last decade has indeed spurred most of the WTO participants to agree that something needs to be done to make the rules governing foreign investment more consistent across national borders.

International investment law is one of the fastest-growing areas of international law. Treaties, bilateral, regional and plurilateral, have increasingly become the basic source of international investment law. Foreign investment has become extremely important since the 1980's only. At first sight, foreign direct investment ("FDI") appears to be substantially different from international trade. While the latter seeks to secure market access for goods and services produced abroad, rules on FDI seek to protect investment in production in the country of destination. A closer look reveals that both fields closely interact as trade regulation increasingly addresses conditions of competition within a given market. The protection of national treatment has important effects on investment protection. Discussion of services regulation under the GATS showed that commitments relating to modes 3 and 4 (establishment and presence of natural persons) essentially protect investment.

Likewise, intellectual property standards serve not only trade but also the purpose of protecting foreign direct investment; in fact it is often an essential pre-condition for such investment and transfer of technology. Finally, WTO law includes the Agreement on Trade-Related Investment Measures (TRIMs Agreement). While trade diplomacy still struggles as to whether or not the WTO should deal with investment (so denied in the General Council decision of July 2004), the WTO framework already entails a body of law dedicated to serve the protection of foreign direct investment. The political debate, however, indicates that common perceptions of foreign direct investment have been relating to instruments outside the WTO, in particular customary international law and bilateral investment treaties ("BITs") – both a sensitive and traditionally burdened issue for developing countries.

¶2-012 Legal theory

The doctrine of international law is evidently of paramount importance in explaining the role and potential of the rule of law, and its effectiveness, in international trade regulation. Many would argue that the predominance of power-oriented – as opposed to rule-oriented – trade policy roots, as in other areas, in the weak nature of international law. Mainly in response to realpolitik schools of international relations, lawyers maintain this to be a false perception. The following excerpt from the writings of Louis Henkin

of know-how, processes and technology, a company may avoid border restrictions simply by manufacturing within the domestic market. Enhanced access to host-country markets generally ranks high among the factors that industries cite as reasons for foreign investment.

examines whether nations observe international law and, if so, why they comply therewith.[12] His general considerations apply equally, and perhaps particularly, to international trade regulation.[13]

The absence of a longstanding legal theory on tradition of international trade regulation explains why even basic questions are still in the open. Theoretical analysis of the exact contents and confines of the core legal principles governing the current multilateral trading system – such as the MFN clause or the obligation of national treatment – are full swing in dialogue with case law and far from settled, despite the fact that these concepts have been in existence for a very long time. An academic body of legal theory of trade regulation is only beginning to be built, dealing with basic structures, institutions and regulatory approaches. Reflecting on the role of law and institutions in international economic affairs, a variety of systemic problems and possible solutions come to mind.[14]

Some observers have begun to question, in more general terms, the adequacy of the current state of law and principles governing international economic relations. They argue that the current framework reflects too functionalist an approach and needs to be adjusted towards a more constitutionalised model. This issue, is often called constitutionalisation of international economic law.

From a legal perspective, we will see throughout this book that trade and investment regulation has traditionally been operating, and sometimes still is, under legally open-textured norms of competence, often leaving matters to governmental discretion.[15] In substance, trade regulation entails an operation of balancing different and partly competing interests. This is often done on a case-by-case basis. The allocation of decision-making powers therefore is of paramount importance.

[12] Louis Henkin, *How Nations Behave* (Columbia University Press, New York, 1979), pp46-53 44. See also Louis Henkin, "International Law as Law in the United States", 82 MICH. L. REV. 1555 (1984); Harold Hongju Koh, Commentary, "Is International Law Really State Law?", 111 HARV. L. REV. 1824 (1998).

[13] See Julien Chaisse & Debashis Chakraborty, "Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System", 28 U. Pa. J. Int'l Econ. L. 153 (2007).

[14] John H. Jackson, a founding father of legal trade theory, lists some of them. See John H. Jackson, *Global Economics and International Economic Law*, JIEL 1 (1998), pp 20-247.

[15] For a collection of the classical and contemporary arguments in support of free trade and the arguments for protectionism, see RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS 5-78 (1996). See also The Miracle of Trade, THE ECONOMIST, Jan. 27, 1996, at 61-62; Richard B. Stewart, International Trade and Environment: Lessons from the Federal Experience, 49 WASH. & LEE L. REV. 1329, 1330 (1992).

little legal certainty and allowing tribunals to interpret the standard in ways that significantly limit the governments' regulatory powers.

The distinctive feature of many BITs is that they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to International arbitration,[52] often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host State in its own courts.[53] The Convention on the Settlement of Investment Disputes ("ICSID") offers a multilateral framework for the settlement of disputes between governments and private operators.

In a regional context, the NAFTA Agreement offers extensive protection in its Chapter 11, [54] as do many other FTAs.[55] Apart from WTO rules on goods, services and intellectual property,[56] FDI has to date not been subjected to a comprehensive multilateral legal framework, although many attempts have been made to this effect.[57] In 1996, the OECD

[52] According to the United Nations Conference on Trade and Development ("UNCTAD"), during the past two decades, there have been more than 500 known investor-State disputes submitted to international arbitration.SeeRecent Developments in Investor-State Dispute Settlement ("ISDS"), UNCTAD, (http:// unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf).

[53] Third party dispute resolution is a key component of the BITs "... [it] is a commitment mechanism that resolves a dynamic inconsistency problem for states. It allows the host state to commit itself to a contract without fear that a future government will expropriate, interfere with domestic courts, or otherwise retreat from the promises embodied in the BIT. Regardless of the level of trust among the parties at the time of the investment, the investor will be concerned that a future government may break the current government's promise. Furthermore, the investor may not trust future governments to refrain from interfering with local courts. Ensuring that international arbitration ... is available to hear investment disputes, helps the host government make a credible commitment that it would otherwise not be able to make." Tom Ginsburg, International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, 25 INT'L REV. L. & ECON. 107, 108 (2005) at 113.

[54] See Jamie Boyd, Canada's Position Regarding an Emerging International Fresh Water Market with Respect of NAFTA, 2 NAFTA: LAW AND BUS. REV. AMERICAS, 3 (1999); Charles H. Brower, Investor-State Dispute Settlement Under NAFTA: The Empire Strikes Back, 40 COLUM. J. TRANSNAT'L L. 43 (2001).

[55] On the negotiation of investment chapters within free trade agreements between Latin American countries and the United States, see Roberto Echandi, A New Generation of International Investment Agreements in the Americas: Impact of Investor-State Dispute Settlement over Investment Rule-Making, available at http:// www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf (last accessed Dec. 27, 2014). See also Charles N. Brower, NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA, 97 Am. Soc'y Int'l. L. Proc. 251, 255-57 (2003).

[56] See Keith E. Maskus,The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, 9 Duke J. Comp. & Int'l L. 109, 109 (1998) (listing China, Argentina, and Mexico as examples of developing countries expanding their intellectual property protection).

[57] See Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 HARV. INT'L L.J. 427, 439 (2010).

nations commenced negotiations to establish a Multilateral Agreement on Investment ("MAI") which was intended to be open for accession to all countries, to introduce the principles of MFN and national treatment for all forms of FDI and to provide a wide range of legal and procedural safeguards for investors.[58] However, MAI negotiators faced systemic hurdles in their ambitious approach to liberalise so broad a field as investment, including the complexity of national tax regimes.[59] They also met with intense public

[58] See, e.g., CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 219 (2008); Juyrgen Kurtz, NGOs, the Internet and International Economic Policy Making: the Failure of the OECD Multilateral Agreement on Investment, 3 MELB. J. INT'L L. 213, 225-26 (2002) (explaining the role NGOs played in the abandonment of the MAI); Nii Lante Wallace-Bruce, The Multilateral Agreement on Investment: An Indecent Proposal and Not Learning the Lessons of History, 2 J. WORLD INVESTMENT 53 ((2001) (describing the abandonment of the MAI); Andrew Walter, Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment, in NON-STATE ACTORS IN WORLD POLITICS 150-68 (Daphne Josselin & William Wallace eds., 2001).

