in Anti-Dumping' (2011) 10(1) *World Trade Review* 5, 8.
[257] Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* WTO Doc WT/DS322/R (20 September 2006).
[258] Ibid [7.99].
[259] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/AB/R (18 April 2006) [263].
[260] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) annex 1A ('*Anti-Dumping Agreement'*) article 2.1.
[261] The US has introduced a methodology which provides calculations beginning from zero.[261] This means that an authority of a State compares the weighted average prices of identified exporters' transactions against the attributed average normal value and considers the result of the comparison to be zero. Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/R (31 October 2005) [2.2]; Jurgen Kurtz, *The WTO and International Investment Law* (Cambridge University Press, 2016) 236, footnote 35.
[262] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/R (31 October 2005) [2.3].
[263] For example, suppose there is a series of transactions totalling 150, of which the first 75 transactions are 15% lower than the normal export value while the second 75 transactions are 30% higher than the normal export value. The transactions that are 15% lower become dumping (positive margin) while the transactions that are 30% higher than the normal export value are not dumping (negative margin). The margins of the first group of transactions are calculated as zero margins. The determination of zero margins is assigned to the second group of transactions, but the negative margin cannot be used to balance the positive margin. As a result, the amount of the margin becomes unreasonably high. Bernard Hoekman and Jasper Wauters, 'US Compliance with WTO Rulings on Zeroing in Anti-Dumping' (2011) 10(1) *World Trade Review* 5, 7; David, above n 18,12.
[264] See Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS 344/R (20 December 2007) [8.1(c) and (d)]; Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WTO Doc WT/DS344/AB/R (30 April 2008) [4].

1994'.[265] The Appellate Body has taken prompt action to establish a superior judicial organ to order panels to comply with its decisions to bring predictability and to ensure regulatory autonomy of States which can be used to balance investors' and host States' rights.[266]

7.6.2 Development of Investment Law for Equitable Economic Order

The objective of trade and investment law is to create an equitable economic order in the world. Social equity can be a concept that permits fair treatment for every segment of society. Free trade and fair trade are not mutually exclusive. Social equity can be achieved only through sustainable economic development. To achieve sustainable economic goals, host States should have the regulatory flexibility to make law for the welfare of people.[267] Therefore, States must be allowed to promote sustainable development by making laws that benefit their people and protect the environment.[268] To achieve sustainable economic goals, trade alone is not sufficient, investment is a necessary factor. Sustainable economic goals cannot be achieved only by protecting investors' rights, it should also be able to protect host States' rights.[269]

To a certain extent, BITs now also recognise the regulatory autonomy of host States.[270] Investors have successfully challenged host States' regulatory authority and arbitrators are

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[265] Appellate Body, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/AB/R (18 April 2006) [264]; Appellate Body, *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India* WTO Doc WT/DS141/AB/R (1 March 2001) [66]; Appellate Body, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("zeroing") WTO Doc WT/DS294/AB/R (18 April 2006) [134].

[266] *WTO News, Farewell Speech of Appellate Body Member Ricardo Ramirez-Hernadez* (28 May2018) available at<https://www.wto.org/english/trap_e/dispu_/ricardoramirezfarewellspeech_e.htm> accessed on 21 February 2020; Michael Ming Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' (2011) 14(3) *Journal of International Economic Law* 639, 666.

[267] Anne van Aaken and Jürgen Kurtz, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism' *Journal of International Economic Law* (2019) 22(4) 601 603; *2012 U.S. Model Bilateral Investment Treaty article* 12(5); James Zhan and Moritz Obst, 'UNCTAD's 2017 High-level IIA Conference: Moving Forward on Addressing Older-Generation International Investment Agreements'(2017) 8(4) *Online Quarterly Journal on Investment Law and Policy from a Sustainable Development Perspective* available at <www.iisd.org/itn> accessed on 22 January 2018, 7.7.

[268] Aaken and Kurtz, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism' above n 267; *2012 U.S. Model Bilateral Investment Treaty article* 12(5); Zhan and Obst, above n 267.

[269] For example, initially, the US policy towards investment was to protect investors and their investment. This approach has shifted as measures introduced by a government, such as those aimed at preserving public health and the environment, do not constitute an indirect expropriation of investment. *2012 U.S. Model Bilateral Investment Treaty* annex B(4)(b); The US is reluctant to give its approval to the proposed Trans-Pacific Partnership (TPP) Agreement. *EU Finalises Proposal for Investment Protection and Court System for TTIP*, European Commission Press Release, IP/15/6059 (12 November 2015); August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Arbitration' (2016) 19(4) *Journal of International Economic Law* 761, 766; Laurie A. Buonanno, 'The New Trade Deals and the Mobilisation of Civil Society Organizations: Comparing EU and US Responses' (2017) 39(7) *Journal of European Integration* 795, 796.

[270] 'Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity

yet to capture the significance of the regulatory autonomy of States when deciding cases.[271] For example, in the case of *Occidental Petroleum Corporation Occidental Exploration and Production Company vs The Republic of Ecuador*, Occidental made a complaint against Ecuador for terminating a contract (participation contract),[272] into which Occidental had entered to explore and exploit hydrocarbons in Ecuador.[273] Occidental contended that Ecuador's measure was arbitrary and without legal basis.[274] Ecuador argued that its measure was to raise the State's revenue and that this right was exclusively vested to a State.[275] The tribunal, although recognising that Ecuador has sovereign rights to impose taxes,[276] nevertheless held that Ecuador had violated fair and equitable treatment (which amounted to the breach of legitimate expectation of investment),[277] as enshrined in Article II:3(a) of the Investment Treaty between the US and Ecuador.[278]

Therefore, a regulatory tension prevails in investment law as arbitrators do not balance the regulatory autonomy of States against the legitimate expectations of investors.[279] No clear definition is available of what constitutes legitimate expectations. It is decided according to the facts of the case and it depends on the arbitrators' analysis of legitimate expectations under fair and equitable treatment.[280] The doctrine of legitimate expectation is used by

in its territory is undertaken in a manner sensitive to environmental concerns'. *2012 U.S. Model Bilateral Investment Treaty* article 12(5); *Government of Australia and the Government of the Republic of Korea Free Trade Agreement (KAFTA)* (entered into force on 12 December 2014) article 22:1 (3).

[271] *Murphy Exploration & Production Company-International v The Republic of Ecuador (*Partial Final Award) (6 May 2016) (UNCITRAL) 1, 75 para 243 and 136 para 441; *Occidental Petroleum Corporation Occidental Exploration and Production Company vs The Republic of Ecuador* (Award) (5 October 2012) ICSID Case No**.** ARB/06/11 [456 and 529]; *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador* (Decision on Remaining Issues of Jurisdiction and Liability) (12 September 2014) ICSID Case No ARB/08/06 [591].

[272] *Occidental Petroleum Corporation Occidental Exploration and Production Company vs The Republic of Ecuador* (Award) (5 October 2012) ICSID Case No. ARB/06/11 [1 and 203].

[273] Ibid [1 and 2].

[274] Ibid [206].

[275] Ibid [470].

[276] Ibid [529].

[277] '… when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate'. *Occidental Petroleum Corporation Occidental Exploration and Production Company vs The Republic of Ecuador* (Award) (5 October 2012) ICSID Case No. ARB/06/11 [530]; *Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment*; *Occidental Petroleum Corporation Occidental Exploration and Production Company vs The Republic of Ecuador* (Award) (5 October 2012) ICSID Case No. ARB/06/11 [876].

[278] *Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment* (entered into force 11 May 1997).

[279] Nicolas M Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) 8(4) *Journal of International Dispute Settlement* 673, 693.

[280] *Spyridon Roussalis v Romania* (Award) (7 December 2011) ICSID Case No. ARB/06/1 [318]; Nicolas M Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights' (2017) 8(4) *Journal of International Dispute Settlement* 673, 689; Kenneth J. Vandevelde, 'A Unified

arbitrators to protect the interest of investors and it is not the precedent.[281] Legitimate expectation of investors endorses the protection of investment from unreasonable and discriminatory actions of host States which frustrate investors' expectations for profits and the conduct of business at the time investment was made.[282] This definition does not cover host States' regulatory autonomy to make laws for sustainable economic development. If the arbitrators consider the concept of legitimate expectation, a question arises as to whether a host State can make laws to achieve sustainable economic goals.

A new interpretation of the law of frustration should be given to international investment law to justify a reasonable and legitimate State's rights, with this subsequently introduced for sustainable economic development purposes.[283] The question arises regarding what is understood by the term 'expectations of investors'? Is this referring to maximising profits? Is it related to States' guarantee to secure a transparent environment where investors can conduct business or to a State's violation of the due process of law which hinders investors in conducting their business or maintaining the condition that prevailed at the time

Theory of Fair and Equitable Treatment' (2010) 43(1) *New York University Journal of International Law and Politics* 43, 48.

[281] 'A third element is the frustration of expectations that the investor may have legitimately taken into account when it made the investment. The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious'. This ignores and undermines host States' regulatory autonomy to make laws for sustainable economic development. *Azurix Corp V The Argentine Republic* (Award) (14 July 2006) ICSID Case No.ARB/01/12 [372]; Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30(4) *Fordham International Law Journal* 1013, 1016; Trevor Zeyl, 'Charting the Wrong Course: the Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) 49(1) *Alberta Law Review* 203, 207; 'In its most specific form, legitimate expectations refers to expectations arising from the foreign investor's reliance on specific host state conduct, usually oral or written representations or commitments made by the host state relating to an investment. Reliance typically takes the form of making an initial investment or the expansion of an existing one. Protection of legitimate expectations in this sense is closely related to the principle of estoppel and state responsibility under public international law for unilateral acts. Second, tribunals have referred to legitimate expectations of a stable and predictable legal and administrative framework that meets certain minimum standards, including consistency and transparency in decision-making. Third, at the most general level, legitimate expectations can be used to refer to the 'expectation that the conduct of the host State subsequent to the investment will be fair and equitable.' This would appear to be simply another way of stating that the investor has a reasonable expectation that the host state will comply with its IIA obligations'. Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009) at 279 and 280; Stephan W. Schill, 'Fair and Eqitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 151, 164.

[282] *Spyridon Roussalis v Romania* (Award) (7 December 2011) ICSID Case No. ARB/06/1 [317 and 318].

[283] See *Saluka Investments BV v The Czech Republic* (Partial Award) (17 March 2006) (UNCITRAL Arbitration) [305].

investment was made?[284] It is a relative term. States, after permission is given for investment and while investors are conducting their business, due to supervening circumstances, can introduce measures that affect investment. For example, if country A allowed country B's investors to undertake investment in country A for the excavation of phosphate, investors would invest money in country A. After some time, country A wanted to introduce new laws to stop or reduce the excavation of phosphate as scientific studies had found that the excavation of phosphate would create health hazards and injuries to human health owing to the deep digging. In this scenario, one can argue that investors' legitimate expectations are not protected and that country A has violated fair and equitable treatment and legitimate expectations. This is a technical reading of the terms and the arbitrators must consider that investment arbitration is different from commercial arbitration. In commercial arbitration, more often private parties are involved, with investment arbitration investors and a State involved in disputes.

States have a paramount duty to protect their people: their governments will stand or fall on the policies introduced to increase their people's welfare. This is common to all countries whether they follow capitalist or socialist principles or a mix of economic principles. Therefore, it is the arbitrators' duty to look at legitimate expectations and fair and equitable treatment principles in a State-friendly and sovereignty-friendly manner and take into account subsequent development that might have taken place after the investment was made. The arbitrators should realise that the protection of investors is one segment of investment law and that the broader concept of investment law is to recognise and regulate the autonomy of States for the public interest while balancing investors' rights.[285] Investors' rights do not mean that the State guarantees and protects against any type of damages to investors' investment but that it should, however, guarantee the physical safety of investors without intimidation.[286] The trade law, in contrast to the investment law, recognises the regulatory autonomy of States.

In the GATT era, panels did not recognise social values if it came at the expense of international trade.[287] This is evident from the case of *United States – Restrictions on*

[284] *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award) (29 May 2003) ICSID Case No. ARB (AF)/00/2 [154].
[285] See *Saluka Investments BV v The Czech Republic* (Partial Award) (17 March 2006) (UNCITRAL Arbitration) [305].
[286] See Ibid [484].
[287] MacRae, above n 80, 379.

