Balancing Developed and Developing State Interests under a Regulatory Framework for Foreign Direct Investment: The Potential of the GATS Model

by

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TABLE OF CONTENTS

Abstract viii

List of Abbreviations Used ix

Acknowledgments x

Chapter 1: **Introduction** 1

A. Background 1

B. Thesis Statement 10

C. Overview of Chapters 12

D. Methodology 13

1.1 Research Methodology 13

1.2 Description of Terms 15

1.3 Scholarly Significance 16

Chapter 2: **Historical Background to the Regulation of Foreign Direct Investment in the World Trade Organization** 18

Introduction 18

A. The Law on Foreign Investment and the National Treatment Standard: A Survey of its Evolution 24

B. The Regulation of Foreign Direct Investment 35

1.1 Background: Foreign Direct Investment and Its Place in Host State Economic Development 35

1.2 Regulation of Foreign Direct Investment prior to the World Trade Organization Era 41

1.3 Investment Regime under the World Trade Organization 50

Conclusion 55

Chapter 3: **National Treatment Standard a Multilateral Framework for Investment: Impact on Developing Countries** 59

Introduction 59

A. The World Trade Organization and the Creation of a Multilateral Framework for Investment 60

1.1 Background 60

1.2 Investment Discussions at the Doha Development Round 63

B. National Treatment Standard and a Multilateral Framework for Investment 68

1.1 Principle of Non-Discrimination under the World Trade Organization 68

1.2 Developed and Developing Countries' Views on the Need for a Multilateral Framework for Investment 72

(a) Developed Countries' Perspectives 72

i. Communications from the European Community 72

ii. Communications from Canada 74

iii. Communications from Japan 78

iv. Communications from the United States 79

v. Overview 80

(b) Developing Countries' Perspectives 81

i. Communications from Brazil, Malaysia, Mexico and South Africa 82

ii. Communications from Indonesia and Morocco 84

iii. Other Developing Countries 85

(a) China, Cuba, India, Kenya, Pakistan, Zimbabwe, Hong Kong, China and Egypt 85

(b) Communications from India 88

iv. Overview 91

C. Is A Multilateral Framework For Investment Necessary? 93

Conclusion 96

Chapter 4: Foreign Direct Investment Standards in the General Agreement on Trade in Services: A Model for a Multilateral Framework for Investment 99

Introduction 99

A. Overview of the General Agreement on Trade in Services 105

I. Structure of the General Agreement on Trade in Services 106

II. Scope of Obligations under the General Agreement on Trade in Services 108

1.1 General Obligations 109

(a) The Most Favoured Nation Principle 109

(b) Transparency Principle 111

1.2 Conditional Obligations 111

(a) Domestic Regulation 112

(b) Economic Integration 113

(c) Monopolies 113

1.3 Specific Commitments 114

(a) National Treatment 114

(b) Market Access 115

1.4 Commitments under the General Agreement on Services 117

1.5 Progressive Liberalization 119

B. Scope of Foreign Direct Investment Obligations in the General Agreement on Trade in Services 120

I. Scope of Regulation 120

II. Flexibility in the General Agreement on Trade in Services 123

III. Benefits of the General Agreement on Trade in Service Model for Investment 127

Conclusion 133

Chapter 5: Conclusion 136

Bibliography 141

ABSTRACT

This thesis examines the need for a multilateral regime for the regulation of foreign direct investment. The absence of such a regime has slowed the growth of foreign direct investment, as investment decisions are difficult to make because of the uncertainty of investment rules. Attempts to establish a multilateral framework for investment have failed due to disagreement between developed and developing countries on its scope. The major source of controversy has been the inclusion of the national treatment standard in the prospective agreement.

This thesis analyses the position of both sides, and attempts to find a balance between the positive and negative effects of the multilateral framework for regulating foreign direct investment. It argues that an investment regime modelled after the General Agreement on Trade in Services could be beneficial, as it would provide security for investment, and flexibility for host countries to control the inflow of foreign investment.

LIST OF ABBREVIATIONS USED

BIT	Bilateral Investment Treaty
Doha	Doha Development Round
ECT	Energy Charter Treaty
FCN	Friendship, Commerce and Navigation Treaties
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
ITO	International Trade Organization
MAI	Multilateral Investment Agreement
MTN	MTN Nigeria
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
TNC	Transnational Corporation
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade & Development
UNCTC	United Nations Commission on Transnational Corporations
UN	United Nations
WTO	World Trade Organization

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CHAPTER 1: INTRODUCTION

A. Background:

According to Nicholas DiMascio and Joost Pauwelyn, international trade involves the movement of goods or services across borders, while investment refers to the movement of capital and other factors of production. They are of the opinion that "companies trade to supply their foreign investments; they invest to facilitate and diversify their trade".[1] The momentous expansion of foreign direct investment over the years may be ascribed to increased trade, service and investment liberalization goals provided by the World Trade Organization (WTO) which was established in 1995. However, unlike sectors such as trade and services, no comprehensive framework for the regulation of foreign direct investment exists, despite many efforts to establish such a framework.[2] In 1996, the WTO set up a working group to examine the relationship between trade and investment at the Singapore Ministerial Meeting.[3] One of the purposes of the working group was to set out a basis for the negotiation of a multilateral framework for investment.

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[1] Nicholas DiMascio & Joost Pauwelyn, "Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102 Am J Int'l L 48-89, online: <http://www.jstor.org/stable/40007768>.

[2] The first attempt was the foreign investment provisions in the Havana Charter (1948), which did not come to fruition due to the objection to the provisions by business groups and the refusal of the United States to participate in establishing the organization. Other attempts will be discussed in the next chapter of this thesis.

[3] The World Trade Organization, Working Group on the Relationship between Trade and Investment, online: The World Trade Organization, online: World Trade Organization <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm>.

At the 2001 Ministerial Conference held in Qatar,[4] members of the WTO decided to commence negotiations on a multilateral framework on investment if an agreement on the procedures of such negotiations could be reached at the Cancun Ministerial Meeting in 2003.[5] Proponents of a multilateral framework on investment were mainly from developed countries, particularly the European Community[6] and the United States, which advocated for the need to secure, protect and liberalize foreign investment and, wanted the inclusion of the national treatment standard in the agreement. Developed countries argued at the Doha meeting that including a national treatment standard in a multilateral framework for investment would increase the growth of foreign direct investment and lead to the harmonisation of investment rules. They argued that it would also ensure the protection, predictability and transparency of foreign direct investment transactions.[7] However, developing countries, such as India, opposed the commencement of such a negotiation on the ground that it may result in their loss of control over foreign direct

[4] This is often referred to as the Doha Development Round (Doha) in this thesis.

[5] WTO, Doha Ministerial Declaration, WTO Doc WT/MIN(01)/DEC/1, (14 November 2001) 41 ILM 746 at 749, online: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>. [Hereinafter referred to as *Doha*].

[6] The European Community is an economic and political union of 27 member states which are located mostly in Europe. The European Community aims to ensure the free movement of goods, services and capital and tries to maintain common trade policies through the formulation and implementation of external trade policies negotiated on behalf of member states.

[7] WTO, Doha Ministerial Declaration, *supra* note 5 at 749.

investment activities within their jurisdictions. Furthermore, such a framework, if it included the national treatment standard, would prohibit the use of investment restrictions, as practised by developing countries, to help in controlling the inflow of foreign direct investment.[8] The inability of both sides to reach a compromise on the scope of the multilateral framework for investment led to its suspension from the Doha discussions in 2004.[9]

The plethora of bilateral and regional investment treaties[10] make investment decisions difficult due to uncertainty in investment rules.[11] The fact that no multilateral agreements

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[8] Restrictions may include: restrictions on the importation of certain equipments necessary for service delivery, stringent screening procedures and the imposition of heavy tax duties on foreign investors. See Mary Footer, "The International Regulation of Trade in Services following Completion of the Uruguay Round" (1995) 29 Int'l L 453.