[59] See Eric Neumayer, Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD Negotiatons, 46 Wirtschaftspolitische Bl tter 618 (1999). Trebilcock and Howse have also described the political dynamics that took over the MAI negotiations and ultimately led to their breakdown. By May 1997, agreement had been reached between the negotiators on many elements of the basic architecture of the MAI [Multilateral Agreement on Investment], including MFN and National Treatment. However, important differences of view between countries were surfacing with respect to the relationship of the MAI to environmental and labour standards and cultural policies. As well, considerable disagreement existed concerning whether and how investment incentives should be disciplined, the result being that incentives were simply not dealt with in the draft. At the same time, however, a vigorous public debate was beginning in OECD countries such as Canada, the United States and Australia concerning the impact of the MAI on the democratic regulatory state in general, and on environment, labour rights and cultural protection more specifically. Canadian activist groups were at the forefront of bringing the MAI negotiations into public view. In January 1997, when no public version of the negotiating text was available, Canadian activists obtained a confidential version, and began circulating it to like-minded groups, using the Internet as an effective dissemination tool. In April 1997, accounts of the MAI began to appear in the popular press, and governments were placed on the defensive to justify their negotiating positions to the public at large. Some of the groups in question had unsuccessfully challenged the Canada-US FTA and the NAFTA, often making grossly exaggerated and hypothetical claims about the damage likely to flow from these agreements to the welfare state. With the MAI, their approach was shrewder and more careful. They linked a more general critique of globalisation driven by corporate interests with a highly plausible analysis of specific provisions of the draft MAI, or omissions from it, as well as a critique of the way it was negotiated. While many groups took different and overlapping positions, the thrust of the overall attack is well expressed by Tony Clarke and Maude Barlow: We do not wish to leave the impression that we reject the idea of a global investment treaty. We are well aware that transnational investment flows have been accelerating at a rapid pace and that there is a need to establish some global rules. But the basic premise on which the draft versions of the MAI have been crafted is, in our view, largely flawed and one-sided. It expands the rights and powers of transnational corporations without imposing any corresponding obligations. Instead, the draft treaty places obligations squarely on the shoulders of governments . . . Meanwhile the MAI says nothing about the rules that transnational corporations must follow to respect the economic, social, cultural, and environmental rights of citizens. The secrecy surrounding the negotiations and the usual cloak-and-dagger behaviour by foreign ministries when faced by early enquiries about the course of the negotiations gave prima facie credence to a conspiratorial view of the whole undertaking. The fact, noted above,

The following texts give a brief overview of the more stringent AoA rules governing the admissibility of domestic agricultural support measures, as well as the successes and shortcomings of the AoA in this area. The different measures are classified in "green box", "amber box" and "blue box" (as a subgroup to the "amber box") disciplines. The "green box" allows for unlimited non-production-related support and forms the main basis of direct payments.

Under the GATT 1947, granting subsidies contingent on the export of primary products – i.e. most agricultural products – was allowed, as long as the Contracting Party concerned did not gain a "more than equitable share of world export trade" by doing so (Article XVI:3). Even these rules remained largely ineffective after the United States were granted, in 1955, a waiver from GATT obligations regarding their extensive export support policy. The 1979 Subsidies Code likewise exempted agricultural products from its ban on export subsidies.

The widespread use of export subsidies, in particular on agricultural products, was at the root of the major "trade wars" of the 20th century. While tariffs and most non-tariff barriers to trade were continually being reduced during the GATT 1947 rounds, agricultural export subsidies kept increasing. Ultimately, the Contracting Parties were forced to address the problem of export subsidies in the context of the Uruguay Round.

Although export subsidies have been rendered subject to the disciplines of the AoA, in their use, members remain constrained not by the agreement's general rules themselves but by the contents of their schedules of commitments. Since these schedules are the result of negotiating trade-offs, members have often managed to continue to support the export of specific products of particular importance to their farmers.

Technical Barriers to Trade

Product requirements by law and industry standards essentially serve two legitimate purposes. First, the safety of products put on the market is a prime concern for governments, producers and consumers alike. The costs and harms of unsound and unsafe goods are significant for humans, animals and for the environment. Product safety requirements are thus clearly entitled to prevail over market access for unsafe products. Second, technical regulations and standards serve the purpose of interfacing different products. As final products are composed of different components commonly stemming from various countries and jurisdictions, shared accepted standards assure interoperability.[71] At the same time, technical regulations and standards potentially serve the purpose of limiting market

[71] See, e.g., Kenneth A. Bamberger & Andrew T. Guzman, Importers as Regulators: Product Safety in a Globalized World, in Import Safety: Regulatory Governance in the Global Economy 193, 194 (Cary Coglianese et al., eds., 2009).

access for competing products. Since standards largely vary among different countries, they may be *excessively* strict and may be upheld artificially. Moreover, we have seen that standards may not only relate to the characteristics of a product but also to the ways and means of how it was produced.[72]

The Agreement on Technical Barriers to Trade ("TBT Agreement")[73] was first developed in the Tokyo Round (then also called Standards Code) and was further improved in the Uruguay Round, with a view to strengthening the basic disciplines enshrined in Articles XI and XX of the GATT 1994.[74] It was largely inspired by the work undertaken within the EC and the EFTA.

The TBT Agreement responds to two broad policy considerations. On the one hand, technical regulations and product standards, including packaging, marketing and labelling requirements, as well procedures for testing and certifying compliance with these regulations and standards, shall not create unnecessary obstacles to international trade. On the other hand, members should, at the same time, be able to pursue appropriately legitimate policy objectives such as the protection of national security, the prevention of deceptive practices and the protection of human, animal and plant life and health. The agreement is designed according to these two underpinnings which are explicitly referred to in the preamble.

[72] Therefore, the basic tension in applying technical regulations and standards lies in differentiating between legitimate objectives and disguised protectionism. The reconciliation of safety, interoperability and market access is best achieved by the harmonisation of technical regulations. Except in cases of standardised interoperability (e.g. in telecommunications as undertaken by the ITU), harmonisation is an extremely difficult task, even within customs unions. Too divergent are the interests concerned. Governments and producers commonly adjust unilaterally or bilaterally to conditions necessary for access to larger markets, as the case of Switzerland will show. International trade regulation in the WTO is limited to setting forth a number of substantive and procedural criteria and safeguards, seeking to avoid excessive and protectionist establishment and application of technical regulations and standards. See See Daniel C.K. Chow & Thomas J. Schoenbaum, International Trade Law: Problems, Cases, and Materials 173 (Aspen 2nd Edn 2012) [hereinafter "Chow & Schoenbaum, International Trade Law"] at 276.

[73] Agreement on Technical Barriers to Trade, Preamble, Arts. 2.6-2.7, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 [hereinafter "TBT Agreement"] (emphasising the importance of international standards by "[d]esiring therefore to encourage the development of such international standards and conformity assessment systems").

[74] The TBT Agreement is the 'successor to the 1979 Tokyo Round's "Standards Code', which in principle also covered sanitary and phytosanitary measures. However, the 'Standard's Code' was considered to be ineffective in addressing the trade effects of SPS measures and initial plans to amend the "Code' were eventually abandoned during the negotiations: see Summary of the Main Points raised at the second Meeting of the Working Group on Sanitary and Phytosanitary Regulation and Barriers, GATT Doc. No. MTN.GNG/NG5/WGSP/W/2 (14 November 1988), at para 12.

Governments have at their reach a number of policy tools to work towards these goals. Concluding international agreements with relevant partners is not a minor one.[1] International investment agreement ("IIA") may signal to international investors a favourable investment environment, and provide them with guarantees that their investments will benefit from adequate regulatory conditions in their business operation.[2]

This chapter on the international law of foreign investment presents the main recent developments in international investment law. It does so by examining investment rulemaking practice at the bilateral agreement and regional level (in both international instrument devoted solely to investment regulation, as in agreements of wider scope that also provide substantial obligations on foreign investment) as well as the multilateral level since some World Trade Organization ("WTO") provisions are relent to the treatment of foreign investment.[3] This chapter also makes use of "model BITs" as influential capital exporting states usually negotiate BITs on the basis of their own "model" texts (such as the US model BIT) which provide important innovations as for investment rule-making.[4]

The scope of investment agreements and the key definitions that play a crucial role therein are analysed in ¶5-010. ¶5-020, ¶5-030, ¶5-040 and ¶5-050 focus on the key substantial obligations featured by international investment agreements –namely, most favoured nation("MFN"), national treatment ("NT") and fair and equitable treatment, and guarantees against expropriation, inter alia. In ¶5-060, particular attention is also drawn to the exceptions to investment agreements' obligations and the scheduling o

[1] See Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", 25 INT'L REV. L. & ECON. 107, 108 (2005).

[2] See Kenneth J. "Vandevelde, A Brief History of International Investment Agreements", 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005).

[3] See Julien Chaisse, *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy, in The Prospects of International Trade Regulation - From Fragmentation to Coherence* 417 (Thomas Cottier & Panagiotis Delimatsis, eds, Cambridge Univ. Press, 2010).