Imports of Tuna.[288] In this case, the panel held that the US introduction of regulations to protect the environment could not be justified under Articles XX(b) and XX(g) of the GATT.[289] In the case of *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*,[290] Thailand banned foreign cigarettes to discourage young people from becoming addicted to cigarettes.[291] This was challenged before a GATT panel by the US on behalf of multilateral companies.[292] Thailand argued that their measure was to protect human life and the health of its people under Article XX(b) of the GATT.[293] They were backed by the World Health Organization (WHO) which provided expert opinion on behalf of Thailand, explaining that smoking cigarettes could lead to lung cancer.[294] The panel did not accept Thailand's defence without giving adequate consideration to the co-principles of Article XX of the GATT and held that Thailand had violated Articles XI:1 and XI:2(c)(i).[295]

Thailand's endeavour was to improve the health of its people, but it did not fall strictly within the four corners of the GATT Article XX(b). Nevertheless, the GATT Panel ought to have considered the co-principles laid down in the GATT Article XX(b) which justified that Thailand's introduced measure was to preserve the health of its people. The reason was that the GATT panelists were inspired by liberal trade values and did not have appropriate legal backgrounds for comprehending the underlying principles of Article XX of the GATT (the exception being to derogate the general obligations to protect human health).[296]

The GATT Preamble does not speak about sustainable development or the environment (before the WTO agreement was established). Therefore, one can argue that the GATT panel should strictly confine its interpretation of the GATT Article XX(b) to the literal meaning. However, the GATT Preamble, in stating 'raising standards of living', should have led the GATT panel to consider that improving living standards is not confined to economic development through trade, but that protecting people from health risk is a fundamental duty of a State: this could have been interpreted under GATT Article XX as

[288] GATT Panel Report, *United States – Restrictions on Imports of Tuna* GATT Doc DS21/R- 39S/155 (3 September 1991).
[289] Ibid [6.3].
[290] GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* GATT Doc DS10/R-37S/200 (5 October 1990) (adopted on 7 November 1990).
[291] Ibid [6].
[292] Ibid [1].
[293] Ibid [38].
[294] Ibid [51].
[295] Ibid [87].
[296] Kurtz, *The WTO and International Investment Law*: *Converging Systems* above n 203, 239.

'raising standards of living'. It was the duty of the panel to give due consideration to the GATT Article XX and the GATT Preamble. The Appellate Body has been established under the DSU and this position has now changed.

The GATT Article XX provides exception to derogate the WTO obligations. These general exceptions are common to developed, developing and least-developed countries. The main objective of Article XX is to recognise the sovereignty of countries and to grant certain flexibilities to the single undertaking of the WTO agreement obligations broadly speaking to achieve sustainable development. This objective has been brought to the forefront of the WTO objectives and is captured in the WTO Preamble.

In the case of *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, the matter concerned the deviation from the traditional concept of like product under Article III:4 of the GATT, and the Appellate Body held broadly that, in order to determine likeness, health risk is a necessary social justice consideration.[297] The Appellate Body held that regulatory autonomy is meant to have strong public welfare benefit objectives.[298] In the case of *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* Article XX(g) of the GATT was broadly interpreted to include living natural resources by considering the WTO Preamble for the protection and conservation of exhaustible natural resources.[299]

The question then arises as to whether a State can introduce discriminatory regulations for a particular like product vis-à-vis a domestic product in the name of the welfare of its people. The answer is no. In the case of *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes*), the Appellate Body held that the regulatory objectives of a State did not permit that State to introduce discriminatory regulatory measures for a particular like product or a particular sector and that it should relate rationally to the regulatory objectives that are exclusively vested with a State.[300] In

[297] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R (12 March 2001) [113].
[298] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)* WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) [5.310]; Emily Lydgate, 'Is It Rational and Consistent? The WTO's Surprising Role in Shaping Domestic Public Policy' (2017) 20(3) *Journal of International Economic Law* 561, 562.
[299] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [128 and 129].
[300] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WTO Doc WT/DS406/AB/R (4 April 2012) [225 and 226].

the *US – Clove Cigarettes* case, the US banned Indonesia's clove cigarettes but did not ban the domestic menthol cigarettes. Without also banning domestic menthol cigarettes, the US was unable to establish that its regulatory measure came under the legitimate regulatory objective to preserve human health. For example, in the case of *Técnicas Medioambientales Tecmed S.A. v The United Mexican States*,[301] the Técnicas Company was permitted to operate an industrial waste landfill in Mexico as an investment project.[302] On the basis that it wanted to protect the environment, the Mexican government refused to renew the permit given to Técnicas.[303] Técnicas complained that the refusal to renew the landfill licence by the Mexican government was due to political reasons and that this was an expropriation of their investment.[304] Contrary to Técnicas' position, the government argued that it did not renew the landfill licence as it wanted to protect public health and preserve environmental stability.[305] The Mexican government's argument was based on political economy considerations relating to the public interest.[306] The arbitrators were unconvinced by the government's submission on the reasonableness of its regulatory measure and it was asked to pay compensation to Técnicas.[307] On the other hand, in the case of *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO Appellate Body justified the State's regulatory autonomy under the GATT exceptions for even non-trade goals through interpretation.[308] Apart from the general exceptions, the WTO has introduced the SDT in the covered agreement and the DSU which permits panels and the Appellate Body to interpret covered agreement development in a way that is friendly for developing and least-developed countries to reduce the disparity gap, allowing for greater regulatory flexibility.[309]

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[301] *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award) (29 May 2003) ICSID Case No ARB (AF)/00/2.
[302] Ibid [35].
[303] Ibid [39].
[304] Ibid [58]; see also *Murphy Exploration & Production Company-International v The Republic of Ecuador (*Partial Final Award) (6 May 2016) (UNCITRAL) [243, 136 and 441].
[305] *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award) (29 May 2003) ICSID Case No ARB (AF)/00/2 [129].
[306] Ibid [47].
[307] Ibid [200].
[308] 'Paragraphs (a) to (j) [of GATT] comprise measures that are recognised as *exceptions to substantive obligations* established in the GATT 1994 because the domestic policies embodied in such measures have been recognised as important and legitimate in character'. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc WT/DS58/AB/R (12 October 1998) [121].
[309] Amin Alavi, 'On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' (2007) 41(2) *Journal of World Trade* 319, 320.

7.6.3 Interpretation of Investment Law in Accordance with Public International Law

Developing the law can be defined as a concept in which the law evolves through changes by a particular branch of law with the help of another branch of law through harmonisation and interpretation for the benefit of people and to ensure its predictability. This can be effected through broad interpretation of a particular branch of law for social needs, for example, investment and trade.[310] This theme was reiterated at the UNCTAD's 2017 High-level International Investment conference with members stressing the importance of implementing sustainable development objectives through 'actionable treaty language'.[311]

The objective assessment test is important for treaty interpretation.[312] Article 11 of the DSU provides for the panel and the Appellate Body to apply the objective assessment test to decide issues.[313] The term 'objective assessment' is not defined anywhere in the DSU or in a covered agreement.[314] It is a relative term and its meaning depends on the context of the case and varies from the WTO Agreement to Agreement.[315] In the case of *European Communities – Measures Concerning Meat and Meat Products* (*Hormones*),[316] the Appellate Body considered the scope of the objective assessment test enshrined in Article 11 and held that the objective assessment test is that the panel and the Appellate Body should consider the evidence submitted and make findings on the basis of that evidence.[317]

In the case of *United States – Standards for Reformulated and Conventional Gasoline*,[318] the Appellate Body held that, according to Article 3.2 of the DSU, the Appellate Body should interpret covered agreements with the assistance of public international law when

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[310] MacRae, above n 80, 380 and 381; Shaffer and Trachtman, 'Interpretation and Institutional Choice at the WTO' above n 67, 120.
[311] Zhan and Obst, above n 267.
[312] Article 11 of the DSU provides for a standard review and the panel can apply factual and legal questions of a case to determine an issue. To determine the issue in a dispute, a panel is required to apply an objective assessment.
[313] '… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations'. DSU article 11.
[314] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/ABR, WT/DS48/ABR (16 January 1998) [133].
[315] Yuka Fukunaga, 'Standard of Review and 'Scientific Truths' in the WTO Dispute Settlement System and Investment Arbitration' (2012) 3(3) *Journal of International Dispute Settlement* 559, 561.
[316] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/ABR, WT/DS48/ABR (16 January 1998).
[317] Ibid [133].
[318] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (20 May 1996).

there is a lacuna.[319] The VCLT provides three guidelines to interpret a treaty by applying objective assessment test: the ordinary meaning should be assigned to the text of a treaty; the intention of countries (negotiation history) should be considered when interpreting a treaty; and the aim, objective and purpose of treaties should be taken into consideration when interpreting a treaty or part thereof, for example, the Preamble.[320]

A treaty should be interpreted in a way that does not diminish the ordinary meaning given to its wording.[321] According to Article 31.3(b) of the VCLT, the subsequent practice adopted once the WTO Agreements came into force was to be taken into account when interpreting the provisions of international agreements. Article 3.2 of the DSU states that the DSB can 'clarify the existing provisions' of covered agreements 'in accordance with the customary rules of' public international law.[322] Article 3.2 of the DSU is important due to its role in applying customary international law to interpret the WTO covered agreements to bring predictability to the multilateral trading system. Thus, the Article expressly prohibits the lowering of the rights and obligations established under covered agreements and through treaty interpretation. The Appellate Body has developed a legal literature to transform the WTO trade regime into a legal regime.[323]

In contrast to this position in trade law, international investment tribunals do not give an adequate interpretation of investment law by using customary international law and, as a result, they fail to engage with the underlying objective of the text of a treaty.[324] Arbitrators hear cases in an ad hoc manner under the ICSID Convention and they could not rely on the VCLT to interpret and modify the ICSID Convention as the ICSID Convention does not allow modification through treaty interpretation.[325] However, in fact, the VCLT can be applied to consider the objective, purpose and textual meaning of the ICSID Convention

[319] Ibid 17.
[320] This Convention provides important guidelines for the interpretation of treaties between states. *Vienna Convention on the Law of Treaties,* signed 23 May 1969, Vol 1155 UNTS 331 (entered into force on 27 January 1980) article 31.
[321] *Vienna Convention on the Law of Treaties,* signed 23 May 1969, Vol 1155 UNTS 331 (entered into force on 27 January 1980) article 31.
[322] 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of public international law, that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. DSU article 3.2.
[323] See MacRae, above n 80, 378.
[324] Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3(1) *Journal of International Dispute Settlement* 31, 44.
[325] Reinisch, above n 269, 771 and 773.

and the BITs. Therefore, the VCLT can be applied by investor-arbitrators. At times, arbitrators, through their interpretation, add meanings to treaties which were never intended by the parties. This position is illustrated by the case of *Pope & Talbot Inc vs The Government of Canada*.[326]

The drafters of the NAFTA Chapter 11 wanted the application of fair and equitable treatment to be in accordance with the customary international law concept. That meant that NAFTA members did not want to provide fair and equitable treatment beyond what was required by customary international law. In fact, Article 1105 of the NAFTA Chapter 11, if its textual and literal meaning is considered, does not confer additional substantive rights other than rights conferred under customary international law.[327] Strangely, in the case of *Pope & Talbot Inc vs The Government of Canada*, the arbitrators adopted a suggestive comparative methodology to widen Article 1105, and the arbitrators went on to state that fair and equitable treatment was 'additive to the requirements of international law'.[328] The tribunal did not consider whether the members to the NAFTA wanted to deviate (when drafting NAFTA Article 1105) from the concept of fair and equitable treatment in customary international law under NAFTA's Article 1105.[329]

Investment tribunals do not follow interpretative rules and they do not give a justification of their analysis by considering legal text and the preparatory work of a BIT, which is an essential requirement in treaty interpretation.[330] The Draft TTIP has attempted to address this uncertainty: it provides a series of measures that constitute breach of fair and equitable treatment and, as a result, one can contend that arbitrators cannot add to or diminish a provision through interpretation.[331] Similarly, in the case of *William Ralph Clayton,*

[326] In this case, the arbitrators gave a wide interpretation to the fair and equitable treatment enshrined in Article 1105 of the NAFTA, ignoring its textual meaning. 'First, there is the basic unlikelihood that the Parties to NAFTA would have intended to curb the scope of Article 1105 vis-à-vis one another when they (at least Canada and the United States) had granted broader rights to other countries that cannot be considered to share the close relationships with the NAFTA parties that those Parties share with another'. *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) (10 April 2001) [115].

[327] *NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions* (31 July 2001); Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19(1) *Journal of International Economic Law* 27, 34.

[328] *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) (10 April 2001) [110].

[329] See the US submission to the tribunal. *Pope & Talbot Inc. v The Government of Canada* (Award on the Merits of Phase 2) (NAFTA Chapter 11 Arbitration) (10 April 2001) [114].