[9] It is important to note that no formal discussions on the subject have been entertained at the WTO since 2004 and the activities of the Working Group has been set up by the WTO have been suspended.

[10] Examples of such agreements include *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289; the *Energy Charter Treaty,* 17 December 1994, 34 ILM 381; *General Agreement on Trade in Services*, 15 April 1994, 33 ILM 1167; *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 31 ILM 247; *United States-Morocco Free Trade Agreement,* 16 June 2004 44 ILM 544; *Dominican Republic-Central America-United States Free Trade Agreement* 28 May 2004, 43 ILM 514.

exist is due to divergent approaches to the problem of foreign investment protection and the existence of competing investment agreements regarding the treatment of foreign investment.[12] One of the contentious issues regarding the need for a multilateral framework on investment is the scope of foreign direct investment obligations under such an agreement. The concern in this regard is the extent to which such a multilateral agreement would expand the scope of WTO obligations on trade and services to include investment. This was a cause of worry because such an expansion may lead to international interference with domestic rights to regulate the inflow of foreign direct investment. This likelihood of encroachment on sovereignty was a subject of apprehension, particularly for developing countries. These debates have been the centre of previous unsuccessful attempts to establish a multilateral framework for investment. An example is the unsuccessful attempt to create a Multilateral Agreement on

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[11] The volume of investment treaties signed among various countries and subsequent amendments to those treaties make it difficult to keep track of investment rules. Furthermore, a potential foreign investor may face difficulties where there is no existing investment treaty between it and the country it intends to invest. This demonstrates the need for a multilateral framework for investment.

[12] M Sornarajah, *The International Law on Foreign Investment* (New York: Cambridge University Press, Grotius Publications, 1994) 269.The various bilateral and multilateral investment treaties have different provisions for the treatment of foreign direct investment. An example is the NAFTA which provides for pre-entry and post-entry national treatment obligation while the General Agreement on Trade in Services operating under the auspices of the WTO, only provides for post-entry national treatment.

Investment under the Organization for Economic Cooperation and Development[13] (OECD) framework in 1995. The inability of members to reach a consensus on the content of the proposed agreement led to its failure. One of the contending issues was the insertion of the national treatment standard in the agreement which the European Community opposed.[14] The WTO has been the most recent forum for negotiations on the multilateral framework for foreign investment.

The disagreement over the issue has been between developed and developing countries. As noted above, a major point of controversy underlying the debate relating to a multilateral framework on investment is the inclusion of a national treatment standard in the agreement. The national treatment standard is set out in the General Agreement on Trade in Services[15] (GATS). The GATS provides for the non-discrimination principle which is made up of two major components: the most favoured nation principle and the national treatment standard. GATS regulates trade in services through two sets of obligations: general obligations and specific obligations.

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[13] The OECD consists of thirty-four member countries from Europe, North and Latin America and the Pacific with a commitment to democratic government providing a forum to discuss and develop issues relating to social and economic policies of its members.

[14] Further discussions on this issue are made in the next chapter of this thesis.

[15] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 [*GATS*]. The GATS builds on the core foundations of the *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187 [GATT].

The most favoured nation principle restrains members from granting preferences to certain members while excluding others. All members have the most favoured nation status because it is a general obligation therefore, members are entitled to any condition of trade or service granted to another member, whether favourable in nature or not. General obligation applies to all measures affecting trade in services and is referred to as the "top-down" approach because it permits members to list exemptions to its application.[16]

The national treatment standard is similar to the most favoured nation principle, and is set out in Article XVII of the GATS. It stipulates that each Member of the WTO shall accord to services and service suppliers of any other Member, treatment no less favourable than it accords to its own like services and service suppliers.[17] The national treatment standard as stated above prevents discrimination and ensures equal competition between foreign and domestic goods and investment in services. The national treatment standard is a specific obligation which applies to only those sectors that a member has

[16] David P Fidler & GATS Legal Review Team for the World Health Organization, *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective,* Globalization, Trade and Health Working Papers Series, online: <http://whqlibdoc.who.int/gats/GATS_Legal_Review_eng.pdf>.

[17] GATS, *supra* note 15 at article XVII; see also the Report of Panel on China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,* WT/DS363/R (2009), online:<http://www.worldtradelaw.net/reports/wtopanels/china-publications(panel).pdf>.

committed to in its schedule. This approach is known as the bottom-up approach.[18] The flexibility provided by GATS allows countries to restrict foreign direct investment in certain sectors of their economies.

The national treatment standard as provided in the GATS states that WTO members are not permitted to grant investment incentives or place any form of investment restrictions within their countries which operate to the disadvantage of foreign investors. Developing countries fear that the imposing the national treatment standard may stall the growth of domestic companies because they have to compete with multinationals on an equal playing field. This is viewed as unfair because most multinational corporations have huge capital, competitive brand names, technical knowledge and skilled manpower which domestic companies may not possess.

Developed countries also preserve their policy objectives in terms of the need to control foreign investment so as to prevent excessive foreign domination over their economic activities. They do this by means of the various restrictions on foreign direct investment created to protect their economies. An example is the *Investment Canada Act*[19] which regulates foreign investment in Canada. The purpose of the Act is "to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be

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[18] M Sornarajah, *The International Law on Foreign Investment* (New York: Cambridge University Press, Grotius Publications, 1994) 269 at 300.

[19] Investment Canada Act RSC, 1985, c 28 (1st Supp).

injurious to national security".[20] The Act provides for screening foreign direct investment by placing several value thresholds that trigger national security review under the Act with respect to investments by non-Canadians.[21]

This thesis expresses the view that the multilateral framework on investment is necessary to protect investment and to ensure predictability in the regulation of foreign direct investment, however, it is essential to consider the negative effects it could have on the economy of members of the WTO if a one-size-fits-all approach is employed in doing so. Members of the WTO are at different stages of economic development[22] and this, to a large extent, determines the level of foreign direct investment each one could embrace depending on its policy needs. Hence, some developing countries, such as those of Africa, need to retain control over the flow of foreign direct investment to ensure that domestic policy objectives and developmental growth are promoted.

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[20] *Ibid* at preamble.

[21] Michael Holden &Library of Parliament- Parliamentary Information and Research Service, *The Foreign Direct Investment Review Process in Canada and other Countries* (Ottawa: Parliamentary Information and Research Service, 2007). For more readings on the Investment Canada Act see <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home?OpenDocument>.

[22] The impact of expanding the scope of obligations under the proposed multilateral framework for investment will be different for each country depending on the level of development it is at.

Also, it argues that a potential multilateral framework on investment could provide comprehensive and harmonized international investment standards, however the advantages are accompanied by potentially disadvantageous implications. It is the scope and effect of such an agreement that will determine what may be the more favourable approach for developing countries.

The thesis argues that the scope of obligations provided under a multilateral framework for investment should ensure a balance between the positive and negative impacts of the agreement. This may be achieved by granting host states the flexibility to determine which obligations to be bound by. For instance, as in the GATS example, the national treatment standard should not be made a mandatory obligation but rather, a specific obligation which members of the WTO may choose to be bound. This approach may make a multilateral investment agreement more acceptable to opposing states, particularly developing countries. An example of such an agreement is the GATS which ensures the liberalization of trade in services by securing a balance of rights and obligations, while giving due respect to national policy objectives,[23] achieved through its Schedule of Specific Commitments.[24] This schedule permits members to determine the level of liberalization they wish to embrace, by choosing sectors of their economies to which the national treatment and market access would apply. This provision allows for the necessary flexibility that may be desired by host states.