[4] See, e.g., 2012 US Model Bilateral Investment Treaty Arts 24, 37, 2012, available at (http://www.ustr.gov/sites/default/files/BIT%20text%C20for%C20ACIEP%Meeting.pdf) [hereinafter "2012 US Model BIT"]; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments arts. 9, 10, 2008, available at (http:// www.italaw.com/sites/default/files/archive/ita1025.pdf) [hereinafter "2008 German Model BIT"]; Canada Model Agreement for the Promotion and Protection of Investments arts. 24, 48, 2004, available at (http:// italaw.com/documents/Canadian2004-FIPA-model-en.pdf) [hereinafter "2004 Canadian Model BIT"]; France Draft Agreement on the Reciprocal Promotion and Protection of Investments arts. 7, 10, 2006, available at (http:// italaw.com/documents/ModelTreatyFrance2006.pdf) [hereinafter "2006 French Model BIT"]; Colombian Model Bilateral Agreement for the Promotion and Protection of Investments arts. 9, 10, 2007, available at (http://italaw.com/documents/inv_ model_bit_colombia.pdf) [hereinafter "2007 Colombian Model BIT"]; Indian Model Agreement for the Promotion and Protection of Investments Arts 9, 10, 2003, available at (http://www.italaw.com/sites/default/files/archive/ita1026.pdf) [hereinafter "2003 Indian Model BIT"].

commitments and reservations. ¶5-070 explain the relevance of WTO norms on foreign investment regulation. On each of these topics, the book presents the relevant interpretations made by arbitral tribunals, as well as novel features of the most recent investment agreements.

¶5-010 The Significance of International Investment Agreements

Investment agreements interest all members of the international community.[5] Capital-exporting countries use these rules to seek investment opportunities abroad and to protect their investments in foreign jurisdictions.[6] Capital-importing economies wish to promote inward investment by ensuring foreign investors a stable business environment in line with high international standards.[7] A selected group of developing countries stand on both sides of that road. As developing countries, they wish to benefit from foreign investment. As vigorous and growing economies, it is their interest to expand their businesses into other markets. China stands in this particular position. Mainland China has been for the last decade the primary developing country recipient of foreign direct investment.[8]

¶5-011 The proliferation of IIAs

We use the terms bilateral investment treaties ("BITs") and 'bilateral investment agreements' in reference to international instruments specifically devoted to the promotion and protection of foreign investment –such as "Bilateral Investment Treaties", "Foreign Investment Promotion Agreements" or "Investment Promotion and Protection Agreements". We refer as "free trade agreements" ("FTAs") all bilateral, regional or plurilateral arrangements

[5] See generally Andrew Newcombe & Luís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 41-46 (2009); Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 17-20 (2008); Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 49-59 (2010).

[6] See Amanda Perry, An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality, 15 AM. U. INT'L L. REV. 1627, 1631 (2000).

[7] Joshua Boone, How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, 1 GLOBAL BUS. L. REV. 187, 187 (2011) (indicating that the driving force behind BITs was "to facilitate ... investment flows by the opening up of secure channels for foreign direct investment ... stabilizing the investment climate, granting protective investment guarantees, and providing neutral dispute mechanisms for 'injured' investors"); see also United Nations Conference on Trade and Development (UNCTAD), The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, UN Doc. E.09.II.D.20 p4 (2009).

[8] Some studies have highlighted that official figures on foreign investment in China may be overestimated, since a substantial share of these flows correspond to the domestic capital that has fled China and then flows back in the form of foreign direct investment, as well as domestic capital that is counted as foreign capital against the government regulation – so called "round-tripping FDI". Round-tripping FDI, especially from Hong Kong, is considered to represent roughly between 20% and 30% of Chinese inward FDI flows, although some studies considered it to account for as much as 40% of the foreign investment in China.

convertible currency.[136] Some IIAs allow deviation from the obligations enshrined in the transfer of funds provision in four cases.[137] Whereas this is most common in FTAs, which usually allow the introduction of safeguards motivated by the balance of payments or external financial difficulties,[138] exceptions of this nature are rather unusual in bilateral investment agreements.

¶5-062 Movement of natural persons

Many investment agreements provide extra assurances for the foreign investors and their ability to exercise full management over their investment in the host country by featuring provisions on the movement of natural persons related to such investment. Provisions on this nature are usually found in BITs. FTAs with investment provisions, instead, are more likely to include an independent chapter on the movement of natural persons, which normally feature more detailed disciplines and encompass a broader set of persons than those found in BITs. These obligations normally apply to two different situations.

First, a few BITs, namely those promoted by the United States and Canada, ban host country's measures that demand foreign investors to appoint senior managers of a certain nationality. Furthermore, according to these BITs host countries may require that a majority of the board of directors of the foreign company are nationals of or residents in the host

[136] A very comprehensive agreement would normally cover: (i) "returns" on investment, including all profits, benefits, interest, capital gains, royalties, and management, technical assistance or other fees; (ii) proceeds from the liquidation or sale or all or any part of the investment; and (iii) payments under a contract, and earnings of other remuneration of foreigner personnel in connection with the investment. Austria–Hong Kong provides for a relatively broad one (Article 7:1 & 2): *"unrestricted right to transfer abroad their investments […] and returns"* + *"Investors shall also have the unrestricted right to transfer abroad in particular, but not exclusively…]. Article 7:2: "Transfers of currency shall be effected without delay in any freely convertible currency."*

[137] One option is to subject the transfer clause to domestic laws, in which case the host state is free to limit the flow of capital out of its economy, for instance during economic crises, as long as it is done through law. *E.g.*, Agreement for the Promotion and Mutual Protection of Investments, Portugal–Bulgaria, Article 5, 27 May 1993. Another option is to allow exceptions to the free transfer of funds, but only during balance-of-payments difficulties and typically with a requirement that such restrictions should be necessary, non-discriminatory and on a temporary basis. See, e.g., Agreement for the Promotion and Protection of Investments, UK. – Argentina, Article 6, 11 December 1990. Finally, some treaties include other major limitations that permit restrictions on capital flight, such as certain Chilean BITs attempting to restrict short-term capital in- and outflows. See, *e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Chile–Austria, protocol, 8 September 1999. Other possible exception: host state should be able to prevent foreign investors from freely transferring revenues and capital out of its country if it were under economic difficulties.

[138] See, for instance, Korea-Singapore FTA, Article 10.12, or NAFTA, Art 21.04.

country, subject to the conditions that this requirement "does not materially impair the ability of the investor to exercise control over its investment".[139]

Secondly, a number of investment agreements provide for the facilitation of entry and stay to investors and certain personnel necessary for the establishment and operation of the investment. Most investment agreements with such obligations limit the provision to managerial and executive personnel, or in regard to posts that require specialised knowledge. Occasionally those benefits are also extended to family members of the person related to the investment, such as the BIT signed between China and Jordan,[140] or to all persons employed in the foreign company, independently of their seniority or level of expertise, as provided by a number of Sino-Foreign BITs, such as the one with Barbados of 1998.[141] In order not to interfere with the host countries' ability to regulate the entry and stay of foreign persons, these disciplines are commonly subject to the laws, regulations and policies relating to the entry of aliens, or drafted in a way so as to express a best-endeavour obligation.

¶5-063 Performance requirements

Host countries often resort to measures that require certain behaviours from foreign investments that are deemed to bring about certain benefits for their economy. These performance requirements may relate to the promotion of domestic production -requiring foreign investors particular levels of domestic content in their activity-; to the improvement of the country's external account, so that a given proportion of the investment production must be imported; or to transfer of technology. These measures may be mandatory or voluntary, as conditions to obtain certain benefits.

Some of these measures, those that relate to domestic content and foreign trade balancing go against the WTO agreement on Trade Relate Investment Measures ("TRIMs"), and are prohibited for all WTO members.

A number of FTAs with investment discipliners have followed the example of the NAFTA, and introduced restrictions on the use of performance requirements. In some cases, such as the FTAs between India and Singapore, and Japan and Malaysia, these provisions substantially reproduce the obligations already found at the multilateral level. In many others, instead, the provisions apply to a number of measures not addressed by the TRIMs, such as those relating to technology transfer. This is particularly the case of FTAs entered in by the US and Canada, but also many other agreements concluded by non-NAFTA countries, such as Korea-Chile and Panama-Singapore and Nicaragua-Taiwan (China) FTAs.

[139] See Canada Model FIPA, Art 6.1-2.

[140] China-Jordan BIT, Art 2.3.

[141] China-Barbados BIT, Art 2.2

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU, Annex 2) provides for the establishment of panels and the Appellate Body to deal with disputes between members.[5] It builds upon customary practices developed under the General Agreement on Tariffs and Trade ("GATT") 1947 and a descriptive codification of the panel system of 1979. However, the new mechanism has substantially been changed and juridified.[6] The WTO dispute resolution mechanism invents a two-tier system genuine in international law. Unlike under the GATT 1947, a member found to violate WTO law can no longer block the verdict upon appeal and faces severe measures of retaliation in case of non-compliance with the decisions of the Dispute Settlement Body. Article XXIII of the GATT 1994 and the DSU set out the basic institutional and jurisdictional scope of WTO dispute resolution. The latter has established a unified and compulsory dispute settlement mechanism for all covered agreements adopted under the umbrella of the WTO.