[330] Andrea Saldarriaga, 'Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement' (2013) 28(1) *ICSID Review* 197, 213.

[331] Article 3(2) of the TTIP states that the breach of the obligation of fair and equitable treatment constitutes: '(a) denial of justice in criminal, civil or administrative proceedings; or

William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada, the terms 'fair and equitable' and 'minimum standard of treatment' in Article 1105 of the NAFTA were interpreted.[332] In this case, the arbitrators admitted that an investor should be able to prove a breach of fair and equitable and minimum standard treatment under NAFTA, if a State's measure was considered 'egregious'.[333] However, the arbitrators held that it was not necessary to establish that a State's measure was 'shocking or outrageous behaviour',[334] meaning that it did not pass the rigid threshold and the NAFTA was not interpreted in a way that was State-friendly. The arbitrators who decide investment cases give general reference to the treaty interpretation and few cases have analysed the VCLT to grant awards,[335] and the arbitrators apply the objective assessment test to protect investors' rights.[336]

The inherent weakness of investment arbitrators is that they have not developed a standard of review guideline that could be applied to investment disputes, although they apply the principle of 'good faith' (determining whether the investment was taken over in good faith or if the investor's institution of action was based on good faith)[337] and burden of proof and standard of proof.[338] The standards of review is a balancing process between the States that make the laws and the law adjudicators who hear the cases: its objective is to balance

(b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
(c) manifest arbitrariness; or
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
(e) harassment, coercion, abuse of power or similar bad faith conduct; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article'. *Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce Chapter II – Investment* (EU Commission Draft Text TTIP – Investment) article 3(2).

[332] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada* (Award on Jurisdiction and Liability) (UNCITRAL) (17 March 2015).

[333] Ibid [36 and 441].

[334] Ibid [449].

[335] Fauchald analysed 98 cases and according to his finding shows that out of 98 cases 35 awards have given general reference to the relevant VCLT provisions, but only in 20 awards, arbitrators have actually analysed and applied VCLT provisions. Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) *The European Journal of International Law* 301, 304; Maximilian Clasmeier, 'The Protection of Arbitral Awards in the Global Context of Investment Treaty Interpretation' in Maximilian Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law* (Kluwer Law International, 2016) 53, 107

[336] DiMascio, Nicholas and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' *The American Journal of International Law* 48, 81.

[337] *Jan Oostergetel and Theodora Laurentius v The Slovak Republic* (Final Award) (UNCITRAL) (23 April 2012) 1, 79 para 300; *Abaclat and Others v Argentine Republic* (Decision on Jurisdiction and Admissibility) (4 August 2011) ICSID Case No ARB/07/5, 1, 254 paras 248 and 249; Eric De Brabandere, ''Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims' (2012) 3(3) *Journal of International Dispute Settlement* 609, 609.

[338] Fukunaga, above n 315, 569.

between the regulatory autonomy of a State and the State's compliance with its international obligations arising from treaties.[339] In other words, investment law standards of review are a balance of power between host States and investors with regard to international investment and regulatory autonomy.[340]

Investors want to maximise profits and host States also want profits as well as developing the political economy of their countries. Therefore, a test should be established to determine whether a measure introduced by a State is justified or legal. The question arises as to what factors arbitrators should consider in determining the standards of review. What test is used in assessing whether a measure introduced by a host State is for sustainable development? Is a regulatory measure of the State determined according to its proximity for the public interest, or for national security, emergency situation, reasonableness or proportionality or health? To assess whether the measure of a State is justified or legal, arbitrators apply the proportionality and deference test. To determine proportionality, arbitrators decide whether the measure introduced by a State is commensurate with the public interest and its impact on investment.[341] The notion of deference is associated with the freedom of a State to regulate laws and its reasonableness. Through treaty interpretation, arbitrators cannot change the policy decisions of States, but they should balance States' rights to introduce a law for public interest and investors' investment. Conversely, a notable feature of investment arbitration is that arbitrators more often apply the good faith principle to determine whether host States have breached the minimum standard of treatment in relation to foreign investment and have abused the term 'in good faith'.[342] Therefore, the need for reforms to investment law is evident.

7.7 Reform for International Investment Dispute Settlement

To suggest an IIDSU under the WTO, the shortcomings of the DSU should be identified to provide some guidance for drafting a potential IIDSU. The WTO DSU has created a rules-based legal system with clear rules but, with years of practical experience, it has shown that it has weaknesses:[343] sequencing (how the ruling is implemented when there is a

[339] Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of Standard of Review and the Importance of Difference in Investor-State Arbitration' (2013) 4(1) *Journal of International Dispute Settlement* 197, 199.
[340] Ibid, 207.
[341] Proportionality is determined through the difference, such as cost of the investment and the benefit of the public welfare. *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award) (29 May 2003) ICSID Case No. ARB (AF)/00/2 [122].
[342] Brabandere, above n 337, 615.
[343] Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' above n 31, 27; *Proposals on the DSU, by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*

disagreement);[344] the quality of some rulings by panels and the Appellate Body; delays in settling the disputes;[345] high litigation costs;[346] practical problems in retaliation (it is a self-inflicted wound for LICs);[347] transparency issues;[348] the Appellate Body cannot send a case

WTO Doc TN/DS/W/19 (20 September 2002); *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement*, WTO Doc TN/DS/W52 (14 March 2003); Richard H Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98(2) *American Journal of International Law* 247, 251; Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc WT/DS248, WT/DS249, WTDS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R (11 July 2003) [10.714]; Lorand Bartels, 'The Separation of Power in the WTO: How to Avoid Judicial Activism' (2004) 53 *International Law and Comparative Law Quarterly* 861, 876.

[344] Sequencing issues arise under Article 21.5. This happens when parties to a dispute, after the recommendation is given by the panel or the Appellate Body, have a dispute about whether the losing party has implemented the DSB recommendation. In this eventuality, the original panel should monitor respondent's compliance with the DSB decision and report to the DSB whether the respondent has complied. In addition, Article 22.2 has provision for a winning party to make a request to the DSB for retaliation, if the respondent has failed to implement the rulings. Similarly, if uncertainty arises, there is provision for the winning party to directly make an application for the suspension of concessions under Article 22.6 of the DSU without following the procedure laid down in Articles 21.5 and 22.2; See also *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency*, WTO Doc TN/DS/W/13 (22 August 2002).

[345] Gregory Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' (Resource Paper No 5, International Centre for Trade and Sustainable Development, 2003) https://www.peacepalacelibrary.nl/ebooks/files/.. accessed on 10 October 2020, 46; Andrea M Ewart, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement' (2007) 35 *Syracuse Journal of International Law and Commerce* 27, 58.

[346] *Proposals on the DSU, by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe* WTO Doc TN/DS/W/19 (20 September 2002) 2; Haken Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?'(2008) 7(4) *World Trade Review* 587, 601; see Chad P Bown and Bernard M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of Economic Law* 861, 870.

[347] The DSB may authorise retaliation within 30 days of the end of the reasonable period after the request is made under DSU Article 22.6 but the reasonable period has not been defined and, therefore, it is ambiguous. The wording of Articles 21.5, 22.2 and 22.6 is not clear whether the winning party should follow Article 21.5 first and thereafter make an application under Articles 22.2 or 22.6. If the WTO introduced financial compensation, the LICs would benefit as it would be difficult in practical terms for them to implement the DSB-authorised suspension of concessions with such a penalty being self-inflicted due to its impact on trade capacity. See *Hong Kong WTO 6th Ministerial Briefing Notes, Dispute Settlement Force of Argument, Not Argument of Force* (2005) <http://www.eto.org/english/thewto_e/min05_/brief10_e.htm> accessed on 6 March 2018; *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General, Supachai Panitchpakdi, ('Sutherland Report') [239] and [243]; *Proposals on the DSU, by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe* WTO Doc TN/DS/W/19 (20 September 2002) 2; Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/ARB/ECU (24 March 2000) [177]; Marco Bronckers and Naboth Van Den Broek, 'Financial Compensation in the WTO Improving the Remedies of WTO Dispute Settlement' (2005) 8(1) *Journal of International Economic Law* 101, 105.

[348] Christiane Ahlborn and James Headen Pfitzer, 'Transparency and Public Participation in WTO Dispute Settlement' (Center for International Environmental Law Paper, 2009) <http://<www.ciel.org> Transparency_ WTO_ Dec09pdf > accessed on 02 March 2020, 3.

back to the panel to correct factual error;[349] and, the ambiguity of special and SDT provisions.[350]

The Appellate Body cannot consider factual issues and its review of panel reports is limited to the question of law.[351] In a situation where the panel refused to accept a document that was material to a case or if the panel violated natural justice, the question arises as to whether or not the Appellate Body can review such procedural errors.[352] This could be overcome if the Appellate Body was vested with the authority to question errors of fact.[353] The DSU does not expressly provide for third-party participation or an *amicus curiae* brief from interested groups, such as environmental organizations, which also helps to assess issues with the object and purpose of a covered agreement.[354]

The SDT provisions in the DSU are ambiguous and are not often used for pleas; in addition, these provisions are not mandatory.[355] For example, Article 4.10 of the DSU has the provision that members, during consultations, should consider a dispute involving developing countries with special attention and a sympathetic manner.[356] There is no SDT

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[349] *Hong Kong WTO 6th Ministerial Briefing Notes: Dispute Settlement, Force of Argument, Not Argument of Force* (2005) <http://www.org/english/thewto_e/minist_e/min05_e/brief_e/brief10_e.htm> accessed on 1 February 2018; William J Davey, 'Reforming WTO Dispute Settlement' (Research Paper No 04-01, Illinois Public Law and Legal Theory Research Papers Series, 2004) <http://ssrn.com/abstract=495386> accessed on 5 February 2018, 19.

[350] *Negotiation on the Dispute Settlement Understanding: Special and Differential Treatment for Developing Countries, Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe* WTO Doc TN/DS/W/19 (9 October 2002) 2.

[351] DSU article 17.6; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products* (*Hormones)*, WTO Doc WT/DS26/ABR, WT/DS48/ABR (16 January 1998) [132].

[352] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products* (*Hormones)*, WTO Doc WT/DS26/ABR, WT/DS48/ABR (16 January 1998) [132]; Under the DSU, the Appellate Body does not have the authority to correct factual errors made by panels and it cannot send these reports back to panels to correct factual errors (known as remand).

[353] 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.' DSU article 17.6; see also DSU, article 17.13.

[354] Generally, fresh evidence is not allowed in appeal cases, unless it is due to exceptional circumstances. In the case of *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, the Appellate Body held that *amicus curiae* briefs could be obtained in the appeal stage if they were found to be relevant and important to a case for objective assessment of issues. Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* WTO Doc WT/DS138/AB/R (10 May 2000) [41 and 42].

[355] Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' above n 345, 25.

[356] Article 4.10 of the DSU uses the term 'should' which does not have a binding effect on developed countries. Therefore, it is necessary for a developing country to convince the panel that it has invoked the SDT provisions and that the invocation of these provisions is relevant to the dispute at hand.; Alavi, 'On the (Non-)Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' above n 309, 323; Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc WT/DS/248, WT/DS249, WTDS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R (11 July 2003) [10.714].

that considers the unequal status of parties and countries, stipulating that arbitrators should especially consider the special circumstances of LICs under investment law. Modern BITs have SDT provisions and arbitrators still have not been able to interpret these provisions in favour of host States.[357]

The DSU is not connected to the municipal laws of countries regarding the enforcement of its rulings. The immunity of States, which is frequently discussed as an impediment to the enforcement of an award in investment law, has no role to play in the WTO DSU and its hierarchical structure with the permanent Appellate Body provides a comprehensive international legal institution for trade disputes. A salient feature of the WTO DSM is that it resolves disputes among States and it cannot be readily adaptable for an investment DSM, but its important features such as treaty interpretation, compulsory jurisdiction, appellate mechanism, objective assessment, NT, exceptions, applicable law, legitimate expectation and enforcement should be considered when drafting an investment agreement**.**

At present, there is no investment dispute settlement mechanism that has a proper hierarchical structure and applies *stare decisis*. This is repeatedly emphasised in the literature but the literature has not suggested an institutional framework to provide predictability and security in international investment. Therefore, it is necessary to have a hierarchical international investment dispute settlement mechanism with *stare decisis*. This should start by consultation with panels and the Appellate Body in ascending order, and a comprehensive definition of investment should also be introduced.