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[23] GATS, *supra* note 15 at preamble.

[24] GATS, *supra* note 15 at article XX.

To this end, the thesis proposes that the national treatment standard should be included in the multilateral framework for investment in the format adopted under the GATS to allow for flexibility in the control of foreign direct investment by each WTO member.

B. Thesis Statement

This thesis focuses on the national treatment standard. It assesses the scope of the national treatment standard under GATS and argues that the scope should be maintained, and included in the proposed multilateral framework for foreign direct investment, considering the dynamic nature of investment.

A similar national treatment standard is provided in most bilateral and regional agreements and is to be observed at the post-establishment stage of foreign direct investment. However, its effect on a multilateral framework must be considered on its own merits, particularly the call to expand it to the pre-establishment phase of foreign direct investment.

This thesis examines how the inclusion of the national treatment standard in a multilateral framework for investment affects the economic development of developing countries, and argues that it should only be applied at the post-investment stage, giving room for flexibility as inherent in the GATS.[25] Consequently, the scope of the national treatment standard should not be expanded beyond what it is under the GATS.

The analysis leads to the following proposition:

[25] The Schedule of Commitments under GATS, as stated above, provides the necessary flexibility in adhering to GATS' obligations.

> The national treatment standard should be included in the multilateral framework for investment but its scope should be limited to specific economic sectors, to which members permit its application as inherent in GATS, in order to balance its positive and negative effects on the economies of developing countries.

However, before a framework can be evaluated, it is necessary to understand the scope of existing foreign direct investment obligations under the WTO. One of the foreign direct investment obligations of member states of the WTO is the non-discrimination principle which is provided in the General Agreement on Tariffs and Trade (GATT)[26], GATS[27], the Agreement on Trade Related Investment Measures (TRIMs)[28] and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).[29] The principle has also been a major source of disagreement between developing and developed countries in the negotiations for a multilateral framework for investment. The following chapters of this thesis will discuss the role of the non-discrimination principle in the regulation of foreign direct investment and how its benefits can be harnessed to outweigh its disadvantages.

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[26] *General Agreement on Tariffs and Trade*, 15 April1994, 1867 UNTS 187.

[27] GATS, *supra* note 15.

[28] A*greement on Trade-Related Investment Measures*, 15 April 1994, 1868 UNTS 186. [TRIMs Agreement].

[29] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 1197 [TRIPS]. Further discussions on these Agreements will be provided in the next chapter.

C. Overview of Chapters

This thesis is divided into five chapters. The first chapter, the present chapter, is introductory in nature, and provides a brief summary of the entire thesis as set out above. Chapter Two provides a historical background to the development of the law of foreign direct investment, the national treatment standard and non-discrimination principle. It outlines the several efforts in the WTO to create a multilateral framework for investment and the factors that contributed to their failures. Chapter Three discusses the role of the non-discrimination principle under the WTO in the regulation of foreign direct investment. It analyzes the opinions of developed and developing countries at the Doha negotiations, how the views of both sides on the establishment of a multilateral framework for investment impact the economic growth of host states, and how it provides security for the interests of foreign investors.

Chapter Four assesses the operation and scope of the GATS obligations regarding foreign direct investment. It analyzes the benefits of the GATS, and demonstrates that it is a workable model for the multilateral framework for investment because it provides flexibility for host states to control their economic growth through its Schedule of Specific Commitments. This Schedule permits members to accept or refuse to be bound by national treatment standard in certain areas of their economies. This chapter concludes that a multilateral framework for investment designed along the lines of GATS, would lead to an acceptable compromise between developed and developing countries which would result in the establishment of a multilateral framework for investment. Chapter Five provides a general conclusion and makes recommendations based on the analysis provided in chapters 2 to 4.

D. METHODOLOGY[30]

In an attempt to provide answers to the research question, several research methodologies including the doctrinal, historical, comparative and interdisciplinary methods of research will be used.

1.1 Research Methodology

This thesis is essentially doctrinal in nature. It utilizes the descriptive, theoretical, critical and analytical methods of doctrinal research in addressing the research questions raised. Doctrinal scholarship is employed to discuss the task of the WTO in regulating foreign direct investment. It is used to analyze the scope and nature of obligations of member states of the WTO regarding the regulation of foreign direct investment in view of the WTO's principle of non-discrimination. The doctrinal approach will assist the assessment of negotiations at Doha Development Round[31] (Doha) on the need for an increase in the scope of foreign direct investment obligations.

Another research tool used in the thesis is the historical approach. As outlined above, several attempts to create a multilateral framework for foreign investment have been unsuccessful. A historical perspective is essential to trace the endeavours made to create a multilateral framework for foreign direct investment and the factors responsible for

[30] Some parts of this section were discussed in my Methodological Prospectus which was submitted this term to Professor Sheila Wildeman, 17 February 2011 (Schulich School of Law, Dalhousie University).

[31] The Doha development round (Doha) is the current trade negotiations in the WTO which positions development as its core objective.

their failures. The historical methodology is used to investigate if the problems of the past are still present in current deliberations at Doha. An understanding of this helps to contextualize recommendations that may facilitate the avoidance of past pitfalls. The required historical information will be obtained from secondary materials such as textbooks, articles and reports.

The comparative approach is also employed in this thesis. This approach seeks to "compare two or more things with a view to discovering something about one or all of the things being compared".[32] Since there are two perspectives to the altercations on the subject matter of concluding a multilateral framework for foreign investment, namely, developed and developing country perspectives, a comparative analysis of both viewpoints is required in order to find a solution to the standoff. A solution may be found through an analysis of both viewpoints and in balancing them to find a compromise that may be satisfactory to both developing and developed countries.

This thesis is interdisciplinary and broaches on some subject matters in law, economics, politics and international relations. Interdisciplinary research entails the study of a subject other than law and using this knowledge for legal analysis to arrive at legal conclusions. Aside from law, the thesis is linked with economics and politics therefore, an understanding of economics is required in this thesis. The economic aspect of this thesis relates to the operation and effects of foreign investments. Also, in an attempt to provide a solution to the research question on the impact of a multilateral framework for foreign investment on developing countries, an understanding of the legal, economic and

[32] Wikipedia, online: http://en.wikipedia.org/wiki/Comparative_research.

political effects of a multilateral framework for foreign investment on economic development is necessary. Furthermore, an economic analysis of the arguments for and against a multilateral framework for foreign investment is needed to fully appreciate the discrepancy between developing and developed countries and, hopefully provide solutions which take into account the economic and political consequences apprehended by both sides. The study of secondary materials on the subject such as books, articles and online sources may provide the required information.

1.2 Description of Terms

This thesis recognizes the fact that there are economic complexities in describing developed and developing countries. The ever changing nature of economies makes this broad categorization of countries as developed and developing difficult. Therefore, this thesis limits its discussion of developed countries to the European Community, the US, Canada, and Japan. On the other hand, developing countries for the purpose of this thesis refers to slowly developing countries in Africa, Asia, South and North America. Also, this thesis acknowledges that the global financial collapse of 2008 may have varied the perspectives of both developed and developing countries on the need for a multilateral framework for investment, and the inclusion of the national treatment standard therein. However, this thesis does not delve into such variations and its discussions are limited to positions taken by both sides at the Doha Ministerial meeting which commenced in 2001.

The word “developed countries” may be used interchangeably with “industrialised nations”. “Host state” refers to the recipient of foreign direct investment which is the

domestic country while "home state" refers to the country of the foreign investor who seeks to make foreign direct investment.

"State" is used interchangeably with "country".