The WTO comprehensively codifies the relevant procedural rules and guidelines. The same core principles apply to any dispute across all agreements and subject-matters (with only few exceptions of special or additional rules contained in covered agreements applicable as *lex specialis* only to disputes arising under that agreement). Fundamentally, the mechanism is explicitly designed to promote the rule of law and to provide security and predictability to the multilateral trading system. Hence it ensures that the approach taken by panels and the Appellate Body is of an essentially legal nature.

¶6-011 DSB proceedings

WTO dispute resolution is basically divided into three stages, namely i) consultation stage; ii) panel and, if appealed, Appellate Body proceedings; and iii) – in the case of WTO-inconsistency of the disputed measure – implementation of the panel or Appellate Body report by the losing party.

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 UNTS 154 [hereinafter "WTO Dispute Resolution Understanding"].

[6] For an analysis of dispute settlement under GATT 1947 and criticisms of that process, see ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); US INT'L TRADE COMM'N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND THE TOKYO ROUND AGREEMENTS (USITC, No. 1793, 1985); PIERRE PESCATORE, HANDBOOK OF GATT DISPUTE SETTLEMENT (1992); Robert E. Hudec, A Statistical Profile of the GATT Dispute Settlement Cases: 1948-1989, 2 MINN. J. GLOBAL TRADE 1 (1993); William J. Davey, The GATT Dispute Settlement System: Proposals for Reform in the Uruguay Round, in WORKSHOP ON THE MULTILATERAL TRADE NEGOTIATIONS OF GATT (1992); William J. Davey, Dispute Settlement in GATT, 11 FORDHAM INT'L L.J. 51 (1987); Rosine Plank, An Unofficial Description of How a GATT Panel Works and Does Not, 4 J. INT'L ARB. 53 (December 1987).

If a Member does not comply with WTO rules, it may give rise to a dispute.[7] A violation complaint will succeed when the respondent fails to carry out its obligations under the WTO agreements resulting directly or indirectly, in nullification or impairment of a benefit accruing to the complainant under these agreements. The DSM is then an important tool to ensure proper implementation of the WTO law.[8]

One of the most notable features of the panel procedures in the WTO is the provision of compulsory jurisdiction over a case brought by its members. Indeed, the WTO establishes a panel unless there is a consensus not to do so. Therefore, the consent of the Defendant State to establish a panel is no longer required.[9] If a member requests the establishment of a panel, consensus not to establish a panel is lacking by definition, the DSB will establish a panel. The Dispute Settlement Understanding ("DSU") deals with any dispute arising from WTO Agreements and there's a single set of rules for all disputes. Finally, as soon as the DSB has adopted the report, the report becomes binding on disputing parties as a matter of international law. The losing party must bring its legislation into line with the recommendations of DSB.

The panel stage

A WTO dispute settlement procedure is launched at the request of one or more member governments for a consultation regarding complaints against defending members. This process is an entirely government-to-government one, which is available only to WTO members in procedures against other

[7] A dispute arises when a member State believes that another member State is violating an agreement or a commitment that it has made to WTO.

[8] For additional analyses of the WTO dispute settlement process, see FRANK W. SWACKER, KENNETH R. REDDEN, & LARRY B. WENGER, WORLD TRADE WITHOUT BARRIERS: THE WORLD TRADE ORGANIZATION ("WTO") AND DISPUTE RESOLUTION (1995); Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats, 29 INT'L LAW. 389 (1995); Judith Hipler Bello, The WTO Dispute Settlement Understanding: Less Is More, 90 AM. J. INT'L L. 416 (1996); Andreas F. Lowenfeld, Remedies Along with Rights: Institutional Reform in the New GATT, 88 AM. J. INT'L L. 477 (1994); John H. Jackson, The WTO Dispute Settlement Understanding — Misunderstanding on the Nature of Legal Obligation, 91 AM. J. INT'L L. 69 (1997); Azar M. Khansari, Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization, 20 HASTINGS INT'L & COMP. L. REV. 183 (1996); Grant Aldonas, The World Trade Organization: Revolution in International Trade Dispute Settlements, DISP. RESOL. J. 73 (Sept. 1996); Curtis Reitz, Enforcement of the General Agreement on Tariffs and Trade, 17 U. PA. J. INT'L ECON. L. 555 (1996); Judith H. Bello & Alan F. Holmer, Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits, 28 INT'L LAW. 1095 (1994).

[9] See William J. Davey, The WTO Dispute Settlement System: The First Ten Years, 8 J. INT'L ECON. L. 17, 40-45 (2005) at 17. ("The first half of [the first ten years of operation of the WTO dispute settlement process] — from 1995 through 1999 — was characterised by extensive use of the system by the United States initially, and later by the EU"); ibid, at 24 (noting that "the US and the EC no longer were as dominant as complainants in the system" and that "developing country use of the system increased dramatically" in the second half of the first decade of operation of the WTO dispute settlement process).

or other entity constituted in accordance with the laws and regulations of that Contracting Party and having ***its seat*** *within the territory of that Contracting Party*". While the seat is the key criteria in some BITs, it can alternatively be the "substantive business interest" as in the Greece-India BIT which Art 1.3 says that "*the term 'investor' means [...] any legal person such as company, corporation, firm, business association, institution, or other entity constituted in accordance with the laws and regulations of that Contracting Party and have their substantive business activities in the territory of that same Contracting Party*"

All BITs concluded by Greece, reviewed for the purpose of this chapter, subscribe to this trend and provide coverage for investments made by all sorts of juridical persons. Language in Greek IIAs, however, varies greatly, although they all seek to set a broad and all-encompassing coverage.

¶7-030 Bondholders' Procedural Rights

If Greek bondholders want to enforce their rights under an IIA, they have to initiate legal proceedings against the host state. As states may bring claims against private investors arising out of interpretation or application disputes, investors may bring claims against the states arising out of treaty violations. A series of questions arise then such as: Are public debt obligations covered by IIAs? Can private bondholders file arbitral claims under IIAs to pursue their financial interests? To these questions it is possible to answer positively. First, private bondholders may have access to investor-state dispute settlement procedures (3.1), second, they can bring investment treaty claims which are collective in nature (3.2). Advance planning, specialised staff and technology and information sharing are three of the many measures that facilitate mass claims and that may not be readily available to international investment arbitration — yet.

¶7-031 Investor–state dispute settlement procedures

In principle, foreign investors may choose to initiate legal proceedings in the domestic courts of the host country, a right they never lose. Alternatively, they may initiate international arbitration proceedings that can be more favourable to them, since it is easier to know international law and practice, and international tribunals are not subject to political domestic pressure.

Should foreign investors face discrimination in a state with a weak legal system, it is highly recommended to initiate international arbitration proceedings as a priority. International arbitration is the process by which neutral arbitrators settle disputes concerning bilateral IIAs between sovereign states and foreign investors. In order to avoid multiple proceedings on the same matter, however, IIAs often establish that, once a dispute has been brought to one forum—or, in some cases, a decision has been reached—the dispute may not be pursued in another venue.

Most IIAs further allow the foreign investor to choose the venue for the arbitration. *Ad hoc* arbitration allows the parties to agree on the procedural rules for the dispute, although countries commonly rely on the established United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules.[33] ISDS clause constitutes a major instrument in the hands of foreign bondholders, as they can force host states to comply with international law. Statistics show that investment arbitral awards are respected, i.e., enforced by states even if the financial cost may be very high.

Nearly all Greek–foreign IIAs provide for investor–state dispute settlement procedures and refer to both ad hoc procedures and institutional arbitration. Also, Greece signed the ICSID convention on 16 March 1966, ratified the said treaty which entered into force on 21 May 1969.[34] Such a scenario shows that most of the foreign bondholders, who are investors in the meaning of the relevant BIT concluded by Greece, will also be granted the right to bring a claim before investment tribunals. However a hurdle to overcome in the case of German potential bond holders wishing to initiate arbitral proceedings against Greece is that of lacking an investor–state arbitration clause in the 1961 Greece-Germany BIT which shifts the legal prospects on the difficulties of importing such clause on the ground of the most favoured national ("MFN") treatment clause.

More generally, claimants against Greece might rely on some specialties of the relevant BIT. Its article on expropriation contains a) a clause saying that the legality etc. and the amount can be reviewed by court and b) a special *MFN-Maffezzini-like* clause[35] stating that in "all matters relating to

[33] The parties may also resort to organisations that provide a venue and have developed their own arbitral procedures. The ICSID, established in 1967 under the umbrella of the World Bank, specialised in investor-state disputes, and has received the most attention, totalling well over half the investor–state claims brought today. For the most part, IIAs feature more than one option for international arbitration. Most IIAs allow resorting to ICSID, and to *ad hoc* arbitration under UNCITRAL rules. Some agreements additionally allow the claim to be brought to other institutions, such as the Stockholm Chamber of Commerce or the International Chamber of Commerce.