7.8 Contour of International Investment Dispute Settlement Understanding (IIDSU)

Any IIDSU should have a consultative and adjudicating mechanism to claim a successful dispute settlement system with compulsory jurisdiction. Consultation should be the first step: this process helps parties to settle disputes amicably and gains broader acceptance of a solution. Parties can agree to a mode of settlement to ensure that enforcement difficulties would not arise. If the consultation fails, a panel shall be appointed for investment cases within one month after the consultation fails, regardless the agreement of the parties. The panel and the Appellate Body should be able to seek and receive evidence. This would help to merge together the adversarial and inquisitorial systems. An *amicus curiae* brief would need to be curtailed as developing countries and least-developed countries state that, in the

[357] *ASEAN Comprehensive Investment Agreement (ACIA)* (entered into force 24 February 2012) article 23.

WTO reforms, allowing an *amicus curiae* brief would diminish rights enshrined in the WTO agreements.[358] However, the US model BIT provides for an *amicus curiae* brief from non-disputant parties[359] and in the ICSID Convention, rules have been introduced to accept an *amicus curiae* brief.[360] Therefore, it is important that any investment agreement introduced as a WTO covered agreement should have a provision that permits an *amicus curiae* brief in the interest of looking after the sustainable development goals. Transparency is needed for an international investment agreement. One of the criticisms is that the WTO panel and the Appellate Body are not open to public participation for limited purposes such as sustainable environmental goals.[361]

The panel should deliver its decision within six months: if it is unable to deliver the decision within six months, it should deliver it within nine months. An appeal from a panel decision should be lodged within 60 days, when the notice of appeal should be filed in the Investment Dispute Settlement Body (IDSB). An IDSB in a similar form to that of the WTO's DSB can be established by countries. The Appellate Body shall dispose of appeals within six months and if it fails to dispose of an appeal within six months, the permission of the IDSB is to be obtained with the appellate decision pronounced within nine months. These time periods are laid down to establish a predictable institutionalised legal system for investment, as it is observed that investment law and BITs do not provide a length of time for the disposal of cases.

BITs should be designed to protect the interests of investors and host States irrespective of whether claims are small or large. However, the current investment dispute settlement systems do not favour small claims made by investors and host States.[362] There is no small claims investment dispute settlement procedure in the world to adjudicate small claims. Nordstrom and Shaffer state that a small claims procedure is a 'defined category of claims before a division of an existing lower court of general jurisdiction, be it a municipal,

[358] Ahlborn and Pfitzer, above n 348, 1 and 10; Raj Bhala, 'Austin's Ghost and DSU Reform'(2003) 37(3) *The International Lawyer* 651, 673.
[359] *U.S. Model Bilateral Investment Treaty* (2012) article 28(3).
[360] ICSID Rules of Procedure for Arbitration Proceedings rule 37(2); *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.* (Order in Response to a Petition for Participation as Amicus Curiae) (17 March 2006) ICSID Case No. ARB/03/17, 1, 7 para 15.
[361] Ahlborn and Pfitzer, above n 348, 3 para 4.
[362] Kristen E Boon, 'Investment Treaty Arbitration: Making a Place for Small Claims' (2018) 19(4) *The Journal of World Investment and Trade* 667, 668; UNCTAD, *'Investor-State Dispute Settlement: Review of Development in 2015*, IIA Issue Note No 2 (June 2016) available at <unctad.org/en/Publicationslibrary/webdiaepcb2016d4en.pd> accessed on 17 January 2019, 6.

country or district court, although there is greater variation among jurisdiction' to hear cases expeditiously and to access justice without incurring significant costs.[363] Therefore, a small claims procedure is desirable to facilitate small claims without incurring expensive costs for investment litigation.[364]

There is no legal aid system available to LICs to defend or institute a case against multilateral companies as litigating for investment disputes is very costly and there is no mechanism similar to the WTO legal aid programme for LICs.[365] The ACWL was established to provide legal assistance to developing countries in WTO disputes litigation as these countries did not have the resources to defend or institute cases under the DSU.[366] After the establishment of the ACWL, the participation of LICs improved dramatically.[367] Therefore, a legal aid centre must be established for LICs that are facing investment disputes so these countries can be provided with legal assistance to institute cases and meet investors' claims.[368] The forum, applicable law and the law applicable to arbitration should be embodied in the WTO investment agreement to avoid the complexity of investment arbitration. Developed and developing countries confront difficulties for making laws for regulatory autonomy. Therefore, it is necessary to introduce exceptions in line with the GATT article XX to balance rights of investors and host States. Investment law should be drafted as Article III of the GATT to determine the like circumstance and to examine whether the host States have violated minimum standard and good faith. This will assist in determining whether the host States' actions to take over investors' property or making rules for regulatory purpose are amounting to expropriations. Any potential CIIA should have a definition of investment to avoid the complexity of investment arbitration. The WTO

[363] Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 55, 609.
[364] Boon, above n 362, 669.
[365] Susan D. Franck, 'Rationalizing Costs in Investment Treaty Arbitration' above n 122, 769.
[366] *Marrakesh Agreement Establishing the World Trade Organization* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2, DSU; Advisory Centre on WTO Law (ACWL) *Report on Operations, 2016* (7 July 2017) available at <http://www.acwl.ch/acwl-publishes-report-operations-2016> accessed on 17 January 2019; Kim Van der Borght, 'The Advisory Centre on WTO Law: Advancing Fairness and Equality' (1999) 2(4) *Journal of Economic Law* 723, 725.
[367] Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO LAW' (Brooking Global Economy and Development Paper No 37, 2009) 1, 14.
[368] *Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Advisory Centre* 38th session UN Doc. A/CN.9/WGIII/WP.168 (25 July 2019) para 4, 5 and 6; Karl P Sauvant and Federico Ortino, 'Improving the International Investment Law and Policy Regime: Options for the Future' (Ministry of Foreign affairs of Finland, 15 December 2013) 120; Robert W Schwieder, 'Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO and Investment Experiences' (2018) 19(4) *The Journal of World Investment and Trade* 628, 628; Eric Gottwald, 'Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?' (2007) 22(2) *American University International Law Review* 237, 265.

legitimate expectation is important to inject into investment law, allowing it to balance investors and host States' rights. The investment tribunals should interpret the investment covered agreement in accordance with customary rules of public international law.

7.9 Conclusion

The discussion in this chapter has revealed that the WTO DSU has established a rules-based legal system for trade disputes. As the GATT dispute settlement system has not created a law-based dispute settlement system, WTO members have undertaken commendable efforts to overcome the shortcomings of the GATT legal system over several years with successive negotiations. As a result, members have been able to introduce the DSU for trade dispute settlement as it possesses compulsory jurisdiction for panels and binding decision-making. The DSU's success is mainly due to covered agreements, which are the substantive laws. The procedural law has also been established with clarity in the DSU. Members have recourse to the DSU upon violation of the WTO substantive law. The DSU rules provide for a panel and the Appellate Body to determine the applicable law under the DSU's Article 1. At the same time, the panel and the Appellate Body are guarded to protect the predictability and security of the WTO trade system and legal regime. Moreover, the WTO legal process provides for uniformity through the Appellate Body and panels cannot deviate from *stare decisis*. It was revealed in the chapter that the Appellate Body promptly intervenes and corrects panel decisions which try to deviate from Appellate Body decisions.

In contrast to the above position, the investment arbitration differs from case to case and from BIT to BIT, while arbitral tribunals are established in an ad hoc manner. There is no appellate procedure for investment law decisions except that they can be reviewed through an annulment procedure under the ICSID Convention. This annulment procedure is not sufficient to cater for solutions for aggrieved parties. Any legal system will survive and gain momentum through an effective appellate mechanism with a hierarchical institutionalised system. The selection of arbitrators on a case-by-case basis does not guarantee predictability and uniformity within the investment legal system. At present, a plethora of BITs have created inconsistency in investment law; therefore, it is necessary to inject procedural and substantive law improvements into investment law. Consequently, within the WTO, a rules-based investment dispute settlement system should be established. This will strengthen the existing multilateral trading system and avoid the further fragmentation of investment law and trade law that would occur through the use of BITs

for trade and investment. If the WTO members agreed to introduce a CIIA, the WTO, generally, and the IIDSU, more particularly, could be named as the unique legal order throughout the world for settling trade and investment dispute

Chapter 8: Conclusion

8.1 Introduction

This thesis began with the proposition that a multilateral investment agreement under the WTO facilitates a proper, functioning and sustainable global investment regime. It considered how challenges could be overcome in order to incorporate a more comprehensive FDI regime within the present WTO system. This thesis recommends for an effective rules-based international investment regime in the WTO through the convergence of trade and investment. For this convergence it proposes to establish a rules-based comprehensive international investment agreement (CIIA) and an international investment dispute settlement understanding (IIDSU). A comprehensive investment agreement within the WTO will achieve sustainable economic development for LICs since FDI has an important role for the economic development of countries. A comprehensive investment regime will also pave the way to balance the regulatory autonomy of States on the one hand and, protect investors' legitimate expectations and provide security for their investment on the other**.** In addition, this research proposes a new category of LICs according to their share of international trade and FDI to achieve economic development.

International investment law is becoming increasingly complex and uncertain, hence, developed and developing countries have repeatedly failed in their attempts to establish a CIIA. A new opening is needed for another round of negotiations under the WTO to establish a new CIIA in order to create a uniform international investment legal system. To commence this research endeavour, the data and literature were collected and analysed to support the core proposition that a convergence of trade and investment within the WTO is important to establish a rules-based CIIA, and therefore, to contribute to sustainable economic development for LICs.

This study introduced a background to the core proposition for convergence of trade and investment for economic development of LICs. The existing major international investment agreements such as NAFTA, ICSID and BITs, at present, do not establish a rules-based international investment agreement in the world. This study explained the significance and utility of a rules-based IIDSU. It also discussed the ways in which the WTO Agreements have transformed the uncertain trade rules into substantive international trade law with an effective dispute settlement system in order to establish a legal regime for trade disputes. This inspiration and influence, in fact, can be used to develop a novel CIIA as a covered

investment agreement within the WTO, which is urgently needed in the new world economic order.

This chapter concludes the thesis by refining, reviewing and precisely clarifying the core proposition of the thesis, and it introduces a model of a CIIA and an IIDSU. Furthermore, it provides a summary of the main point of the thesis with an acknowledgement of the study's shortcomings and a suggestion for future research.

8.2 Emergence of Low-income Countries in the GATT

Chapters 1, 2 and 3 examined that, historically, most developing countries had been colonies when the GATT and the investment conventions were negotiated and drafted. As discussed in Chapter 3, developing countries made repeated appeals during the multilateral trade negotiations demanding for concessions and exceptions to the obligations which they had agreed to undertake for their economic development.

Developing countries requested certain exceptions from the MFN and NT principles so that they could compete with developed countries as equal partners in the trade liberalisation process, because of their economic disparity as revealed in Chapters 1, 2 and 3. In response to this demand, developing country notion emerged and SDT provisions were incorporated in the GATT giving exemption to developing countries under GATT Articles XI and XVIII to derogate MFN principle. Developed countries granted preferential market access to developing countries by adopting the GSP Decision of 1971 and the Enabling Clause. However, as demonstrated in Chapter 3, these provisions are vague and lack clear direction. As mentioned in Chapter 3, the EU has introduced a GSP+ which has no connection with trade or economic development, but relates to good governance. The EU uses political consideration in providing preferential market access to LICs. Developed countries continued to exercise discretion when granting concessions to developing countries under their GSP schemes. Therefore, Chapter 3 suggests for amendments to be made to the GATT Article XVIII, the GSP and the Enabling Clause to remove the discretionary powers of developed countries. Chapter 3 also showed that LICs need FDI to increase market access to reap benefits of the GSP.

8.3 Categorisation of Developing Countries in the WTO

The WTO does not define who are the developing countries and countries can declare as developing countries and join the WTO as revealed chapter 1 and 2. The LICs are hidden in the developing country notion. The current study found that the literature was unable to determine why LICs have not achieved economic development despite the GSP, the Enabling Clause and the SDT provisions in the WTO Agreements. As revealed in Chapters 1 and 2, the WTO's incorrect categorisation of developing countries has aggravated this anomaly. It was established in Chapter 2 that the categorisation of countries, for a trade and an investment organisation, should be according to their respective trade and FDI capacity. Furthermore, in Chapter 2, it was demonstrated that FDI is very important for the economic development of countries, without which trade cannot be sustained and improved. Not only is FDI an important means of increasing trade capacity, it also helps to achieve sustainable economic development. Therefore, this research suggested an amendment to Article XVIII of the GATT by removing 'early stages' of countries and 'low standard' of countries and replacing with 'countries whose economy is below a percentage of international trade and FDI' so they can receive the GSP and FDI. Countries whose FDI and international trade are low, should be allowed a derogation of the MFN principle. Simultaneously, the Enabling Clause and the GSP Decision should be amended to state that countries whose trade capacity and FDI is at a low percentage in world trade, should benefit from the GSP.