1.3 Scholarly Significance

This thesis analyzes contentious issues underlying the increasing demand for a multilateral framework for investment. The national treatment standard is an important subject in this controversy and arguments in support of its inclusion in a multilateral framework for foreign investment have led debates between the developed countries, and between developed and developing countries. Scholars have provided literature and given opinions, for, and against the conclusion of the multilateral framework for foreign investment. This thesis is significant because it analyzes the advantages and disadvantages of including the national treatment standard in a multilateral framework for foreign investment and hopefully, provides a balanced solution that may be useful for future WTO negotiations on the subject.

Despite the fact that negotiations on a multilateral framework for foreign investment were suspended at the WTO in 2004, and no formal discussions or Working Group on the subject have been set up at the WTO since then, scholars like Donatella Alessandrini[33] have continued in their research on the topic. Members of the WTO continue to engage in foreign direct investment, and its growth has contributed to

[33] Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Oxford: Hart Publishing Limited, 2010) 1.

economic development, hence, the subject of its regulation will continue to surface in the future WTO negotiations. This research is a preparation for such re-emergence, as it hopes to provide some recommendations to assist in navigating the way to an acceptable agreement for all interested parties.

This thesis serves as a catalyst for further research, particularly in relation to finding a balanced solution acceptable to member states of the WTO, and adds to the wealth of scholarship in international trade law.

CHAPTER 2: HISTORICAL BACKGROUND TO THE REGULATION OF FOREIGN DIRECT INVESTMENT IN THE WORLD TRADE ORGANIZATION

INTRODUCTION

Trade has been in existence for as long as humanity and constitutes an essential means of livelihood. In the days of our ancestors, trade was used to access scarce goods, skills and merchandise. Most communities explored their natural resources, and specialised in the production of goods which were later traded or exchanged with neighbouring communities for goods they lacked. The increase of the population of communities and the emergence of new communities resulted in increased trade activities. Thus, trade soon became a means of not only economic growth, but also an attribute of power due to the increased wealth it generated for communities and later States. Ancient Greece, for example, relied heavily on the trade of silver and oil in the Mediterranean region for economic growth.[1] Trade contributed significantly to the transition from the ancient to the modern world.[2]

Trade became more than a means for economic survival, it grew into a source of economic wealth which made self-sufficient trading countries powerful and influential. States increased their wealth and power through amplified export activities and minimal imports. This strategy facilitated economic growth and development in host states as it

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[1] Gilbert R Winham, "The Evolution of the World Trading System – The Economic and Policy Context" in DL Bethlehem et al, Oxford Handbook of International Trade Law (Oxford : Oxford University Press, 2009.) 1 at 7.

[2] *Ibid*.

encouraged host states, to maximise their natural and agricultural resources which resulted in economic wealth, gained through export activities. Host states were able to minimize their import activities by their basic needs producing locally. Over time, trade development inspired states to expand their activities beyond their neighbouring communities to other parts of the globe, leading to increased export and import activities and, eventually to colonialism.[3]

The expansion of trade necessitated some form of regulation to ensure stability and progress in commercial and related economic activity. Trade regulation was introduced by political leaders for the purposes of collecting taxes, tolls, tariffs and to impose non-tariff restrictions[4] on foreign traders.[5] These measures generated revenue for governments and were, and continue to be used today to protect the domestic traders from foreign competition and bolster the import/export balance. This practice, often referred to as protectionism, led to restrained trade between states, as stringent measures were applied

[3] Winham, *supra* note 1at 8.

[4] Non-tariff measures include restrictive import quota, restrictive licensing, packaging and labelling conditions and rules of origin. See M Ferrantino & OECD, *Quantifying the Trade and Economic Effects of Non-Tariff Measures*, OECD Trade Policy Working Paper No 28, Doc No doi:10.1787/837654407568 (2006), online: OECD <http://tradefacilitation.free.fr/download/Trade/Quantifying%20the%20Trade%20and%20Economic%20Effects%20of%20Non-Tariff%20Measures%20OECD%202006.pdf>.

[5] Winham, *supra* note 1 at 7.

to discourage imports and to promote economic development. [6] Attempts were made to promote trade through trade liberalization mechanisms because protectionist practices were slowing down trade activities.[7] Such mechanisms are provided, for instance, in the 1947 GATT,[8] which required states to reduce trade tariffs and other trade barriers, including the elimination of discriminatory treatment in international trade.

At the global level, the conclusion of World War II inspired the emergence of schemes intended to restructure the post-war economy.[9] As well, those states that had no longer had colonies traded and invested in former colonies and in other foreign states, especially through the mechanics of foreign direct investment.[10] The end of World War II saw the emergence of colonies into independent states. The new states sought to protect and regain control over their natural resources that had formerly been under the control of

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[6] Alan O Sykest, "Regulatory Protectionism and the Law of International Trade" (1999) 66:1 University of Chicago Law Review at 1-46.

[7] For further readings see Winham, *supra* note 1 at 1-12.

[8] *General Agreement on Tariffs and Trade*, 30 October 1947, Can TS 1947No 27 [GATT].

[9] Such schemes include the demands for a new international economic order which aimed to ensure grant developing countries power to regulate trade and foreign investment. Also, attempts were made to establish international principles concerning foreign direct investment through an International Trade Organization and Havana Charter.

[10] Further discussions will be made on foreign direct investment in subsequent sub-sections of this chapter.

their foreign colonial masters.[11] One tactic they adopted to do this was the nationalisation of property belonging to foreign entities operating within their jurisdictions. A major motivation for these acts of expropriation was the fear of these independent States that the dominant foreign presence in their economic sectors would jeopardise their newly found political independence.[12] Because foreign direct investment requires the commitment of significant capital, technological expertise and managerial skills in each economic sector where investment is made, the regulation of foreign investment became a subject of concern for the rapidly industrialising world, particularly in view of the possibility of expropriation of such investments by the host developing countries.

For developing countries, the objective of expropriation is regaining and retaining economic sovereignty, while embracing foreign direct investment.[13] Consequently, the growth of foreign direct investment heightened the need for its regulation to ensure stability, predictability and development. At the same time, as with international trade, restrictive measures were applied by the host state governments to limit the free flow of foreign direct investment in order to prevent foreign dominance of their economies. Some examples of the investment restrictive measures they adopted are: limitation on foreign participation in certain economic sectors, increased tax burden for foreign investors and limitation on the value of investment transactions. These measures have stalled the

[11] Rafael Leal-Arcas, "The Multilateralization of International Investment Law" (2009) 35 North Carolina Journal of International Law and Commercial Regulation 1 at 11.

[12] Charles P Kindleberger & David B. Audretsch eds., *The Multinational Corporation in the 1980s* (Cambridge: MIT Press, 1983) 1 at 26.

[13] *Ibid* at 26-27.

growth of foreign direct investment, and developed countries believe that they need to be loosened to encourage economic development. It is to ensure such liberalization that developed states demanded the application of minimum international treatment standards to foreign direct investment.[14]

The conclusion of the trade negotiations at the Uruguay round in 1994, led to the emergence of a new trading era under the WTO, with a particular recognition for the need to regulate investment. Consequently, the national treatment standard was provided in the General Agreement on Tariffs and Trade (GATT)[15], General Agreement on Trade in Services (GATS)[16], the Agreement on Trade Related Investment Measures (TRIMs)[17] and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)[18] to regulate both trade and investment.[19] However, the limitations[20] of these agreements have

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[14] Nicholas DiMascio & Joost Pauwelyn "Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" online: (2008) 102 Am J Int'l L 48 at 52, online: < http://www.jstor.org/stable/40007768>.

[15] *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187.

[16] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167.

[17] A*greement on Trade-Related Investment Measures*, 15 April 1994, 1868 UNTS 186. [TRIMs Agreement].

[18] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 1197 [TRIPS].