[34] See List of Contracting States and Other Signatories of the ICSID Convention as of 25 July 2012. (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English).

[35] The tribunal decided that by virtue of the MFN clause of the 1991 Argentine-Spain Bilateral Investment Treaty, the claimant had the right to import the more favourable jurisdictional provisions of the 1991 Chile-Spain Agreement. Tribunal stated "*"... it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favoured nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below." Emilio Augustín Maffezini v Kingdom of Spain*, Decision on. Jurisdiction, Case No. ARB/97/7 (25 January 2000), para 56.

three provisions exempts sanctions taken in the fulfilment of obligations under the UN Charter.

The problem with national security issues is that there is no way of clearly defining what types of investment invoke these concerns and what types of investments do not. Whereas it may be clear that foreign investment in a country's defence industries would raise national security concerns, there are many other industries that do not fall within the traditional notion of defence but are nonetheless essential to a country's security.[142] If any action taken under such legislation violates the recipient country's GATS obligations, would the Article XIVbis security exception apply? This provision has never been invoked and therefore does not give any clue on its applicability,[143] and the capacity of governments to prohibit SWF investment on this ground.[144] The prospects are however very limited and not encouraging.

It is indeed clear from the wording that GATS (Article XIV, *chapeau*) introduces a requirement that such measures shall not constitute, or be applied in a manner which would constitute arbitrary or unjustifiable discrimination. In addition, the measures may not serve as "disguised restrictions." But the GATS qualification noted above is not carried over to the security provisions of GATS *per se* (Article XIVbis), so that as it concerns national security, the measures remain entirely self-judging. The security exception is to preserve members' freedom of action in areas relating to national defence and security. Trade liberalisation and international regulation do not prevail over members' vital interests in maintaining the core of sovereignty and cannot restrain members' freedom to preserve and defend their very existence. Moreover it should be recalled that GATS provides only for state-to-state dispute settlement and that as concerns investment matters what is probably another limit to the possibility to control national protectionism towards SWFs on the basis of GATS.

the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

[142] See Anthony Wang, *Sovereign Wealth Funds and the Problem of Assymetric Information: The Santiago Principles and the International Regulations*, 34 BROOK. J. INT'L L. 1096 (2009).

[143] Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse ?*, 11 J. INT'L ECON. L. 135-154 (2008).

[144] Cottier Thomas & Delimatsis Panagiotis, *Article XIV bis GATS: Security Exceptions*, *in* 6 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO – TRADE IN SERVICES 329-48 (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle eds., 2008).

¶8-054 Dispute resolution in the WTO

The private sector as well as non-governmental organisations (NGOs, including producer, consumer, environmental and other organisations, both national and international) have no direct voice in or access to the work of the WTO or its meetings. Nonetheless, both groups have become significant players in trade and trade-related issues governed by the WTO and to a large extent shape the organisation's perception by the general public. They have the potential to substantially influence the organisation's agenda by using various channels in order to lobby for the matters of their concern. Private companies and domestic NGOs usually stay in close contact with national governments and parliaments and seek representation of their interests by official national representatives. In addition, transnational channels are used to bring about coordination among delegations. Transnational NGOs with central administration and a global, rather than national, constituency (such as WWF, Greenpeace, Médecins Sans Frontières) act close to the WTO and its various committees and bodies and try to directly and publicly influence their work.[145]

The WTO dispute settlement system functions exclusively between members and it precludes SWFs from playing any official role. It is, typically in the tradition of GATT 1947, designed as government-to-government dispute resolution. Panel and Appellate Body proceedings are confidential. Only the representatives of the parties (including mandated attorneys) are permitted at the hearings. Members other than the parties may participate as third parties. Pursuant to Article 10 of the Dispute Settlement Understanding ("DSU"), they need to have a "substantial interest" in the matter before a panel. They are obliged to notify their interest to the DSB. As a third party, they are heard once by the panel and can make written submissions as well as receive the submissions given by the parties to the first panel meeting. The case law reveals that a member's interest in the matter is normally not challenged. In particular, large delegations with sufficient resources participate as third parties quite frequently on the grounds of systemic interests and in the light of precedential effects of adopted panel and Appellate Body reports.

Non-state actors are formally excluded from the dispute settlement process. Producer interests are often strongly present informally as they are the driving force behind complaints and thus support the effort to make a successful case. Organisations representing non-trade concerns, however, do not enjoy similar (informal) access in many countries. They express concerns that their government, or the dispute settlement process at large, would not adequately represent the various views on a matter. In particular, globally

[145] The General Council set up specific guidelines on the relationship between NGOs and the WTO pursuant to Article V:2 of the WTO Agreement: General Council Decision, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 82 (18 July 1996).

Convention on the Settlement of Investment Disputes ("ICSID").[68] This convention does not create any substantive obligation on party states, but offers only a dispute resolution process for ISD settlement.[69]

NAFTA as a "TRIMs Plus" agreement

The United States and the European Union are negotiating since 2013 the Transatlantic Partnership Agreement. For their part, Canada and the European Union concluded in October 2013, a tentative agreement on the Comprehensive Economic and Trade Agreement negotiations. If these agreements were to be signed and ratified, they would consolidate the normative primacy of free trade within the States Parties. These treaties, in addition to promoting a marked increase in cross-border investment should include clauses conferring important legal protection to foreign investors. At a time of economic globalisation, the issue of treatment of these transnational investors enlightens us as to the balance of powers and axiological nature of law governing international trade and global financial flows. It may therefore be instructive to take a look to North America, where Chapter 11 of NAFTA which deals with the protection of investors, has now been in effect for two decades.[70] This chapter has given rise to several cases that illustrate the tension between the private interests of investors and the national interest or the common good.

Chapter 11 of NAFTA provides for a dispute settlement mechanism part – a signatory – and an investor of another party. This mechanism gives more rights to investors, including that of NT (Article 1102), the right to treatment in the MFN (Article 1103), the PR ban (Article 1106), the right the minimum standard of treatment (Article 1105), as well as protection against expropriation (Article 1110). These last two rights that deserve to be looked specifically.

[68] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 17 UST 1270, 575 UNTS 159 [hereinafter "ICSID Convention"]. The ICSID Convention came into force in October 1966. The rules and regulations were modeled on different sources. See AR Parra, "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes" (2007) 22 *ICSID Review-Foreign Investment Law Journal* 55, at 55–57 (describing the creation of ICSID, and its rules and regulations and noting that the rules 'also drew inspiration from, among other sources, the Statute and Rules of the World Court, the International Law Commission's 1958 Model Rules on Arbitral Procedure and the Permanent Court of Arbitration's 1962 Rules for Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State'). For a general commentary, A Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" in *Selected Essays: World Bank, ICSID, And Other Subjects of Public And Private International Law* (1995) 188, 198.

[69] See generally I Shihata, "Toward a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA" in KW Lu, G Verheyen and SM Perera (eds.), *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (2009) 2.

[70] See HQ Zeng, "Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice" (2014) 17 *Journal of International Economic Law*, at 299–332.

These tensions between legal protection now afforded to investors and the regulatory power of the state can be found in the multilateral legal agreement established by NAFTA involving Canada, the United States and Mexico since 1992. Chapter 11 of the Agreement provides for a mechanism to ensure the protection of foreign investments whose scope is considerable. Note that it was not always so, however: the free trade agreement in place since 1988, which initially consisted of the United States and Canada, provided no similar device. So it is with the inclusion of Mexico in the free trade area that the United States insisted on its inclusion as part of the NAFTA negotiations. The United States considered, with a view to protecting the interests of US multinationals, that 'the legal system in Mexico, developing countries were not as mature, predictable and transparent than that of developed countries'. Accordingly, Chapter 11 was to protect the economic rights of foreign investors by providing a stable legal environment, so as to stimulate investment. This was probably a legitimate concern. Nevertheless, it is important to note that Chapter 11 is by its editor, just as applicable in Canada and the United States and Mexico. In this regard, NAFTA is a first: it is indeed the first international legal instrument granting protection to foreign investors in developed countries, a mechanism traditionally which has been reserved for developing countries, including through the use of International Centre for Settlement of Investment Disputes ("ICSID"), established in 1965 by the Washington Convention and part of the World Bank Group. There would probably be a lot to say about the proliferation of free trade agreements and bilateral investment treaties for several years, a trend that illustrates the primacy given to trade and the economy conceived as essential instruments of the foreign policy of Western states.

As can be seen from Box 1, the list of prohibited performance requirements in NAFTA (Article 1106) goes beyond that of the WTO prohibition.