8.4 Failed Attempts to Establish an Investment Law Regime

After the Havana Charter's demise and the establishment of the GATT, the International Monetary Fund (IMF) and the World Bank established a significant causal relationship between investment and trade for economic development. As discussed in Chapter 1, the Havana Charter was the first charter to introduce investment for economic development, although it did not materialise for political reasons. Thereafter, the GATT was established but it contained no provisions that dealt with investment. The *Canada – Administration of the Foreign Investment Review Act* (FIRA) case, described in Chapter 1, demonstrated the difficulty of resolving investment-related disputes in the absence of an international investment agreement. The GATT panel in the FIRA case resorted to GATT Article III to resolve the investment issues that erupted between the US and Canada. It was not a successful attempt and difficulties were encountered when granting relief since there were no investment rules codified in the trade law system.

As seen in Chapter 1, during the period immediately after World War II countries wanted to introduce investment under a trade organisation (the Havana Charter), but this also failed as the US did not ratify the Charter. Thereafter, negotiations took place under the GATT system, but countries could not agree on an investment agreement in the Punta del Este GATT ministerial conference held in 1986. During the Uruguay Round, developed countries insisted on establishing a CIIA, as can be seen from the submissions made by the US during the talks. However, developing countries were not interested in having a CIIA within the WTO because developing countries wanted to have more regulatory autonomy and decision-making power in their dealings with FDI. It is difficult to achieve a breakthrough in the current impasse until the establishment of a CIIA as a common goal of all countries.

During the Uruguay Round negotiations, the GATT members were able to establish covered agreements for trade that paved the way for a comprehensive trade agreement under the WTO. At the Uruguay Round, the WTO was able to introduce investment in a limited way under the GATS and the Agreement on TRIMs mentioned in Chapter 1. However, Chapters 5 and 6 demonstrated that these agreements were unable to resolve the existing issues such as choice of law, a forum where a dispute could be heard, proper law or applicable law, an enforcement mechanism and an international investment legal system. In the WTO Singapore Ministerial and Doha Ministerial meetings, agreement on a CIIA was not reached by members due to the diverse views of developing and developed countries. The OECD members drafted the MAI in 1998. However, the attempt to establish a CIIA was also unsuccessful again since, to a certain extent, it had to curtail States' regulatory authority.

Between the 1970s and 1980s, the UN also took initiatives to establish an investment agreement. It was observed in Chapter 5 that the draft UNCTS also had progressive reforms in relation to investment law. According to the draft UNCTS, multinational corporations could not become embroiled in the domestic politics of host States; these corporations were to keep their distance from regime change and they would become liable if they engaged in corrupt practices. However, this also did not become a reality due to the apathy of developed countries towards UNCTS due to their perception that the system was biased in favour of the host States and that it provided less protection to investors.

Developed countries wanted to have free movement of FDI and to restrict the States' authority to control and impose FDI conditions and regulations. In other words, developed countries wanted to limit the regulatory authority of States. Developing countries vehemently opposed it. Particularly during the Singapore Ministerial meeting, developed countries wanted to establish a CIIA but developing countries opposed this move and insisted that developed countries fulfil the obligations that they had already undertaken. Developing countries were of the view that FDI could restrict their freedom to make laws for political economy and local companies were unable to compete with multilateral companies.

As discussed in Chapter 4, developed countries and developing countries were in dispute on the definition of indirect investment. Developed countries wanted to liberalise investment by minimising host States' regulatory authority, while developing countries insisted on protecting States' autonomy and the right to regulate FDI-related activities. One contested point during the WTO Doha round negotiations was whether short-term speculative capital (portfolio investment which includes shares, bonds) should be included in the definition of investment and whether they wanted to control portfolio investment. Developed countries wanted portfolio investment to be included in the definition of investment. In contrast, developing countries did not agree on this point because it could destabilise the economies of LICs due to volatility; moreover, they wanted to prevent interference in host States' internal affairs. Developing countries argued that FDI would play a significant role in expanding trade liberalisation and that this would contribute to economic development. This could be done by considering the genuine concerns of LICs and developing countries. Their main concerns include the local content requirement, the issue of regulatory autonomy and the fact that multilateral companies are taking large amounts of money out of their countries.

Although the existing literature discussed the shortcomings of international investment law, to date, no one has suggested a CIIA under the WTO as a covered agreement. As shown in Chapter 1, the literature asserted the importance of a CIIA, however no specific model has ever been offered converging trade and investment. Therefore, this thesis makes an original contribution by drafting the CIIA and IIDSU.

8.5 Convergence of Trade and Investment Laws as a Theoretical Foundation

This study provided a historiographical explanation of international trade and investment law to establish the fact that, historically, the two pillars of trade and investment have been artificially divorced due to political factors. Investment is not a new phenomenon of the 21st century; it emerged during initial trade negotiations as far back as the 1940s as a means of regulating economic development, and the international trade law framework itself began to emerge circa mid 1800s when England and France developed the Cobden-Chevalier Treaty of 1860.

Chapter 2 revealed that international trade law and international investment law are essentially interconnected with development, although they belong to two distinct areas of public international law. Until very recently, the connection between international trade law and investment law has either been ignored or has received scant attention in academic studies. International trade law and international investment law differ in terms of their immediate objectives. Trade law is intended to achieve liberalisation and minimise or abolish restrictions, while the objective of investment law is to protect the properties of foreign investors. However, this ignores the reality that the ultimate objective of trade and investment is to achieve economic development.

The concept of development has evolved to mean the achievement of sustainable economic development. Sustainable economic development is not a new concept and has existed from the beginning of the history of humanity. As humans embarked on the mission to conquer the world for material gain, the maximisation of profits became the priority with little regard for the environment and the welfare of society. Chapter 2 discussed the notion of sustainable economic development and provided background information, showing how this notion emerged. This form of development, seen from a new perspective, constituted the conceptual framework for this study.

Chapter 2 discussed various economic theories to establish a theoretical foundation for introducing converging contribution to comparative advantage by merging investment and trade under the one WTO umbrella for sustainable economic development. Comparative advantage provides a theory for the specialisation of products, thereby encouraging development. Likewise, the bringing together of investment and trade provides

predictability not only to the trade regime but also to the investment regime and development.

FDI has been increasing worldwide and is traversing the frontiers of individual States. Investment law was originally developed to protect the properties of developed countries in their colonies after those colonies began to obtain independence. Subsequently, investment law was introduced to protect multinational corporations. Developing countries wanted to nationalise foreign investments as they considered that these assets belonged to them and that they were being exploited by rich countries. Furthermore, these developing countries were of the view that foreign investment assets were important to the development of their infant industries. Hence there remains a tension between the regulatory autonomy of the host States and the investors' protection.

Chapter 2 discussed the consideration by arbitrators and the WTO Appellate Body of the value of the WTO law and the investment decisions for the harmonisation of the WTO and the investor-State arbitration in *Continental Casualty Co. Vs Argentine Republic* and *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* is discussed. Parallel and overlapping jurisdictions can be found in the NAFTA and the WTO agreements. As revealed in Chapter 2 in the *Total S. A. v. Argentine Republic* case, cross intersection and jurisprudential fertilisation is possible, as the arbitrators tried to apply the GATS Article VI for investor-State arbitration.

As revealed in Chapter 4, the WTO has provided for FDI-related rules through GATS and TRIMs. The GATS provides rules for services rendered by foreign service suppliers. The TRIMs agreement does not allow to impose domestic content' and certain 'export performance' conditions on foreign investors (the developing countries have five-year transitional period). These laws can be found under BITs. Even the countries that drafted the NAFTA (the US, Canada and Mexico) were dissatisfied with the arbitrators' interpretation of the Chapter 11 provisions. The arbitrators were not ready to consider the regulatory autonomy of States; rather, their main concern was to grant relief to investors. The reason was not that arbitrators were hostile to States; but there are no appropriate guidelines available in BITs and public international law to ensure a balance between States' regulatory autonomy and investors' rights.

The objective of trade and investment law is to generate economic development. Common rules such as the NT, MFN, fair and equitable treatment and legitimate expectations are found in bilateral, regional and multilateral trade and investment agreements and these principles should be drafted in line with the WTO MFN, NT and general exceptions to balance the host States' and investors' rights. This thesis analysed the dichotomy of two systems to establish a theoretical foundation to incorporate these principles in the CIIA.

The discussions in Chapters 2 and 4 considered the advantage of converging trade and investment law in order to achieve commonality; however, arbitrators were unable to strike a balance between regulatory autonomy of the host States and investors' rights. Regulatory autonomy is a key concept that makes or breaks governments. Host States need to establish rules for sustainable economic development. Arbitrators are unable to balance investment rules and the legitimate regulatory measures established by host States. The paramount duty of States is to provide security and safety for all. After investment projects have been approved, supervening circumstances may erupt and governments, at times, may withdraw the licences given to investors. In this scenario, arbitrators should examine whether the State's action was *mala fide* and whether the said measure was introduced solely to frustrate foreign investors in line with the WTO exceptions. This particular issue was covered in Chapters 4, 5 and 7.

8.6 Complexity of International Investment Arbitration

This study investigated the current muddle of investment law, finding that it is fragmented and that its very existence is complex and in crisis. To date, issues in international investment law such as the applicable law, the forum uncertainty and the difficulty of enforcing awards, have not been resolved. This study revealed that there is no comprehensive regime for dealing with international investment disputes and offered evidence to justify the introduction of a coherent and unifying system for investment, converging investment law and trade law within the WTO. It is argued that the current DSU has established a rules-based dispute settlement system for trade which cannot be used as an investment dispute settlement mechanism as it is intended to resolve disputes between States; hence, the WTO does not have a CIIA. Chapter 4 examined the GATS, the TRIMs, NAFTA Chapter 11 and the MAI, demonstrating that no existing CIIA exists that can deal with international investment-related disputes, and emphasizing the importance of

convergence of trade law and investment law. Chapter 11 in the NAFTA also does not provide substantive law or procedural law for investments.

The procedure of investment arbitration throughout the world is complex due to the uncertainty of the applicable law, the choice of law and the forum where the case is to be heard; in addition, arbitration is multifaceted and changes from case to case. Although the Geneva Protocol was introduced, it did not provide rules for an enforceable mechanism for arbitral awards. Subsequently, the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) was introduced and it also failed to deliver the expected result in resolving international investment disputes. The Geneva Convention shifted the burden-of-proof to the award-creditor to show that the award has been made in favour of award-creditor; the award was final; that it was acceptable to the public policy of the award-recognising State; that a valid arbitration agreement was in place, and that proceedings had been conducted in accordance with that agreement. It is burdensome for the award-creditor to prove all these elements after obtaining an award.

The NYC was established in 1958 and is still in force. This Convention was introduced so that foreign arbitral awards would be recognised by national courts. This Convention did not address the issues of the choice of law, the arbitration forum and the enforcement of awards. Under the NYC, it is difficult to enforce arbitral awards as these awards are frequently challenged on the grounds of public policy as revealed in Chapter 6. Furthermore, as public policy is not defined, it is difficult to decide which public policy is relevant when deciding that an award is contrary to a State policy. Arbitrators are faced with the difficulty of deciding whether they should apply the principles laid down in public international law, or those in the public policy of the award-enforcing State. These complexities have been discussed in Chapters 5 and 6. The NYC is, however, a shift from the Geneva Convention: under the NYC, an award debtor has to show that the subject matter cannot be arbitrated and that the award is contrary to the public policy of the award-recognising State. In addition, the NYC does not provide substantive law for investment: its salient feature is that it facilitates the execution of broadly commercial arbitral awards as stated in its Preamble.

Subsequently, in 1966, the ICSID Convention was established to address the gap in international investment law. The ICSID Convention was significant as it recognised that investors could sue States regarding investment disputes: this changed the traditional

concept of the subject of international law in relation to investment. Even though the ICSID Convention brought about significant changes to existing international investment law by providing multilateral companies and individual investors the right to challenge States' measures relating to investment, it did not provide substantive law for international investment disputes and the ICSID arbitration remained an ad hoc arbitration. Chapters 4, 5 and 6 illustrated how BITs worldwide differ from one another, thereby making international investment law both complex and uncertain.

Furthermore, Chapters 5, 6 and 7 discussed the point that, even though the ICSID Convention was introduced to resolve disputes between investors and States, it was unable to deliver the goods as it created uncertainty and ambiguity regarding the applicable law, the forum where a dispute is heard, choice of law, arbitrability of disputes, and the enforcement of awards. Chapter 5 discussed the difficulties faced by investors and States regarding the selection of the applicable law and the law governing the arbitration.