[19] Further discussions on these agreements will be made in subsequent sections of this chapter with emphasis on the GATS.

led to the demand by the industrialised nations at the Doha Development Round in 2001 for a multilateral framework for investment to operate under the auspices of the WTO.

A key principle employed by the WTO in its bid to liberalise trade is the non-discrimination principle, and particularly, the national treatment standard. The national treatment standard set out in Article XVII of GATS requires member states of the WTO to treat domestic and foreign products and services alike, and without any form of discrimination.[21] This principle played a great role in the liberalization of international trade and suggestions have been made by industrialised nations to apply the same rule to foreign direct investment in 2001.[22]

The remainder of this chapter provides a conceptual background to the evolution of the law of foreign direct investment and the national treatment standard. It analyzes the historical background to the demand for a multilateral framework for investment both before and in the WTO era. These demands seem to be inspired by the need to protect, and to ensure stability, transparency and predictability in the regulation of foreign direct investment. Attempts to provide a regulatory framework for foreign direct investment

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[20] The agreements are limited in scope as they were established for specific sectors such as trade, intellectual property and services.

[21] Further discussion on the national treatment standard is provided in subsequent sections of this chapter.

[22] WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, (14 November 2001) 41 I.L.M. 746 at749, online: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

date back to the 1948 Havana Charter,[23] and have continued to resurface in various trade negotiations over time.[24] This chapter traces the several attempts to create a multilateral framework for foreign direct investment and the factors that contributed to their failures. An understanding of the unsuccessful past efforts provides the background information for the analysis of this thesis, and establishes the context for the recommendations it makes towards finding a workable solution for the regulation of foreign direct investment under the multilateral framework for investment that negotiators at the Doha hoped to create.

A. THE LAW ON FOREIGN INVESTMENT AND THE NATIONAL TREATMENT STANDARD: A SURVEY OF ITS EVOLUTION

The evolution of the national treatment standard dates back to the period when the different treatment of foreign investors by host states was the subject of controversy. Scholars like Victoria suggested that aliens and nationals of the host state must be treated equally, because trading was an expression of a communal feeling natural to man.[25] Vattel, on the other hand, thought that national treatment standards in host states may be low, and so aliens should be treated in accordance with some external standard higher

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[23] *Havana Charter for an International Trade Organization*, 24 March 1948, UN Doc E/CONF.2/78.

[24] Subsequent sections of this chapter will trace the various forums where attempts to create a regulatory framework for foreign direct investment have been made.

[25] F de Victoria, De Indis et de Jure Belli Reflectiones III, 1917, 5. See also A Anghie, "Francisco Victoria and the Colonial Origins of International Law" (1996) 5 Social and Legal Studies at 321 at 326.

than the national standard.[26] The common purpose of the suggested standard was to find a way to ensure the eradication of barriers to the free flow of trade and later investment between nations.

During the colonial era, trade activities by foreign colonial masters which would qualify as foreign direct investment today, were not really regarded as foreign direct investment because such transactions were regarded as an extension of domestic trade. Foreign direct investment, though not referred as such, did not require protection, as colonial legal systems incorporated the concept of imperial power. Foreign direct investment protection was, thus, guaranteed to investors and the investments they made in the colonies. There was no need for international rules to be established regarding foreign direct investment. However, capital-exporting countries that were not involved in the imperial system also wanted some form of protection for their nationals.

This demand resulted in the development of the international law system of "extraterritoriality".[27] The United States practiced extraterritoriality and described it as a system where foreign investors or entities claim protection, diplomatic immunity or

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[26] E de Vattel, *The Law of Nations or the Principles of International Law*,(1758) translated by C Fenwick, *Classics of International Law* II (Washington DC: Carnegie Institution, 1916) at 1 at 8, 104.

[27] For more information on the principle of extraterritoriality, see Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion [2004] ICJ Rep 136 at paragraphs 107-111.

exemption from the legal system and territorial jurisdiction of the host state.[28] The capital-exporting states have sometimes used the extraterritoriality system to justify the use of force to pursue the investment claims of their nationals in host states, which often led to intervening in the host states through the use of military force or diplomatic claims.[29] The Drago-Porter Convention of 1907[30] tried to limit or eradicate this principle. The Convention was established to prohibit the use of armed force to recover contract debts from the host state by home states on behalf of its nationals. However, the Drago-Porter Convention did not effectively eradicate the use of force as, home states could legally exercise force to recover debts where the host state refused to submit to arbitration

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[28] Encyclopaedia of the New American Nation, online: <http://www.americanforeignrelations.com/E-N/Extraterritoriality.html#ixzz1IkjTVTPJ>.

[29] See DJ Harris, *Cases and Materials on International Law*, 6th ed (London: Sweet & Maxwell, 2004) 267-268; Centre for International Environmental Law, "International Law of Investment: The Minimum Standards of Treatment", (2003) The Centre for International Environmental Law Issue Brief at 1; online: <http://www.ciel.org/Publications/investment_10Nov03.pdf>.

[30] *Porter Convention on the Limitation of the Employment of Force for the Recovery of Contract Debts*, Encyclopædia Britannica, Online: *http://www.britannica.com/EBchecked/topic/471131/Porter-Convention-on-the-Limitation-of-the-Employment-of-Force-for-the-Recovery-of-Contract-Debts>(Retrieved* on 15 April 2011); See George W Scott, "Hague Convention Restricting the Use of Force to Recover on Contract Claims" (1908) 2 Am J Int'l L 78 at 78 and 89.

or accept an arbitral award.[31] Furthermore, the post-colonial era saw former imperialists seeking protection for their investment in the ex-colonies. International law regarding foreign investment was deemed necessary by the international community to protect the interest of capital-exporting countries where the national laws of host states do not provide the required levels of protection.[32]

Apart from the Drago-Porter Convention, general international law principles were sought by industrialised nations to provide protection to foreign investors. The principle of state responsibility for injuries to aliens and their property under international law was linked to the standard of minimum treatment regarding foreign investment.[33] State responsibility permitted the home state to seek remedies from the host state for injuries done to a foreign investor where such remedies or protection are unavailable in the host state.[34] This is based on the notion that an injury to an alien is an injury to the home

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[31] Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009) 1 at 10.

[32] Year Book of the International Law Commission (New York: United Nations Publication, 1960) Vol. 2 Doc. A/CN.4/Ser.A/1959/Add.l, 1 at 3-9, online: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1959_v2_e.pdf.

[33] *Ibid* at 7-17.

[34] The nationality of aliens, which also included corporations, was an important factor espousing claims under this doctrine. The home state was the only one with legal standing to pursue the investment claims of its nationals. It has sole discretion to determine what steps to take to protect the investment interests of its national abroad; indeed it could decide not to take any steps at all. See Barcelona Traction, Light and Power Co. Case (Belgium v Spain), [1970] ICJ Rep 1 at 3.

state.[35] However, the principle of state responsibility was not satisfactory to home States and foreign investors, as they could only receive the same treatment accorded to nationals which, in their opinion, was inadequate because of the unstable system of government in some host states.[36]

The standard of treatment to be accorded foreign investors was a matter of urgent concern, and the clash between the United States and Latin America States on the treatment of aliens in the 1800s' (prior World War II) brought this issue to the fore.[37] Latin American jurists relied on the "Calvo doctrine"[38] to reject the claims of the developed countries for minimum international standards for the treatment of foreign traders and investors (foreigners). Increased trade and investment activities of foreigners made host states, largely developing countries, wary, and restrictions were put in place to

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[35] M Sornarajah, *The Pursuit of Nationalized Property* (Dordrecht: Martinus Nijhoff, 1986) 10.

[36] A Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) Harvard International Law Journal1at 22-34.