Box 23: NAFTA Article 1106 on performance requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
   (a) to export a given level or percentage of goods or services;
   (b) to achieve a given level or percentage of domestic content;
   (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

WTO Dispute number	Parties to the dispute	Request for Consultations	Dispute Status
DS441	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Dominican Republic)	18 July 2012	DSB deferred the establishment of a panel on 17 December 2012
DS458	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Cuba)	3 May 2013	Consultations
DS467	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Indonesia)	20 September 2013	Consultations

Source: WTO database of trade disputes (as of 17 October 2013)

Importantly, five claims have been filed against Australia since 2012 and all deal with the law on plain packaging. While these cases are still pending at the time of writing, it is clear that the issue of trademark infringement is very much alive and raises thorny issues. Beyond the Australian case, four other cases dealt with trademark at the WTO. The first was *Indonesia — Certain Measures Affecting the Automobile Industry* case that was initiated by the US and resulted in a panel report in 1998.[33] The second was the *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, which was again initiated by the United States and led to a panel report in 2005.[34] The third was the widely commented upon[35] case, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, again brought by the United States and decided by a panel report in 2009.[36] These three cases were all settled by a panel report. The fourth case, the *United States — Section 211 Omnibus Appropriations Act of 1998*,[37] was far more difficult; it took almost seven years to reach proper settlement and the panel report is still not fully implemented as of 2013.[38] This case is the best illustration of trademark protection under the TRIPS Agreement.

[33] Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (2 July 1998).

¶10-030 Revisiting the "Havana Club" Dispute

In the *United States — Section 211 Omnibus Appropriations Act of 1998* case,[39] the European Communities challenged a provision of United States law denying protection to the owners of Cuban trademarks and trade names that had been connected to businesses confiscated by the Cuban government during the Cuban revolution.[40] Below, we argue that the WTO's decision to end this dispute resolved investment questions arising out of the US administration of IPRs.

[34] Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Complaint by the United States*, WT/DS174/R (15 March 2005).

[35] Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009). See Donald P. Harris, *The Honeymoon is Over: The US China WTO Intellectual Property Complaint*, 32 Fordham Int'l L.J. 96, 103 (2009). See also Brian Fitzgerald & Lucy Montgomery, *Copyright and the Creative Industries in China*, 9 Int'l J. Cultural Stud. 407, 408 (2006) (supporting the proposition that Confucianism strongly encouraged the imitation of teachers as a way of learning).

[36] See James Mendenhall, *WTO Panel Report on Consistency of Chinese Intellectual Property Standards*, 13(4) Am. Soc'y Int'l L. Insight (3 April 2009), http://www.asil.org/insights/volume/13/issue/4/wto-panel-report-consistency-chinese-intellectual-property-standards; and Peter K. Yu, *The TRIPS Enforcement Dispute*, 89(4) Neb. L. Rev. 1046 (2010).

[37] Havana Club, supra note 15.

[38] Status Report by the United States Add., *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.130 (September 13, 2013). Meanwhile, the dispute generated six US court decisions. See Havana Club Holding, S.A. v. Galleon S.A., 961 F. Supp. 498 (S.D.N.Y. 1997); Havana Club Holding, S.A. v. Galleon S.A., 974 F. Supp. 302 (S.D.N.Y. 1997); Havana Club Holding, S.A. v. Galleon, S.A., No. 96 CIV. 9655(SAS), 1998 WL 150983 (S.D.N.Y. Mar. 31, 1998); Havana Club Holding, S.A. v. Galleon, S.A., 62 F. Supp. 2d 1085 (S.D.N.Y. 1999); Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116 (2d Cir. 2000), *cert. denied*, 531 US 918 (2000). For a commentary on these domestic developments, see Emily Taylor, *The Havana Club Saga: Threatening More Than Just "CUBA COKE"*, 24(2) Nw. J. Int'l L. & Bus. 513 (2004).

[39] Havana Club, supra note 15.

[40] Graeme B. Dinwoodie & Rochelle C. Dreyfuss, "Designing A Global Intellectual Property System Responsive To Change: The WTO, WIPO, And BEYOND", 46 Hous. L. Rev. 1187 (2009).

Publications Condé Nast. S.A v China Vogue.com, WIPO Case 2005-0615 and where there can be no conceivable good faith use of the mark, See *Jaguar Land Rover Limited v Damasco Inc., Ezio Damasco*, WIPO Case No. D2015-0297, it was found that even if there is no positive action by the respondent in relation to the domain name, passive holding of the domain name is considered evidence of bad faith registration and use under paragraph 4 (a) (iii) of the Policy.

In *Cellular One Group v Paul Brien*, WIPO Case No. D2000-0028 bad faith use was found where the domain name contained in it entirety the trademark of the complainant and the mark in question was a coined word, that has been used for a substantial time before registration of the domain name. It was found that, under such circumstances, there is no basis for good faith use of the domain name.

While the Panel does not consider lack of use of a domain name in and of itself demonstrative of bad faith, however, when there appears to be no bona fide reason to use the mark in the domain name except for the value of the trademark and the unfair advantage the respondent may derive by owning the well-known mark online, bad faith registration and use can be found. The factors and circumstances that a panel would generally consider in finding bad faith passive use of a domain name are: the prior use of the mark by a complainant, the length of use of the trademark, whether the mark is a well-known mark, whether the mark is a coined word exclusively associated with the owner of the trademark, no plausible legitimate use of the domain name and whether respondent's domain name registration with the mark, would result in a likelihood of damage, loss of reputation, dilution to a complainant's mark and the deception to consumers and the public.

The following circumstances in the present case are relevant to the finding bad faith use. The disputed domain names are associated with a website that shows no signs of active use. Further, there appears to be no plausible legitimate use of the domain names by the Respondent due to the well-known nature of the Complainant's mark and there is evidence that the Respondent has advertised the disputed domain names for sale, which reinforces the Complainant's submission that the Respondent is a cyber squatter.

The Panel finds, based on all that has been discussed, the circumstances in the present case show that the Respondent has registered and is using the disputed domain names in bad faith. In conclusion the Panel finds that the Complainant has established the third element under paragraph 4 (a) of the Policy.

Source: *Lenovo (Beijing) Ltd. v Jring Ker*, Case No. HK-1500732, May 15, 2015.

Generally, among the ways that a domain name owner can prove a legitimate right or interest in a domain name is by showing the following:

- use or preparations to use the domain name in connection with a bona fide offering of goods or services prior to any notice of the dispute;
- that the domain name owner has been commonly known by the second level domain name;
- or that the domain name owner is making legitimate noncommercial or fair use of the domain name, without intent of (i) commercial gain, (ii) misleadingly diverting consumers, or (iii) tarnishing the trademark at issue

A trademark owner can show that a domain name was registered and used in bad faith in a variety of ways, including by showing that the domain name owner:

- registered the name primarily for the purpose of selling or transferring the domain name to the trademark owner or a competitor of the trademark owner for a price greater than out of pocket costs;
- engaged in a pattern of registering trademarks of others to prevent the use of the domain name by the trademark owner;
- registered the domain name primarily to disrupt the business of a competitor;
- or is attempting to attract users to a website for commercial gain by creating a likelihood of confusion with the trademark owner's trademark.

Box 27: Uniform Domain Name Dispute Resolution Policy

1. Purpose. This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at (http://www.icann.org/en/dndr/udrp/uniform-rules.htm), and the selected administrative-dispute-resolution service provider's supplemental rules.

[...]

Although developed countries like Japan and the USA also suffer from the AD initiations/measures, the adverse implications are more profound for China, Thailand, India and other low-cost producer countries. In addition, the similarity in the sectors where AD intervention is taking place across development levels (e.g., chemical products, base metals and machineries), further underlines the importance of industrial concentration in influencing AD actions.

The principal paradox posed by the recent increase in dumping by many developing countries, mostly Asian, is that it is simultaneously a reflection of internal weakness of the dumping country and an external challenge to the importing country. This indicates the inefficiency of the domestic industry, always asking for protectionism. Currently the problem of subsidy and dumping is not dealt with in a coordinated manner either at the domestic level or at the WTO, with the different agreements acting simultaneously on and dealing separately with the same issues. The most frequent justification for AD measures is predatory pricing. However, many studies reveal hardly any predatory intent in dumping – the reasons are more likely to be political and economic. The analysis of the cases reveals that there are many gaps in the WTO ADA. The most popular methodologies are not consonant with the ADA itself. The finding of a normal value and margin of dumping is unrealistically inflated. The selection of a surrogate country in the case of NMEs is not consistent with the economic realities existing in dumping and dumped-upon countries. The administrative procedures in the case of the facts-available provision are highly discretionary and subject to the bias of the authorities of the investigating countries. To minimise the misuse of discretion, more explicit and clearer guidelines should be developed and the investigations needs to be made more transparent.