The UNCITRAL rules were introduced in 1976 and revised in 2010 for ad hoc international commercial arbitration. These rules laid down the basic procedural structure for arbitration, especially in regard to trade disputes. However, investors also use this mechanism for investment disputes. As shown in Chapter 6, the domestic courts can refuse to enforce the UNCITRAL arbitral award if it is invalid under the law governing the parties; also, the arbitration procedure may be invalid according to the agreement entered into by the disputing parties and the public policy. For example, if the subject matter of the dispute is not arbitrable, it might need to be dealt with by a domestic court. Therefore, it is evident that the NYC, ICSID and UNCITRAL rules do not adequately deal with investment disputes. From the above discussion, it is apparent that, in the absence of a CIIA, a difficulty exists regarding the adjudication of international investment disputes between States and investors.

A notable feature of BITs is that they incorporate trade and investment rules. This is cause for alarm as the parties to BITs may sometimes have recourse to resolving trade and investment matters in arbitration and this may even lead to uncertainty and fragmentation within trade rules. After great difficulty, countries were able to establish a legal regime for trade under the WTO, thus creating predictability to the multilateral trade regime and successfully preventing the fragmentation of rules. The creation of an effective rules-based legal system is undoubtedly a great achievement for public international law. As revealed

in this thesis, BITs are escalating rapidly and these BITs may destabilise the existing WTO system because most BITs have incorporated trade rules. Therefore, the WTO member States should establish a CIIA within the WTO, taking this initiative as a serious and essential means of protecting the WTO system – otherwise these BITs will destabilise the rules-based WTO trade law system.

BITs have complicated investment law. As revealed in the NAFTA decisions, arbitrators did not recognise the regulatory autonomy of its member States. That is why NAFTA members appointed a commission to recommend amendments to the NAFTA and to consider developing possible interpretative guidelines. In the *Metalclad Corporation* case, municipal authority refused to issue a permit to an investor to construct a station for hazardous waste. In this case, as discussed in Chapter 4, an investor successfully challenged a State's regulatory authority; thus, it presents a challenge for a State when it establishes measures for its political economy that do affect foreign investment. Therefore, this thesis explores the avenues which will enable a balance to be struck between the regulatory autonomy of host States and the legitimate expectations of investors.

The thesis discussed in chapter 1 that in 2016, the EU signed two FTAs: the European Union-Canada CETA, and EU-Vietnam FTA. These two FTAs have introduced an appellate mechanism for ISDS. Any FTA that includes investment needs to be compatible with the ICSID Convention. The problem was the ICSID Convention does not permit appeals and it is doubtful whether the ICSID Convention does allow members to agree on an appellate mechanism. Hence, the question arises in regard to whether such an appellate mechanism is compatible with the ICSID Convention without an amendment to the ICSID Convention. The issue emerges because the CETA has a dispute settlement clause which establishes the ICSID as a forum for the settlement of disputes under Article 8.23 (7). The EU-Vietnam FTA, however, does not refer to the ICSID Convention. The CETA and the EU-Vietnam FTA tried to modify the ICSID Convention, which can be amended only by consensus of all of its members under Article 66 of the ICSID Convention. Therefore, it is near-impossible to obtain this consensus. It is doubtful whether awards of the Appellate Courts of CETA and the EU-Vietnam FTA would be recognised by non-parties to these two agreements. Furthermore, these two agreements do not constitute a CIIA.

The CETA and the EU-Vietnam FTA have, however, provided a new dialogue among States, encouraging a new perspective. Therefore, countries have endeavoured to establish

a CIIA. A CIIA is important for two reasons: it can provide substantive law for investment disputes; and it establishes a rules-based investment dispute settlement system. As revealed in Chapter 7, the ICSID Convention does not provide rules for appeals, providing for a review and annulment procedure only. These present major obstacles to the application of international investment law in a coherent and consistent manner and this again questions the legitimacy and acceptance of an international investment legal system.

8.7 Outline of the Model CIIA

The objective of proposing a CIIA is to balance the regulatory autonomy of the host States with the rights of investors. In this endeavour, the WTO law is important because the covered agreement established a rules-based trade regime. In addition, GATT Article XX provides for the general exceptions allowing both developed and developing countries to derogate from the WTO obligations on legitimate grounds which could promote their sustainable economic goals. The general exceptions recognised the sovereignty of States, with these exceptions giving States greater flexibility to deviate from the general objectives that they have undertaken for the purpose of sustainable development.

This research has shown in Chapter 7 that the panels and the Appellate Body have safeguarded the States' authority in the WTO cases, thereby maintaining the political economy of trade. The *EC-Asbestos* case revealed that the Appellate Body tries to act as a guardian of the consistency and rational regulation of welfare measures and sustainable development. In the *EC-Asbestos* case, the Appellate Body applied a broad interpretation of Article III:4 to determine the health risk within the four corners of the WTO objectives. In the *US-Shrimp* case, GATT Article XX(g) was interpreted to protect living natural resources giving States wider leverage to make rules readjusting socio-economic values from a new perspective, thus embedding confidence in international trade law among member States. This particular approach of the Appellate Body has provided a compelling ground to incorporate socio-economic values in investment law.

In summary, the WTO rules seek to remove trade barriers, thus providing a way for the liberalisation of trade to achieve the sustainable economic development that is embodied in the WTO objectives. Article III in the GATT, while restricting discrimination to like products, has been drafted to protect States' regulatory autonomy. The language used throughout GATT Article III has helped panels and the Appellate Body to interpret like products in different circumstances, thus preserving political economy of international

trade. This is lacking in investment law. Therefore, it is necessary to introduce in a WTO covered Agreement on investment the NT provision similar to GATT Article III and general exceptions similar to the GATT Article XX, which will prevent usurping the host States' regulatory authority. The investment agreement suggested in this study does not restrict States from introducing laws to achieve social equilibrium by providing equity, and human security.

As seen in Chapter 4, in the *Metalclad Corporation* case, even environmental protection measures undertaken by host States have been considered as expropriation. The political economy of investment has not been considered in relation to investment disputes. As a result, a State cannot impose legitimate measures to protect its subjects as States must be very cautious about whether their measures could be regarded as indirect or direct expropriation. This is common to all countries irrespective of their economic status. This is further evident from Chapter 4 that the *Philip Morris Asia Limited* case in which the Australian government introduced legislation for the plain packaging of cigarettes to discourage smokers. This legislation had the objective of protecting the health of the Australian people.

The *Philip Morris Asia Limited* challenged the Australian government's action. The panel decided that the Australian plain packaging of cigarettes measure was a legitimate measure under GATT Article XX but under a BIT it could have been interpreted as an indirect expropriation. These cases reveal the difficulty that a State can face when enacting laws for the welfare of its people and for the protection of the environment. Therefore, a new and better approach is required that achieves a balance between States' rights to enact laws for the public interest and the ensuring investor protection.

To make a determination on expropriation, it is necessary to consider whether the regulatory measures adopted by the host States would affect the economic rights of investors and their property and the nature of the governmental action. If the governmental action is to protect health, achieve sustainable economic goals, preserve labour standards, protect the environment or provide welfare for the State's people, such measures should not be viewed as tantamount to direct or indirect expropriation. Hence, this study suggests that such measures should be exempt from direct or indirect expropriation, thereby giving greater freedom to States to make laws to achieve sustainable economic goals.

The sustainable development objective is embodied in the WTO. The UN has also highlighted the importance of sustainable development goals. At the same time, this study has tried to find ways to prevent the arbitrary taking over of foreign assets and expropriation by States. In the international investment scenario, the host States should also be able to make laws to prevent restrictive business practices (e.g. monopoly, price discrimination**)** because States pursue economic and non-economic objectives while the objectives of multilateral companies concern profits and growth. In addition, it is suggested that portfolio investment should be excluded from the definition of investment because it can preserve the economic stability and sovereignty of host States, thereby preventing the interference of multinational companies in host States' internal affairs.

The aim of the CIIA is to bring predictability to investment and economic development. The objective of introducing FDI to the WTO is to ensure the equal distribution of benefits among all countries. Otherwise, Investors may insist that host States relax their existing environmental laws and labour laws. Politicians in LICs, may ask investors for gratification before they allow investment and may even choose investors through the tendering process. Another major concern is that these companies sometimes attempt to influence the existing regime, or even try to change it. The establishment of a CIIA discourages this practice. These concerns should be addressed in a CIIA.

The model proposed in this study addresses these areas. One silver lining in world affairs is that all countries, irrespective of their status, agree that investment's primary objective is not only to protect investment property, but also to recognise a State's unfettered rights to regulatory autonomy so that it can make rules relating to its sustainable economic development and its political economy, highlighting again that it is extremely important to have a CIIA.

8.8 Positive Aspects of the DSU and its Beneficial Value for IIDSU

As discussed in Chapter 7, WTO members can have recourse to the DSU when a trade dispute arises. This process begins after a complaint has been made to the DSB. The first step involves consultation. If consultation fails, a panel is appointed to hear the dispute. The losing party can file an appeal and this process lasts until a decision is made, as was explained in Chapter 7. This gives predictability to the multilateral trading system. The WTO members have been able to introduce the DSU for trade dispute settlement with

compulsory jurisdiction for panels and binding decision-making. Chapter 6 gives an in-depth analysis of the scope of the DSU and explains how it works to resolve international trade disputes among member States. The integration of investment dispute settlement within the WTO DSU rules is undoubtedly beneficial to bring predictability to investment law.

Chapter 7 established that the WTO has coherent rules with binding force for the dispute settlement system for international trade. The mandatory WTO DSM is undoubtedly a significant achievement for adjudicating international trade disputes. As observed in Chapter 6, under public international law, the International Court of Justice (ICJ) acquires jurisdiction if a State gives consent. In Chapter 7, it was discussed that the DSU provides a hierarchical dispute settlement mechanism for trade with a clear mandatory time period for settling international trade disputes with precedents.

It was also observed in chapter 7 that the GATT dispute settlement system had not created an effective law-based dispute settlement system and that the WTO members undertook a laudable attempt to overcome the shortcomings of the GATT legal system. The DSU's success is based mainly on the introduction of a mandatory dispute settlement system for the breach of the WTO covered agreements as substantive laws. The DSU provides for the procedural laws with clarity. It is mandatory that member States apply their recourse to the DSU upon violation of the WTO substantive law and this provides the exclusive jurisdiction. This is clearly shown in the DSU's Article 23. The DSU's Article 1 indicates that a panel and the Appellate Body are to determine the applicable law and its parameters. Article 2 of the DSU provides rules for administration of the WTO law through the panel and the Appellate Body. The salient feature of the DSU is that, at the same time, under Article 3.2, the panel and the Appellate Body should ensure the predictability and security of the WTO trading system and legal regime.

Also, in Chapter 7, it was explained that, even though the WTO DSU has created an effective rules-based trade dispute settlement system, this system also has weaknesses which include the ambiguity of SDT provisions and problems of retaliation especially for LICs. Therefore, it was suggested in Chapter 6 that any future investment agreement should address such weaknesses. The current international investment dispute settlement procedure is established in an ad hoc manner and on a case-by-case basis. This does not

guarantee predictability and/or ensure uniformity in the international investment legal system.

The DSU panels are also established on a case-by-case basis but the trade laws are found in covered agreements, and the panels apply the WTO law consistently. Furthermore, the Appellate Body provides interpretative guidance to the WTO law under Article 3.2 of the DSU. On the other hand, there is no appellate mechanism under the ICSID Convention, although it does provide an annulment procedure which, nevertheless, is unable to guarantee predictability to international investment law.

Any legal system, in order to achieve credibility and recognition as a rules-based legal system, should have permanent arbitral panels and an effective appellate body with a hierarchical institutionalised system that ensures the predictability and consistency of international investment law. The salient feature of the IIDSU suggested in this study is that, under the WTO, an investor can make a complaint against a host State. The IIDSU suggested in this thesis has the consultation as its first step; if this fails, a panel is automatically appointed to hear the case. An aggrieved party can appeal to the Appellate Body. The time frame is clearly established at each stage or, alternatively, the arbitration of a dispute is possible under this new system. The award given by the panel or the Appellate Body shall be recognised without further questioning in domestic courts of member countries. Applications for a revision are allowed for grave miscarriages of justice and all international investment disputes are lodged in the international investment dispute settlement body (IDSB) either electronically (online) or by physical presence in Geneva. Before the panel procedure commences, a list of witnesses and documents filed by parties is delivered to each disputing party either online or in Geneva and the interrogatives are introduced to resolve a dispute in a considerably short period. Transparency is assured through permitting *amicus curie* in a limited way to safeguard sustainable economic development goals.