[37] Latin America held the view that the protection accorded to foreign investors should be limited to remedies available to nationals of the host state, while the United States sought an external international standard beyond what was available in the host state.

[38] The Calvo doctrine was espoused in 1896 by Carlos Calvo, a jurist from Argentina. The doctrine stipulates that foreigners are not entitled to higher rights than those accorded to domestic entities and that foreigners are subject to domestic law and the judicial system of host states, just like citizens of the host state. Hence, foreign investors should not expect to be treated better or differently from locals. See Centre for International Environmental Law, *supra* note 28 at 2.

limit foreign direct investment, one of which was through the expropriation of foreign property without adequate compensation, thereby discouraging foreign direct investment.[39] This attitude was a major cause of concern for developed states as they sought to exercise their customary international law rights to adequate compensation in the event of expropriation.[40] The argument of Latin American countries was that foreigners deserved the same treatment granted to nationals of host states in accordance with the domestic laws of the host state.[41] Nicholas DiMascio and Joost Pauwelyn argue that the Calvo doctrine was an argument for 'mere' national treatment under customary international law.[42]

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[39] DiMascio & Pauwelyn, *supra* note 14 at 52.

[40] An example of such expropriation incident is the case of SPP V. Egypt (1983) 22 ILM 752. In this case, South Pacific Properties Ltd (SPP) entered into an agreement with the Egyptian Government Tourist Corporation to build a tourist complex close to the Egyptian Pyramids. This agreement was entered into during the regime of President Sadat. The company began construction which instigated public outcry against the construction of such a building near the historic pyramids. President Sadat's regime ended with his assassination and President Mubarak became the new president of Egypt. Due to the persistent public outcry against the project, President Mubarak cancelled the SPP project. This resulted in enormous financial loss to SPP as construction work had already begun. The matter was referred to arbitration as to the liability of the government to SPP. See also M Sornarajah*, The International Law on Foreign Investment* (New York: Cambridge University Press, Grotius Publications, 1994) at 112.

[41] DiMascio & Pauwelyn, *supra* note 14 at 66.

[42] *Ibid*.

The absence of comprehensive international rules on the subject of foreign investment led to discriminatory practices where host states put in place measures to protect, promote and favour domestic industries at the expense of foreign investment.[43] This discriminatory treatment of foreign investment was not limited to expropriation rights but also extended to the treatment of foreign investors both at pre-establishment and post-establishment stages.[44] Host states, particularly developing countries, sought to retain their sovereignty by placing measures to prevent excessive foreign dominance of their economies.

After the World War II, various States sought foreign investment security and, entered into bilateral treaties on commerce and navigation often referred to as Friendship, Commerce and Navigation Treaties (FCNs)[45]. For instance, the United States and Taiwan FCN of 1946 which granted non-discrimination national treatment rights to United States

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[43] Wendy E Takacs, "Pressures for Protectionism: An Empirical Analysis" (2007) 19:4 Economic Inquiry 687 at 687-693, online: <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-7295.1981.tb00347.x/pdf>.

[44] The pre-establishment stage refers to the treatment of foreign investment when it is being admitted into the host state, while the post-establishment stage refers to its treatment after admission to the host state. Examples of such restrictions include: restrictions on the importation of certain equipments necessary for service delivery, stringent screening procedures and the imposition of heavy tax duties on foreign investors. See Mary Footer, "The International Regulation of Trade in Services following Completion of the Uruguay Round" (1995) 29 Int'l L 453.

[45] The United States entered into twenty-one FCN treaties between 1946 and 1966. See Rafael Leal-Arcas, *supra* note 11 at 12.

corporations conducting business in Taiwan.[46] FCN treaties were initially aimed at facilitating trade liberalization and encouraging economic relationship between nations. However, with the establishment of the GATT in 1947, which sought to liberalise trade, FCN treaty goals changed to the protection of foreign direct investment.[47]

Article III of the 1947 GATT provided for the non-discrimination principle which, through the national treatment standard, prohibited host states from granting more favourable treatment to domestic producers, and ensured equal competitive rights between domestic and foreign producers. The GATT limited the stifling of free trade by prohibiting the use of internal measures, such as imposition of taxes, to circumvent tariff reduction commitments made under GATT. This was aimed at eradicating discriminatory practices by host states between domestic and foreign produce.[48] Attempts to enhance the national treatment standard and reduce discriminatory practices may have led to the

[46] Herman Walker, "Provisions on Companies in United States Commercial Treaties" (1956) 50 Am J Int'l L 373 and 375.

[47] Kenneth J Vandevelde, "United States Investment Treaties: Policy and Practice" (1992) 19 Kluwer Law and Taxation 19.

[48] This provision on non-discrimination is also provided in Article the 1994 GATT and several other WTO Agreements such as the TRIPS, GATS and TRIMs Agreement. These Agreements will be discussed in pages 50-54 of this chapter.

negotiation of the Havana Charter in 1948.[49] Standards of treatment similar to those sought in a multilateral framework of investment at the WTO were provided in the Havana Charter and, served as precedent in subsequent instruments concerning international investment including bilateral investment treaties.

The unresolved debates on the scope of treatment standards for foreign investors and, as outlined above, the limitations of international law principles in this regard, led to the conclusion of less complicated investment agreements such as bilateral investment treaties (BIT).[50] Under these, countries sought to create favourable conditions for investments by "imposing international minimum standards respecting, for example, expropriation, fair and equitable treatment, and non-discrimination".[51] For developed countries, the rationale behind BITs is the protection of foreign direct investments by their nationals abroad. Host states, particularly developing countries, participate in BITs

[49] The Havana Charter was signed by fifty-four countries on March 24, 1948. It allowed for international cooperation and rules against anti-competitive business practices. It also sought to establish an International Trade Organization but failed. Further discussion on this charter is provided on page 41 of this chapter.

[50] The first bilateral investment treaty was signed between Germany and Pakistan in 1959, see *Treaty for the Promotion and Protection of Investments,* 25 November 1959, 1963 UNTS 24.

[51] Thomas L Brewer & Stephen Young, *The Multilateral Investment System and Multinational Enterprises* (Oxford: Oxford University Press, 1998) 30.

to attract foreign investment to accelerate their economic growth.[52] Developing countries were, and are, more willing to embrace foreign investment as they are confident that this would boost their economic development, albeit, with some form of control over the inflow of foreign investment.[53] This attitude to foreign investment increased the number of BITs concluded between developed and developing countries.[54]

The standard of treatment for investments provided in BITs range from national treatment, most-favoured nation and "fair and equitable treatment".[55] It seems that the dynamic and uncertain nature of investment makes a multilateral framework for investment unappealing to developing host countries because of the absence of the clear

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[52] Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 VA J Int'l L 639 at 669-674.

[53] United Nations Conference on Trade & Development (UNCTAD), *Trends in International Investment Agreements: An Overview*, UN Doc UNCTAD/ITE/IIT/13(1999), online: United Nations Conference on Trade and Development <http://www.unctad.org/en/docs/iteiitl3_en .pdf> 1 at 6.

[54] *Ibid* at 6.

[55] Nicholas DiMascio & Joost Pauwelyn, *supra* note 14 at 67-69. It seems that developing states are more willing to conclude BITs than a multilateral framework for investment because of the weight of international obligations. BITs are limited in their scope of operation and can easily be re-negotiated. A multilateral framework on the other hand, is an international instrument made up of responsibilities which cannot be avoided without consequences. Also, a multilateral framework for investment will be an agreement with all the members of WTO unlike a BIT which can be limited to a certain group of States.

buyer-seller linkage, as is the case of goods and services. Also, the outflow of foreign investment cannot be monitored and controlled. This opinion has been expressed by India in its submissions to the Working Group on the Relationship between Trade and Investment during negotiations at Doha.[56] Also, developing states may be more willing to conclude BITs than a multilateral framework for investment because of the weight of international obligations. BITs are limited in their scope of operation, it provides host countries with bargaining power and can easily be re-negotiated. This gives them desired control over the regulation of foreign direct investment. A multilateral framework on the other hand, is an international instrument made up of responsibilities which cannot be avoided without consequences. Also, a multilateral framework for investment will be an agreement with all the members of WTO unlike a BIT which can be limited to a particular State(s).