¶12-020 Subsidies

Provision of subsidies to local players can be explained by several underlying motivations from the standpoint of national governments, namely, industrial development, facilitating innovation, supporting national champions, securing environment-related objectives, ensuring redistribution, etc.[47] The subsidies can be provided to the local players through interventions both in the input as well as output markets. The efficacy of subsidy policy as a

[47] See Terry Collins-Williams & Gerry Salembier, "International Disciplines on Subsidies: The GATT, the WTO and the Future Agenda", 30 J. World Trade 5 (1996); see also Simon Lester, "The Problem Of Subsidies as a Means of Protectionism: Lessons From the WTO EC — Aircraft Case", 12 Melbourne J. of Int'l L. 1, 5 (2013).

strategic trade instrument is however crucially linked with the local industry's learning capability and the extent to which the domestic and foreign goods are substitutable.[48] The trade theoretical literature notes that in a scenario characterised by fast capital mobility, imposition of import tariffs leads to better welfare implication as compared to export subsidies.[49] Nevertheless, presence of domestic distortions in lower income countries results to frequent deployment of subsidy measures to further long-term goals, as they function as more efficient trade policy instrument *vis-à-vis* import tariffs.[50]

Apart from the aforesaid determinants, promoting exports of domestic players who are in competition with their foreign counterparts in the global market is a major driving motive for providing subsidies.[51] The standard trade analysis observes that the subsidies provided by national governments enable the domestic producers suffering from cost disadvantage to sell their products in the international markets at a relatively cheaper price, thereby resulting in a rise in their exports. The theoretical relationship between subsidies and exports is clearly observed, irrespective of market structure, as the policy is capable of delivering both in the presence of competitive, and oligopolistic, markets.[52] Several export subsidy programs are operational in European countries and the US, which provides their firms greater advantage *vis-à-vis* their foreign competitors.[53] The adoption of export subsidies as a strategic policy instrument has been reported extensively in the literature.[54] For instance, production and export subsidies

[48] See Marc J. Melitz, "When and How Should Infant Industries be Protected?", 66 J. of Int'l Econ. 177 (2005); see Kym Anderson, *Subsidies and Trade Barriers* (paper presented at a roundtable in Copenhagen on 24-28 May 2004, as a part of the Copenhagen Consensus project) available at (http://www.copenhagenconsensus.com/sites/default/files/cp-tradefinished.pdf).

[49] See Tanapong Potipiti, *Import Tariffs and Export Subsidies in the World Trade Organization: A Small – Country Approach* (ARTNeT Working Paper No. 119, Bangkok, ESCAP, 2012), available at (http://www.unescap.org/sites/default/files/AWP%20No.%20119.pdf).

[50] See generally Jagdish Bhagwati & V. K. Ramaswami, "Domestic Distortions, Tariffs and the Theory of Optimum Subsidy", 71 J. Pol. Econ. 44, 44-50 (1963).

[51] See generally Gary N. Horlick, "A Personal History of the WTO Subsidies Agreement", 47 J. World Trade 447 (2013); see also James A. Brander & Barbara J. Spencer, "Export Subsidies and International Market Share Rivalry", 18 J. Int'l Econ. 83 (1985).

[52] See Cees van Beers, Jeroen C. J. M. van den Bergh, André de Moor & Frans Oosterhuis, "Determining the Environmental Effects of Indirect Subsidies: Integrated Method and Application to the Netherlands", 39 Applied Econ. 2465 (2007); see also Avinash Dixit, "International Trade Policy for Oligopolistic Industries", 94 Econ. J. 1 (1984).

[53] See International Trade Centre, National Trade Policy for Export Success, UN Doc. P248.E/DCP/BTP/11-XI, UN Sales No. E.12.III.T.3 (2011).

[54] See Kyle Bagwell & Robert W. Staiger, Strategic Trade, *Competitive Industries and Agricultural Trade Disputes*, 13 Econ. & Pol. 113 (2001); *see also* Andrew Y. Lemon, *The Peril of Implementing Export Subsidies in the Presence of Special Interests* (Feb. 21, 2003) (preliminary draft) (on file with the Yale University Department of Economics), *available at* http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Industrial-Organization/lemon-030225.pdf.

of the rights given to them.[46] It also defines a procedure for migrant workers and their families to file individual complaints when they believe that their rights have been violated.[47] In September 2007, Guatemala was the first state party to make a declaration under Article 77, allowing the Committee on Migrant Workers UN, composed of independent experts, to monitor the implementation of the Migrant Workers Convention by the state that received such complaints. Moreover, the Migrant Workers Convention guarantees the right of a new migrant to be informed in a language they understand of the conditions of admission of the state concerned.[48] Finally, it is the duty of the countries of origin to provide information and appropriate assistance to migrant workers and members of their families before their departure, as well as other services necessary and appropriate consular services in the State of destination "shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families."[49]

¶13-012 Exploring the economic dimension: regulating flows of workers over national borders

The main classic sources of international migration law are human rights law, migrant workers law, humanitarian law, refugee law, nationality law, and law of the sea.[50] While human rights concerns, such as amnesty and refugee migrations,[51] are relevant, we choose to focus on the economic dimension of migration, which has been investigated less by scholars: that of the "migrant worker."[52] The economic dimension of migration is extremely important for the growth of the global economy.[53] Indeed, long-term economic development goals are being considered by most states in their approach to migration management as mobile human

[46] Ibid, Art 33.

[47] Ibid, Art 77.

[48] Ibid, Art 33.

[49] Ibid, Art 65.

[50] See Richard Plender, International Migration Law (2d Edn, Martinus Nijhoff Publishers, 1988); *see also* N. Mole, *General Principles of International Migration Law as it Affects Stowaways*, *in* Stowaways by Sea (B.A.H. Parritt, The Nautical Institute 1992).

[51] Convention relating to the Status of Refugees Art 1(A), 28 July 1951, 189 U.N.T.S. 150 (defining a refugee as "any person who… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it").

[52] "The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national." United Nations, supra note 1296, Art 2.

[53] See Timothy J. Hatton, "Should We Have a WTO for International Migration?", 22 Econ. Pol'y 339, 345 (2007).

resources are now seen as critical resources for development—whether as a factor of production in receiving countries, or in countries of origin as a source of skills acquisition, investment and foreign exchange through remittances.[54]

There is hardly a walk of life untouched directly or indirectly by international trade regulation. As economic interdependence is growing, the welfare and livelihood of peoples are largely influenced by it around the globe, in the North, South, East and West. The classic fields of import and export regulation of goods and services still comprise the core of the subject. Yet, trade regulation increasingly entails domestic regulations because countries define market access and conditions of competition in all sectors of the economy, ranging from agriculture to labour mobility.

The neoclassical analysis of the labour market requires that labour follow the same rules as other goods exchange, it is subject to supply and demand, and it is the meeting of these two entities that fixes the price.[55] Labour supply comes from the labour force, and it is subject, by the offeror (the worker), to a trade-off between the disutility of labour (deprivation of leisure) and usefulness (gain of a monetary wage).[56] The labour supply curve is an increasing function of the wage rate.[57] Nevertheless, the work is a specific factor of production,[58] characterised by the fact that it is done by men and women, and cannot therefore be analysed mathematically, like any other commodity. Yet this last vision behind the "neoclassical theory of labo[u]r market" still inspires many analyses.[59] This theory, postulating the existence of a homogeneous labour market, is in contradiction with the reality of management modes. Labour and the complexity of employment systems fit into a social context and political influences affect their operation.

[54] Managing the Movement of People: What can be Learned for Mode 4 of the GATS?, Geneva, 4-5 October 2004, *Joint IOM/World Bank/WTO Seminar Background Paper*, 3, (http://www.wto.org/English/tratop_e/serv_e/sem_oct04_e/background_paper_e.pdf).

[55] See George R. Boyer & Robert S. Smith, "The Development of the Neoclassical Tradition in Labor Economics", 54 Indus. & Lab. Rel. Rev. 199, 202 (2001).

[56] See ibid, at 208.

[57] Labour demand originating from business is also the subject of an arbitration: for the entrepreneur hiring an additional employee, it is necessary that the marginal productivity of the employee (who brings additional production) has a value at least equal to the wages that he pays. Below this limit, he or she will not be hired because the demand curve for labour is an inverse function of the wage rate. Ibid, at 206.

[58] See Edward E. Leamer, The Craft of Economics: Lessons from the Heckscher-Ohlin Framework (2012).