8.9 Methodological Design

A qualitative research methodology is adopted for this study to establish standards according to which the proposition was evaluated and justified. To achieve this objective, the study used three main sources of information: (1) as primary sources, the WTO Agreements, the WTO background documents, international conventions and treaties, WTO and investment cases, WTO Declarations and proposals made by various groups; (2)

as secondary sources, relevant journal articles, books, working papers, websites and reports; and (3) WTO country profile data and UNCTAD data.

The purpose of this phase of the current study was to identify gaps in the literature. Having reviewed the literature, the study suggested a CIIA for investment disputes as a covered agreement under the WTO, to solve and overcome current difficulties faced by countries when an investment dispute arises. Therefore, this study adopted qualitative methodology to carry out a survey of trade and FDI statistics of developing and least-developed countries from 2009 to 2019. It has used the WTO Country Profile Statistics to demonstrate the inequitable status of countries in the WTO's developing country category.

The literature revealed that no studies to date have suggested that countries should be categorised according to their respective trade and FDI capacity. The methodology adopted in this study assisted in establishing the fact that the classification of countries according to their respective FDI and trade capacity does not reflect the current situation of these countries, and the establishment of a CIIA under the WTO would be constituent parts of the WTO reform process and the effectuation of the WTO's objective, and would see the realisation of an effective international investment legal system.

This study has combined a qualitative method with a comparative approach to identify the existing problems of international investment law and to suggest a system that would address these problems by providing an effective model for international investment-related disputes. Qualitative methodology is considered appropriate for the analysis of data and the literature if these contain information that is factual. This methodology was therefore adopted to conduct a comparative study of WTO law, international investment law and municipal laws under Chapters 1, 2, and 4 to 7. This was done to demonstrate the complexity of existing international investment law and the economic disparity between developing countries according to their respective FDI and trade capacity. Qualitative research methodology was appropriate for the comparative research analysis.

Comparative research analysis was important for this study as it provided the basis to compare, contrast and analyse the data and the literature in order to establish that FDI improves economic development and a CIIA would provide predictability to the investment legal regime. For comparative analysis, this study investigated the historical development

of international investment law and trade law. The underlying reason for adopting a qualitative research method comprising comparative analysis was to demonstrate the similarities and differences between trade law and investment law and to identify the shortcomings of existing international investment law. Qualitative methodology was used in this study to compare and contrast, and to interpret and comment on, the existing literature, which is helpful in introducing new rules and drafting a model of international investment law.

8.10 Future Research

The limits of this study are that it did not explore the TRIPs Agreement and anti-trust law. Members should provide the minimum standard of protection set out in the TRIPs agreements as discussed in Chapter 1. These standards are found in the WIPO (Convention establishing the World Intellectual Property Organization), Berne Convention for the protection of literature and art works, and the Paris Convention intended to protect industrial products. The remedies and enforcement are mainly found in the laws of member countries, however, a dispute between two-member States is heard by the DSU.

Anti-trust law is intended to ensure fair competition and to reduce monopolies for the betterment of consumers. This covers the entire business activities of a company and this particular area has to be dealt with by the domestic laws as well as international laws. It warrants a separate study in regard to FDI or mergers or the acquisition of company shares. These two areas are highly relevant to international investment but are not discussed here as they warrant separate studies, thereby indicating an opportunity for future research.

8.11 Conclusion

This study has re-opened the debate calling for indispensable reforms in international trade and investment to revisit the term ‘developing country’; to create a CIIA under the WTO; to increase the level of equitable participation by LICs in the trade liberalisation process; and to establish an investment law regime to reduce regulatory tension. It is vital that all States take on the responsibility of these initiatives to ensure the establishment of a rules-based trade and investment regime.

The question arises whether the WTO could ignore this reality by claiming that adequate rules for FDI are provided. If the WTO fails to realise the current spread of FDI worldwide and is unable to establish a CIIA, it is inevitable that the rules-based trade law system will be eroded and fragmented due to the emergence of bilateral trade and investment

agreements by States. To establish a CIIA is not an easy task. The political will of countries is essential; otherwise, it would be part of a larger political horse-trading exercise.

Reforms are possible only through an objective assessment; through all countries, as a group, seriously considering the investment and sustainable economic development issues with which they are all confronted, particularly LICs; and through all States wanting to make rules for the political economy. This may be possible only by removing the existing shortfalls and eliminating the imbalances that currently exist between developed countries, larger developing countries and LICs and balancing host States' interests and the interests of investors. In addition, LICs need the establishment of a legal aid centre, similar to the Advisory Centre on WTO Law (ACWL) for investment disputes.

The model CIIA introduced in this study with an annex will make a contribution to the existing literature and will augment the model's acceptability, thus improving the sustainable economic development of all countries. However, the historic mistrust and division that exists between rich and poor countries, the heterogeneity of these countries, and in particular the threats made by the former US President Donald Trump regarding the imposition of unilateral trade measures on imports from different countries and to withdraw from free trade agreements may lead to direct economic crisis in LICs and calls for a reclassification of LICs. This thesis acknowledges that the model CIIA may encounter strong resistance from the developed and the larger developing countries, regardless of the model's benefits to global trade and investment.

Finally, this study contributes to the literature in two ways. It makes a theoretical contribution by proposing convergence of international trade and investment laws. In terms of its practical contribution, this thesis has created a model for a CIIA and an IIDSU, based on the existing BITs, for future negotiations within the WTO.

Annex I The WTO members hereby amend the *WTO Agreement.*

The members shall agree to establish a *comprehensive investment agreement* (CIIA) as Annex 1D.

The Members shall agree to establish an *international investment dispute settlement understanding* (IIDSU) as Annex 1E.

Annex II Draft CIIA

Members to the Agreement

Preamble

Members reiterate their commitment to the WTO Agreement and recognise that their connection with investment to achieve economic goals with a view to raising living standards, protecting employment and improving real income and maximum use of world resources is not contrary to sustainable development and protecting and preserving the environment.

Members hereby recognise that foreign direct investment has taken a prominent place in economic development of their countries and its close connection with international trade;

Members are desirous of promoting the expansion of investment and facilitating the progressive liberalisation of investment to create a competitive environment for investment in the world;

Members recognise the necessity of positive steps planned to protect low-income countries that should receive a share of the growth of foreign direct investment for their economic development;

Members are desirous of strengthening the objectives entered in the CIIA with the aim of reciprocal and advantageous rights directed to investment liberalisation *mutatis mutandis* members' regulatory authority;

Members are desirous of having an investment regime through a rules-based system that will provide predictable, fair treatment and transparency in investment law.

Members agree as follows:

Article I

This Agreement is applicable to measures adopted by member countries in relation to investment and any act carried out by an investor or investors concerning investment:

(a) between member countries;
(b) between member countries or a country and an investor or group of investors;
(c) between an investor or group of investors and a member country or countries;
(d) non-governmental organisations only for environmental and sustainable development issues.

The terms ‘member countries’ and ‘a member country’ include a host State.

Article II Investor means:

(a) a legal entity created by a statute of municipal laws of member countries with or without profits that is either private or public companies, multilateral companies, joint ventures, government fully- or partly-owned companies, corporations, partnerships, trusts (excluding charitable trusts); or
(b) a natural person who is a citizen of a member country or resident of a member country;
(c) a natural person or legal person who has an interest in the enterprise.

Article III Investment means:

[A] kind of capital invested in an industry by a state or an investor in another country (host) with long-term and short-term interests and a greater degree of control of the business entity with the aim of profit or not-for-profit principles, including:

(a) novation rights;
(b) assignment;
(c) intellectual property rights;
(d) claims to money and claims to performance rights;
(e) pledges, liens, long-term leases and mortgages;
(f) tangible and intangible properties;
(g) rights relating to movable and immovable properties;
(h) permits, concessions, authorisations and concession licences relating to investment;
(i) the assets of an enterprise;
(j) profit-sharing rights.

Indirect investment and portfolio investment are excluded (portfolio investment is not included as it can be used to avoid interference on internal matters and to maintain a host State's economic stability). Indirect investment is excluded as it may deter government authority from making laws for sustainable development and from protecting the regulatory autonomy of host States.

Article IV Most-Favoured Nation

1. Each member shall provide an investing State or investors of another member and their investment in 'like circumstances' and for 'like products' no less favourable treatment than it provides to its domestic investors, and to their investment in relation to the establishment, acquisition, operation, management, maintenance, use, enjoyment, sale or other disposition of investments including custom duties, subject to Article XII.

2. Each member shall provide an investing State or investors of another member and their investment in 'like circumstances' and for 'like products' no less favourable treatment to investors of any other member or of a non-contracting member, and to the investments of investors of any other member or non-contracting member, in relation to the establishment, acquisition, operation, management, maintenance, use, enjoyment, sale or other disposition of investments including custom duties.

Article V National Treatment

1 The members recognise that internal taxes, charges, laws, regulations and requirements affecting international investment with respect to purchases, transportation and requirements that affect investment and investors' sale or use of products, and internal quantitative regulations that determine the mixture, processing, raw materials and the manner in which a product should be used or manufactured in a specified quantity, should not be applied to foreign investors to give protection to local investors, subject to Articles X, XII, XIV, XV and XVI.

2 Each member shall provide investing States or its investors no less favourable treatment than it provides to its domestic investors in 'like circumstances' and for 'like products' in relation to the establishment, acquisition, operation, management, maintenance, use, enjoyment, sale, manufacturing or other disposition of investments in the host State.

3 After the investment of a member is introduced to a territory of the host State, such investment shall not be subject to direct and indirect internal taxes or other charges of

any kind more than are directly or indirectly applied in domestic 'like situations' and to domestic 'like products'.

4 No member shall apply internal taxes or other internal charges to foreign investment or domestic investment in a manner contrary to the principle enshrined in Paragraph 1.

5 The capital of the territory of a member or investor brought or invested into the any other member's territory shall not be discriminated against less favourably according to 'in like situation' and 'like products' to investments or capital of domestic origin in respect of all laws, regulations and requirements affecting their internal investment, purchase, transportation, distribution, manufacturing or use. This paragraph does not apply to differential internal transportation costs which are not based on nationality.

Article VII Transparency

1. Each member shall forthwith publish its laws, regulations, procedures and rulings of courts which may affect operation of this Agreement.

2. A member shall not be bound to disclose any information that affects its national security or threatens its territorial integrity and including information sensitive to the conduct of States.

3. Investors shall not be discriminated against in respect of granting investment opportunities in host States, and investment opportunities shall be granted solely on an equitable basis.

4. No investment opportunities shall be given in favour of some class of investors or investors due to pecuniary benefits of host States' officials or politicians.

5. Local investors or foreign investors can challenge these measures. In such instances, a citizen of a host State may challenge these measures in an apex court of his/her country.

Article VIII Minimum Standard of Treatment

1. Each member shall provide investors or investment of another member or any investing member State fair and equitable treatment and shall afford protection and security for investors and their property.

Article IX Performance Requirements

1. No member shall, with respect to the establishment, control, maintenance, use, enjoyment, process of manufacturing, sale, construction or any other arrangement of investment in a host State's territory or at the broader level, impose:

(a) local content requirements;
(b) export performance requirements;
(c) trade balancing requirements;
(d) local equity;
(e) profit remittance restrictions;
(f) domestic sale requirements;
(g) utilisation of specified technology;
(h) restrictions for research carried out locally;
(i) establishment of joint ventures with local companies;
(j) limitations on investment to a specific geographical area of the host State's territory;
(k) employment of a given number of citizens of the host State.

Provided that the above measures are not applicable if a host State has an abundance of raw materials.

Provided that the above measures are not applicable to low-income countries for which trade and foreign direct investment capacity improve, to a certain percentage, of international trade and international investment.

Provided the above measures are applicable to the extent of their commitments to the above requirements.

Provided that the above measure (k) is not applicable if the host State's unemployment rate is high, at least 60% of local employees should be recruited and foreign investors should offer at least 25% of managerial positions to local people.

Nothing in this Article prevents the provision of tax holidays, exemption from customs duties and market privileges on a non-discriminatory basis.

Nothing in this Article prevents members from introducing laws to ensure sustainable economic development.

Article X Exceptions for Economic Stability

1. The above-mentioned export performance requirement in Article IX is not temporarily applied to overcome and relieve the host State's economic recession and to improve exports.
2. Temporarily imposed restrictions on foreign investment to protect local investors and employees.
3. Measures to prevent the gap in the balance of payment deficit and to improve low monetary reserves.
4. Measures to avoid any further deterioration of business and economic interests of the host State.