Despite the fact that the national treatment standard was provided in BITs, the focus was on expropriation.[57] However, with the increase of more favourable standards, such as tax holidays, provided to domestic investors in host states, and which operated to the detriment of foreign investment interests, national treatment standard became a subject of concern for foreign direct investors.[58] Foreign direct investors sought to protect their investment from discriminatory domestic laws that enhanced the investment opportunities

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[56] Further discussion on negotiations on the need for a multilateral framework for investment at the WTO Doha Round is provided in Chapter 3

[57] DiMascio & Pauwelyn, *supra* note 14 at 67.

[58] *Ibid*.

of domestic investors. This resulted in investment disputes, as this practice was viewed by the developed countries as indirect expropriation of their investments.

It is quite ironic that the Calvo doctrine earlier referred to, that advocated equal treatment of domestic and foreign nationals, seems to have assumed fresh relevance. The doctrine was initially rejected by the developed nations, such as the United States, but it is now being sought by them as appropriate treatment standard under BITs and a potential multilateral framework for investment. The desire to have a national treatment standard thus, shifted from trade to investment disciplines. Developed countries maintained that this shift in focus was needed to ensure the protection of foreign direct investment. It was believed that establishing a multilateral framework for investment, with the inclusion of national treatment standard, would promote, protect and stabilize foreign investment. In order to achieve these objectives, several attempts have been made to create a multilateral framework for investment, the latest was at the Doha Round of the WTO. These efforts will be discussed below, beginning with what foreign direct investment means and its merits and demerits for the economic development of host states.

B. THE REGULATION OF FOREIGN DIRECT INVESTMENT

1.1 Background: Foreign Direct Investment and Its Place in Host State Economic Development

Between 1973 and 1996, foreign direct investment witnessed an increase from U.S. $25 billion to U.S. $350 billion per year.[59] Furthermore, foreign direct investment has grown

[59] OECD, *The Multilateral Agreement on Investment: Frequently Asked Questions and Answers,* online: OECD <http://www.flora.org/flora/archive/mai-info/oecd-faq.htm> (Retrieved January 10, 2011).

from about 0.5% of the world's gross domestic product in 1970 to over 3% in 2008.[60] The growth of foreign direct investment may be attributed to its ability to stimulate economic development through the increase of wealth, modernization, technological expansion and creation of employment opportunities. According to the World Investment Report of 2009, the internalization of small and medium sized enterprises play a role in this growth, though multinational corporations are mostly responsible for the growth of foreign direct investment.[61]

The International Monetary Fund defines foreign direct investment as:

> investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise.[62]

Foreign direct investment refers to the establishment of new businesses and the procurement of ownership and management of ventures outside the state of the investor. According to the WTO, foreign direct investment occurs when an investor, resident in one country, procures an asset in another country with the intention to control and

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[60] World Bank, *World Development Indicators*, online: The World Bank <http://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS>.

[61] UN Conference on Trade and Development, *World Investment Report: Transnational Corporation, Agricultural Production and Development*, U.N. Doc WIR09 (2009), online: UNCTAD < http://www.unctad.org/en/docs/ wir2009overview_en.pdf>.

[62] International Monetary Fund, *Balance of Payments Manual* 4th ed (Washington: The Fund, 1977) 136.

manage that asset.[63] An important element of foreign direct investment is the desire to "manage" an enterprise or business, which differentiates it from portfolio investment in foreign bonds, stocks and other financial instruments.[64]

Foreign direct investment takes various forms. It may be achieved through direct investment, the creation of a new enterprise, through mergers and acquisitions or through joint-ventures.[65] The impact of foreign direct investment is experienced in both developed and developing countries. According to the United Nations Conference on Trade and Development (UNCTAD), developed countries are responsible for more than four fifths of the global foreign direct investment outflows and two-thirds of the global foreign direct investment inflows.[66] Furthermore, the outward flow of foreign direct investment from the developed countries is on the increase,[67] and developing countries receive a large portion of foreign direct investment, as many of them are increasingly

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[63] World Trade Organization, Press Release, 57, "Trade and Foreign Direct Investment", (9 October 1996), online: <http://www.wto.org/english/news_e/pres96_e/pr057_e.htm>.

[64] Nicholas Phelps, *Foreign Direct Investment and the Global Economy: Corporate and Institutional Dynamics of Global-Localisation* (London: Stationery Office, 1999) 33-37.

[65] Further information on the various forms of foreign direct investment can be found in Rafael Leal-Arcas, *supra* note 11 at 3-4.

[66] AV Ganesan, "Developing Countries and a Possible Multilateral Framework on Investment: Strategic Options" (1998) 7:2 Transnational Corporations 2.

[67] *Ibid* at 2.

becoming attractive destinations for foreign direct investment. The demand for international regulation and protection of foreign direct investment by many developed countries[68] is stimulated by the huge amount of capital involved in foreign investment, the desire to manage foreign investment transactions, and the risks[69] associated with foreign direct investment. This is why there is a yearning to establish minimum treatment standards for the regulation of foreign direct investment.[70]

Most host countries are cautious of foreign direct investment because uncontrolled foreign direct investment may interfere with national policies[71] and may also threaten national security if sensitive economic sectors such as military defence are exposed to foreign investors. A multilateral framework for investment, as opposed to foreign direct investment itself, could also restrict their flexibility to control the inflow of foreign direct investment. Developing host states are particularly apprehensive that excessive foreign direct investment will interfere with their sovereignty, and this is why they have opposed efforts to establish a multilateral framework for foreign direct investment. Also, the

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[68] Mainly European Community, Japan, Canada and the United States

[69] Foreign direct investment risks may include cultural, political, currency and legal risks.

[70] Rainer Geiger, "Towards a Multilateral Agreement on Investment" (1998) 31 Cornell Int'l L J 467 at 468.

[71] National policy varies from country to country and is put in place by national government in order to achieve development goals and to ensure effective economic growth. National policy may include tariff and non-tariff barriers, performance requirements such as local content, tax holidays and investment incentives for domestic companies, environmental and cultural heritage preservation requirements.

possibility that foreign direct investment could be transferred to another location at any time without warning is a source of concern because it could destabilize the economy of host countries. The desire to 'preserve policy space'[72] while encouraging foreign direct investment is an essential motivator in this resistance. Policy space refers to "the scope for domestic policies, especially in the areas of trade, investment and industrial development which might be framed by international disciplines, commitments and global market considerations".[73] Some host countries, irrespective of the stage of economic development, such as Canada and India, try to enhance the impact of foreign direct investment by restricting the entry and operation of foreign direct investment in specified sectors that are of special national interest, such as health care, telecommunications and banking.

Host governments need flexibility to carry out their international obligations in ways that also enable them to pursue their developmental objectives. Policy space is necessary to ensure a balance between the positive and negative effects of foreign direct investment. Although foreign direct investment increases the flow of capital, technology and managerial skills which help in the economic development of a host country, the process should be regulated in order to reduce the risk of the host state's loss of control over the

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[72] Nagesh Kumar et al, *Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations*, (New Delhi: Research and Information System for Developing Countries, 2007) at 7.