[59] Sandra E. Black & Elizabeth Brainerd, "Importing Equality? The Impact of Globalization on Gender Discrimination", 57 Industrial & Lab. Relations Rev. 540 (2004).

needs to be either "necessary"[57] for or "relating to"[58] the pursuit of the policy. Third, the measure needs to be applied in conformity with the chapeau.[59]

The Appellate Body illustratively confirmed this three-step analysis in the *US —Import Prohibition of Certain Shrimp and Shrimp Products* case[60] and stressed that the sequence of steps in the analysis of a claim of justification under Article XX reflects not inadvertence or random choice "but rather the fundamental structure and logic of Article XX".[61] Subsequently, such an interpretation has been constantly reiterated as demonstrated by the 2012 Appellate Body ruling in *China—Measures Related to the Exportation of Various Raw* Materials.[62]

¶14-033 The protection of health under Article XX

In state practice, the motives and policies relating to the protection of the environment and of human, plant, and animal health are of particular importance. In the following, we focus on Article XX paragraphs (b) and (g), which protect human, animal, or plant life or health and the conservation

[57] In order to fall within the ambit of subparagraph (b) of Article XX, a measure must "necessary for the protection of human, animal or plant life or health." In EC – Asbestos the Appellate Body was called upon to elaborate on the correct meaning and application of paragraph (b) of Article XX of the GATT 1994. After having determined that the French measure "protects human ... life or health" within the meaning of Article XX(b), it turned to examine whether the measure was "necessary" for the protection of public health (EC – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, 12 March 2001, WT/DS135/AB/R 443). This dispute marks the first decision under the WTO regime in which an otherwise inconsistent measure was found by a panel or the Appellate Body to be justified under Article XX(b) of the GATT 1994. The Appellate Body seized the opportunity to clarify, and to slightly refine, the findings of the panel in relation to the necessity test in Article XX(b). For more information, see Simon Lester, Bryan Mercurio and Arwel Davies, WORLD TRADE LAW: TEXT MATERIALS AND COMMENTARY (Hart Publishing, 2012) Chapter 9.

[58] In order to fall within the ambit of subparagraph (g) of Article XX, a measure must relate "to the conservation of exhaustible natural resources" The term "relat[e] to" is defined as "hav[ing] some connection with, be[ing] connected to." Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 355, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter "Appellate Body Report, *China*"] (citing 2 SHORTER OXFORD ENGLISH DICTIONARY 2519 (W.R. Trumble & A. Stevenson eds., 6th ed. Oxford University Press 2007)).

[59] "[T]he purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of . . . Article [XX].'" Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 22 WT/DS2/AB/R (29 April 1996).

[60] See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 111-24, WT/DS58/AB/R (12 October 1998) [hereinafter "Appellate Body Report, *Shrimp*"].

[61] Ibid, at ¶ 119.

[62] Appellate Body Report, *China*, ¶ 354.

of exhaustible natural resources respectively,[63] with a view to explain the WTO approach to protection of health and national policy determinations under Article XX, the background against which Arbitral Tribunals would have to interpret and apply the incorporated general exceptions in investment treaties.[64]

The case *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*[65] gave an overview of the interpretation and application of Article XX(b) and (g) of the GATT 1994.[66] As one observer noted,

> *During the course of the GATT proceedings, the United States argued inter alia that Thailand restrictions prohibiting cigarette imports were inconsistent to the GATT articles which prohibit quantitative restrictions and other forms of protection. The Thai government attempted to justify their ban on imported cigarettes under GATT Article XX.... The government feared that the country's efforts to control smoking — and consequently smoking related illnesses – would be hindered by an increase in total cigarette sales that result from competition between domestic and imported cigarettes if the latter were allowed to be imported. It cited medical and scientific research which showed that cigarettes are unhealthy products that can cause cancer and numerous other smoking-related diseases.*

The United States insisted that the Thai import restrictions constituted arbitrary or unjustifiable discrimination, or disguised restrictions on international trade -- abuses of the Article XX health exception for protectionist purposes. The GATT panel concluded in favour of the United States. It noted that Thailand did not restrict domestic production and sales

[63] This Chapter does not discuss the paragraph (a) which protects public morals and paragraph (d) which essentially deals with marketing regulations and intellectual property rights. First, these other paragraphs of Article XX of the GATT 1994 have gained less importance. Second, there are simply not relevant in the context of tobacco control.

[64] For a comprehensive review of all the WTO cases dealing with tobacco products, see Chang-fa Lo, supra note 9, at 266-68.

[65] Specifically, The United States, a large tobacco producing country, campaigned to expand cigarette exports to make up for declining demand in the United States due to increased awareness of health/environmental risks associated with smoking. The US Cigarette Exporters Association (CEA) has targeted markets traditionally closed to foreign cigarette imports. The association, appealing through the office of the United States Trade Representative (USTR), alleged that the target countries' restrictive trade policies with respect to tobacco constitute unfair trade practices, which warrant the imposition of retaliatory sanctions. The US government appealed the case to the GATT and eventually Thailand was forced to open its cigarette import market in order to avoid US sanctions .... The complaint alleged that Thailand's state-owned tobacco company (the Thailand Tobacco Monopoly) unfairly restricted imports and sales of foreign cigarettes. Thai officials maintained that the prohibition of foreign cigarettes was a legitimate measure "necessary to protect the health of Thai citizens." Ferguson, supra note 9.

[66] Panel Report, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R- 37S200 (5 October 1990).

most significant global privatisation projects even amidst a serious economic crisis.

At that time, Argentinian authorities provided poor and insufficient water services and, wastewater treatment.[334] Almost half of the city had no access to potable water, which raised serious health concerns.[335] Additionally, access to sewerage services was of a poor quality and sometimes even non-existent.[336] Almost every pipe and water service structure needed to be replaced.[337] The technology to dispose wastewater was antiquated and there were no funds were available to expand or repair the overall services. Argentina's particular situation could be framed as the classic privatisation scenario. Argentina was therefore inclined, during the initial stages of water service privatisation, to enter in a 30-year concession agreement with a French investor for the operation and management of the country's water and wastewater services in order to be able to finally reach their water obligations owed to its population.[338]

¶15-050 The Three Key Breaches

Investment agreements enshrine a series of obligations on the parties aimed at ensuring a stable and favourable business environment for foreign investors.[339] These obligations pertain to the treatment that investments are afforded in the host country, as well as certain guarantees to foreign investors certifying their ability to perform key operations related to their investment.[340]

The 'treatment' granted to investors encompasses all types of laws, regulations and customs from public entities that apply to, or affect, foreign investors and their investments.[341] All public entities are bound by international obligations, including the federal and sub-federal governments, local authorities, regulatory bodies, and entities that exercise delegated

[334] See *AWG Group Ltd. v Argentine Republic*, UNCITRAL, Decision on Liability, Case no. ARB/03/19, (30 July 2010, award on damages pending).

[335] Ibid.

[336] Ibid.

[337] Ibid.

[338] *AWG Group Ltd. v Argentine Republic*, UNCITRAL, Decision on Liability, Case no. ARB/03/19, (30 July 2010, award on damages pending).

[339] See generally Rudolf Dolzer, Margrete Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff Publishers 1995).

[340] *See* generally Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press 2nd Edn 2012).

[341] See generally Heather L. Bray, Note, "ISCID and The Right to Water: An Ingredient in the Stone Soup", 29(2) ICSID REVIEW 474 (2014).

public powers.[342] Measures adopted by private actors can also fall under the scope of international agreements in exceptional circumstances when such private measures can ultimately be attributed to a governmental entity.[343]

The set of obligations is rather consistent amongst the great number of international investment agreements.[344] The core provisions found in investment agreements typically include a most favoured nation treatment obligation, grants of national treatment, obligations to provide fair and equitable treatment, protection and security for foreign investors, and an obligation to allow international transfers of funds.[345] While the substance of these principles remains the same throughout the great number of investment agreement, however, the precise scope and reach of each obligation depends on the precise wording featured in each case.

These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment. Furthermore, no trend denies such an approach, although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.[346]

¶15-051 The protection of sanitation and water services against expropriation

The protection of foreign investors has historically been the main goal of international investment agreements.[347] Hence, the inclusion of disciplinary measures against the nationalisation or expropriation of foreign investments constitutes a pivotal guarantee for foreign investors. The Article then analyses the application of this provision in the context of water services related disputes.

[342] See generally M. Sornarajah, *The International Law on Foreign Investment*, (Oxford University Press 3rd Edn 2010).

[343] Ibid.

[344] See generally Rudolf Dolzer, Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press 2nd Edn 2012).

[345] Ibid.

[346] The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse and Sullivan, entering a BIT with the United States would nearly double a country's FDI inflows. However, entering BITs with other OECD countries had no significant effect on FDI. See Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46 HARV. INT'L L.J. 67 (2005) at 105–111. Another important study concludes that there is "little evidence that BITs have stimulated additional investment". Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit...and They Could Bite*, 22 WORLD BANK DEV. RESEARCH GRP, Research Working Paper No. 3121 (2003), available at (http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-3121).

[347] See generally Rudolf Dolzer, Margrete Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff Publishers 1995).