Article XI Emergency Safeguard

1. In the event of unexpected development, in 'like circumstances' or a similar situation, of direct or competitive foreign investment that affects local industries and domestic products, a member may take necessary steps to protect local industries and domestic products by temporarily suspending the obligations undertaken in this Agreement.

Article XII Sustainable Development Exceptions

1. Safeguard the public morale of the host State;
2. Sustain and develop humans, living beings and the earth's life;
3. Preservation and conservation of exhaustible natural resources;
4. Development of fauna and flora;
5. Preservation of the sea and the seabed.

Article XIII Cultural Exceptions

1. To protect the host States' archaeological, cultural and historical values and world heritage

Article XIV Health Exceptions

1. Members may derogate the obligations of this Agreement to protect the health and life of their people.

Article XV Security Exceptions

1. Nothing in this Agreement precludes members from undertaking to:

(a) furnish any information that deals with national security and law and order;

(b) take necessary steps that are required to maintain and protect its security interests;

(c) provide government procurement for military purposes.

Article XVI Labour Rights

1. Members shall agree that they will not lower labour law standards that exist in the host State and that they commit to protecting internal labour laws in accordance with internationally-recognised labour laws.

Article XVII Transfer of Capital

1. Investors shall be allowed to take capital, profits, and sales or proceeds of investments out of the host State's territory, provided that nothing of the host State's power to prevent the transferring of capital, profits or proceeds of investments applies under the following:

(a) protection of creditors, or cases of insolvency and bankruptcy;

(b) regulation of financial authority;

(c) compliance with judicial awards or orders in administrative matters;

(d) transfer of capital or investment should not be affected in low-income countries provided such transfer is notified six months beforehand;

(e) transfer of 25% of capital and investment in low-income countries shall not be taken away and must be spent in the host State.

Article XVIII Expropriation

1. Members shall not nationalise or expropriate investment or investment property of other members or their nationals, except as provided in good faith under the following:

(a) for public betterment of the host State;

(b) in the national interest;

(c) on a non-discriminatory basis;

(d) in accordance with laws of the host State;

(e) for sustainable development;

(f) upon award of compensation.

Provided that the host State is not liable for any occurrences relating to the law of frustration and the investor or investing State being bound to undertake mitigation.

Article XIX Monopolies

1. Nothing in this Agreement prevents members from maintaining state or state-sponsored monopolies.
2. Members endeavour not to discriminate against foreign-affiliated monopolies.
3. Low-income countries are not precluded from making rules to prevent monopolies from conducting anti-competitive practices.

Article XX An applicable uniform substantive law for investments through a WTO-covered agreement, based on international rules of law. The law of the seat of arbitration or enforcement of States' laws or conflicts of laws should be used as a gap filling.

Article XXI Commitments

Members shall undertake the obligations enshrined in the Agreement on the date of its entry into force. Low-income developing countries should give notification to undertake their obligations upon the improvement of foreign direct investment and trade capacity to a certain percentage of world investment and trade.

Sources: The WTO, the GATT, the GATS, TRIMS Agreement, the NAFTA and the MAI (Specifically visited, GATT Articles I, III and XX) (GATS Articles II, III VI, VIII, X, XI, XII, XIV, XIVbis, XXII and XXII) (TRIMs Articles 1, 2, 4, 6, 8 and Annex) (NAFTA Articles 1101,1102, 1103, 1106, 1109 and 1110) (MAI Draft Articles II and III)

Annex III Members agree to amend the Article XVIII of GATT

Annex IV Draft Model of (IIDSU)

Model of International Investment Dispute Settlement Understanding (IIDSU)

Article 1. Members agree to establish an International Investment Dispute Settlement Understanding (IIDSU) under the WTO and the rules and procedures as further elaborated herein.

Article 2. Members shall hereby agree to terminate all bilateral investment treaties (BITs) entered into after the WTO Investment Covered Agreement (ICA) comes into force.

Article 3. Members agree to the prompt settlement of investment disputes; the more effective participation of countries and investors in the Investment Dispute Understanding (IDU); the better functioning of investment; and the maintenance of a proper balance between the rights and obligations of developed, developing, low-income countries and investors to seek remedies *mutatis mutandis* to the WTO Investment Covered Agreement (ICA).

Article 4. Members shall agree to consultation if a member or an investor of a member requests in writing to the Director-General of the Investment Dispute Settlement Body (IDSB) stating that a measure or measures of a member violate or affect the WTO Investment Covered Agreement (ICA).

Article 4(1). The respondent State, within 30 days of the request being made for consultation, shall enter consultation with good faith to settle the dispute.

Article 4(2). If a member does not respond to the request made for consultation within 30 days, a panel shall be appointed unless otherwise agreed.

Article 4(3). If the parties cannot settle the dispute amicably, 60 days after the complaint has been made, the complainant may request that a panel be appointed.

Article 5. Members shall hereby agree to establish an Investment Dispute Settlement Body (IDSB) to administer these rules and procedures and, except as provided in the WTO ICA, the IDSB itself.

Article 6. The IDSB shall have the authority to establish a permanent panel for investment claims and to register the panel and Appellate Body reports.

Article 7. Members shall recognise the registered panel and Appellate Body reports deeming them to be the final decree of their municipal courts.

Article 8. An investor of a member or member country whose rights are enshrined in the WTO ICA and who is alleged to have breached or infringed directly or indirectly may, by written request, communicate to the IDSB Director-General. The IDSB Director-General shall direct the member who it is alleged has violated the WTO ICA to file its objections within 30 days of receipt by the IDSB Director-General of the written request.

Article 9. If the member country or countries or investor or investors do not agree to an amicable settlement within 30 days of the IDSB Director-General's direction to the

respondent member or investor, the IDSB Director-General shall refer the matter to the permanent panel to hear the dispute.

Article 10. The chairman of the permanent panel shall appoint a three-member panel, from the panel roster, within 15 working days of receipt of the IDSB Director-General's communication.

Article 11. The panel shall consist of three members from developed, developing and low-income countries.

Article 12. A written request may be filed in person in Geneva or online, using the internet, from the national capital city of the member country, the location of the principal office of an investor or any place where investment property is situated.

Article 13. A written request must contain a concise statement directing the IDSB Director-General to the particular circumstances that are alleged to have constituted a WTO ICA breach.

Article 14. The members and investors involved in the proceeding must submit their list of documents 30 days prior to the hearing. Each such member or investor may, with the leave of the panel, request that they be permitted to deliver interrogatories to the respondent/s either online, using the internet, or in person in Geneva. The member who receives interrogatories may answer them by way of an affidavit.

Article 15. Any member or investor who refuses to answer such interrogatories shall not be allowed subsequently to submit documents in answer to those interrogatories, unless exceptional circumstances are found to exist and it is considered in the interests of justice to allow such submission.

Article 16. The panel shall, as much as possible, encourage the members and investors to arrive at a mutually acceptable solution which settles the dispute and this solution should be consistent with the WTO Investment Covered Agreement (ICA).

Article 17. Each party to the dispute shall file written submissions either online, using the internet, or in person (by depositing them with the IDSB Secretariat) within two months of the written complaint being filed and the IDSB Secretariat must immediately provide such written submissions to the panel and to the other party or parties to the dispute.

Article 18. The panel may grant an additional three weeks, in exceptional circumstances and in the interests of justice, for a party to make its written submissions.

Article 19. If a dispute involves the clarification of the ICA or of the WTO agreement, the panel must forthwith cease to hear the case and transfer it to the IDSB to consider according to the IDSU's normal panel procedures.

Article 20. The panel shall publish its report within six months after hearing the dispute, together with its assessment of the value of the breach or the extent to which the measure in question is inconsistent. If the panel considers that it cannot issue its report within six months, it shall inform the IDSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case shall the panel take more than nine months from its original appointment to publish its report.

Article 21. Panel reports may be appealed only on the grounds of a question of fact and law and any such appeal must be lodged with the panel within 60 days of the date on which the panel report is published.

Article 22. Parties may file a revision application in exceptional circumstances and if considered necessary in the interests of justice.

Article 23. An appeal shall be heard by the Appellate Body which shall hand down its decision within six months from the date on which the appeal was lodged. If the Appellate Body cannot reach its decision within six months, the Appellate Body shall communicate to the IDSB the reasons for the delay. However, in no case may the decision of the Appellate Body be made more than nine months after the appeal was first lodged.

Article 24. The Appellate Body shall consist of 15 members, each of whom shall hold office for five years and who can be removed on gross misconduct or death or if willing to relinquish duties.

Article 25. The panel and the Appellate Body shall recognise the regulatory autonomy of member countries while preserving investors' rights and shall clarify and interpret the WTO ICA and IDSU in compliance with customary international law to fill the gaps.

Article 26. The IDSU is the cardinal principle in providing safeguards and predictability to the WTO investment regime. The members agree that the IDSU protects the rights and obligations enshrined in the WTO ICA and that the IDSU decisions of the panel and the

Appellate Body shall not attach to or lessen the rights and obligations within the WTO Investment Covered Agreement (ICA).

Article 27. The panels may have authority to recommend provisional measures in a situation of exigency to maintain the status quo of the subject matter and this shall be available in exceptional circumstances.

Article 28. If the respondent member does not agree to withdraw the alleged infringing measure while the case is heard after the issue of a provisional measure, the panel may, upon request by the complainant member, grant compensation to that member from the date on which the alleged breach first took place until the end of the hearing, if the complainant is successful with its claim.

Article 29. The panel may grant compensation which is proportionate to the level of investment loss or the loss suffered by the complainant, calculated over the period of time during which the alleged breach occurred, coupled with litigation costs.

Article 30. The panel and the Appellate Body may deliver awards on the basis of a majority vote.

Article 31. Members against whom an award is made may implement the award by notification to the IDSB within one month of the award. If the period of one month is not adequate for this purpose, such member may request the IDSB to allow the member another two months to implement the award.

Article 32. In the event of non-compliance after one month or after the extended period of two months has elapsed from when the award is registered in the IDSB, the award of the panel or the Appellate Body may be enforced in the respondent member's municipal courts. Members and their courts shall recognise that investment awards are the final decree of their courts and a certified copy of the award presented to the district court of that country shall be enforced forthwith.

Article 33. The successful member may assign the award to another member by giving notice of such assignment to the IDSB and the respondent State or investor. The member to whom the award is assigned will have the same rights as the original member or investor to recover the money entitled under the award.

Article 34. A permanent panel shall be composed of well-qualified individuals with demonstrated expertise in law, international trade, investment and economics. Citizens of members whose governments are parties to the dispute shall not serve on the panel unless the parties to the dispute agree otherwise. Vacancies shall be filled as they arise on a transparent basis.

Article 35. The permanent panel shall consist of 25 persons each of whom shall hold office for five years and whose salaries shall be paid from the IDSB Director-General's consolidated fund. The WTO members shall contribute to the fund according to their respective share of world trade and foreign direct investment.

Article 36. Investors of member countries shall pay an amount annually commensurate with their annual profits, with this to be determined by the IDSB Director-General, to the consolidated fund.

Article 37. The panel members shall preserve the panel's independence, impartiality and integrity. Members of the panel may be removed on the grounds of moral turpitude or misconduct if an inquiry by a three-member committee appointed by the IDSB for that purpose determines that such grounds exist. The decision of the committee shall be approved by the majority of the WTO members.

Article 38. A member or investor who asserts a particular fact should prove this fact before the panel and the Appellate Body.

Article 39. The panels may receive and request information relevant to the dispute, but unsolicited technical assistance or information provided by individuals or groups shall not be accepted.

Article 40. Provided, however, in the interests of justice and in exceptional circumstances, on matters concerning sustainable economic development, panels and the Appellate Body may accept submissions made by third parties.

Article 41. All proceedings of the panel and the Appellate Body on the investment dispute shall be open to the public.

Article 42. Members agree to establish an Advisory Centre to assist LICs and small enterprises for investment dispute resolution.

Article 43 Members agree to establish a consolidated fund for the Advisory Centre.

Article 44 Members may not exhaust local remedies.

Article 45 Investment Tribunals may interpret investment rules embodied in the WTO Investment Agreement in line with customary rules of public international law.

Sources: The WTO DSU, the GATT, the GATS, TRIMS Agreement, the NAFTA, the MAI, ICSID Convention and BITs. (Specially visited, the DSU Articles 1, 2, 3, 4, 6, 7, 17 and 23) (GATS Articles XXII and XXIII) (ICSID Convention Articles 12, 13, 14, 15, 26, 28 and 36) (NAFTA Article 1119) (MAI Draft Article V)

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