[73] See Sheila Page, *Policy Space: Are WTO Rules Preventing Development?* (London: Overseas Development Institute, 2007), online: <http://www.odi.org.uk/resources/download/82.pdf> at 1.

inflow of foreign direct investment with its harmful consequences for its economy. An example of this is when domestic companies have to compete with multinational corporations in the manufacturing or supply of similar products. Domestic companies of developing countries lack the wherewithal to adequately compete against such companies because they do not have the kind of capital, human resources, brand name or technological advancement possessed by multinationals. An arrangement which permits the establishment of multinationals in every industry or economic sector of a developing country without some form of control, though advantageous in some respects will, most likely, lead to the eradication of domestic companies as they would have to close down if they are unable to compete. Thus, the unrestricted presence of multinational corporations in and developed and developing host countries may lead to excessive foreign influence on the economic activities of the host state.

Customary international law has played a partial role in the regulation of foreign direct investment. The requirement that a state must compensate a foreign investor in the event of expropriating an investment asset has been acknowledged[74] as a general principle of international law, and this has helped to shape the regulation of foreign investment.[75] Beyond this customary principle, several attempts to regulate foreign direct investment

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[74] See Barcelona Traction, Light and Power Co. Case (Belgium v Spain) (1970), ICJ Rep 3.

[75] OECD, *Indirect Expropriation" and The "Right To Regulate" in International Investment Law*, Working Paper on International Investment, Doc no 2004/4 (September 2004) 1 at 2.

through a multilateral framework have been sought. A discussion of the attempts made prior to the emergence of the WTO and during the WTO era follows.

1.2 Regulation of Foreign Direct Investment prior to the World Trade Organization Era

Increase in international trade in goods and services, and the need for regulation and liberalization led to the conclusion of the first multilateral trade agreement, to wit, the 1947 GATT. However, the growth of foreign direct investment did not witness similar progress due to conflicting opinions as explained earlier[76] on the need for a comprehensive international investment Agreement. As stated previously, several efforts have been made towards achieving this goal.

The first attempt was the Havana Charter which contemplated the establishment of an International Trade Organization (ITO) in 1948.[77] The Charter contained provisions for the regulation and protection of foreign investment, including control regarding the pre- and post-establishment phases of foreign direct investment. This attempt was unsuccessful because of objections to its provisions from various business interests and the refusal by the United States to participate in the establishment of the ITO.[78]

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[76] These opinions are referred to in preceding sections of this chapter.

[77] Havana Carter*, supra* note 23 and 51. The charter ultimately failed because the Congress of the United States rejected it. Elements of it would later become part of GATT.

[78] Sornarajah, supra note 40 at 269. Although the establishment of an ITO was spearheaded by the United States, the Havana Charter could not be passed because the United States Congress refused to ratify it. Furthermore, there was conflict between

Another effort was made by a private group in the United Kingdom and Germany via the Abs-Shawcross Draft Convention in 1959 to provide guidelines for the regulation of international investments.[79] Though unsuccessful, this draft convention led to the emergence of the OECD Draft Convention on the Protection of Foreign Property in 1962 which was published in 1967.[80] The latter also suffered a similar fate due to resistance from less developed south European Member countries.[81] In 1976, the OECD adopted the OECD Guidelines for Multinational Enterprises.[82] Although the Guidelines are not binding, they encourage co-operation and provide for national treatment in the control of foreign direct investment.[83]

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developing and developed countries on some of the text of the charter. Developing countries canvassed for the right to pursue national policies while embracing foreign investment and also the right to expropriate foreign investment which was opposed by developed countries on the ground that this would not provide investment security. See Andrew Newcombe & Lluis Paradell, *supra* note 40 at 233-319.

[79] Sornarajah, *supra* note 40 at 269-270.

[80] *Organization for Economic Cooperation and Development Draft Convention on the Protection of Foreign Property*, 12 October 1967, OECD Pub No 23081, 7 ILM 5.

[81] Peter T Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) 34 Int'l L 1033.

[82] OECD, OECD Guidelines for Multinational Enterprises (1976), online: OECD < http://www.oecd.org>.

[83] OECD, OECD Policy Brief, *The OECD Guidelines for Multinational Enterprises* (June 2001), online: OECD <http://www.oecd.org/dataoecd/12/21/1903291.pdf> 1.

The growth of foreign direct investment is closely linked to the increasing activities of multinational corporations in host states.[84] Attempts to control the economic influence of foreign multinational corporations on developing countries were made by developing countries through the United Nations Commission on Transnational Corporations (UNCTC) established in 1974.[85] The main goals of the UNTC were:

> to understand the political, economic, social and legal effects of TNC activity, especially in developing countries; to secure international arrangements that promote the positive contributions of TNCs to national development goals and world economic growth while controlling and eliminating their negative effects; and to strengthen the negotiating capacity of host countries, in particular developing countries, in their dealings with TNCs.[86]

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[84] UN Conference on Trade and Development, *supra* note 60.

[85] The Draft UN Code of Conduct on Transnational Corporations, (1984) 23 ILM 626. The increase of Transnational Corporations (TNCs) in the economic activities of the world led the United Nations Economic and Social Council in 1973 to engage a "Group of Eminent Persons" with the responsibility of advising on the activities of the TNCs and their impact on development process. The recommendations of this group led to the establishment of the United Nations Commission on Transnational Corporation in 1974 as a subsidiary of the United Nations Department of Economic and Social Council. The UNCTC was established to provide an intergovernmental forum for deliberations on issues related to TNCs and foreign direct investment.

[86] UNCTAD, *United Nations Centre on Transnational Corporation Origins*, online: UNCTAD <http://unctc.unctad.org/aspx/UNCTCOrigins.aspx>.

The UNCTC aimed to set down fair rights and responsibilities between Transnational Corporations (TNCs) and the host countries in which they operated. Most developing countries feared the power of multinational corporations[87] and sought to protect their sovereignty and national development goals against them via what has been dubbed, the new international economic order[88] whose tenets were intended to give them power to control the inflow of foreign investment. Commentators like Carlos Correa and Nagesh Kumar have suggested that the attempt by the UNCTC to create a draft code of conduct for the regulation of multinational corporations failed because of opposition by developed countries on contentious issues, such as its scope, the application of international law and the national treatment standard, and the value of compensation for expropriation of investments by host states.[89] Another reason for the failure is the fact that developing

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[87] Ehrenfried Pausenberger, "How Powerful are the Multinational Corporations?" (1983) 18:3 Inter-economics 130; online: <http://www.springerlink.com/content/8152x3v85x740229/fulltext.pdf> 130.

[88] The "new international economic order" was a set of proposals put together during the 1970s by some developing countries through the UNCTAD to promote the interests of developing countries. The purpose was to revise the existing international economic system which favoured industrialized countries, by gaining control of political and economic activities of TNCs, thereby securing the sovereignty of developing countries. See United Nations General Assembly, *Declaration for the Establishment of a New International Economic Order,* 6th Sess, UN Doc A/RES/S-6/3201, (1974), online: <http://www.un-documents.net/s6r3201.htm>.

[89] Nagesh Kumar, *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (London: Zed Books, 2003) 128.

countries, in a bid to attract foreign direct investment, abandoned their quest for a 'new international economic order' and instead embraced foreign investment by granting, through treaties and domestic regulations, high standards of protection to the foreign investments they accepted.[90] Consequently, the UNCTC draft code was suspended in 1992.[91]

Subsequently, developed countries seized the opportunity created by the abandonment of the quest for a new international economic order to emphasise the need for the creation of a multilateral framework to protect foreign direct investment for the sake of stability, transparency and predictability in foreign investment transactions.[92] The fact that no multilateral framework for investment existed, sparked the negotiation of bilateral and regional agreements to regulate foreign direct investment. [93] Examples of such agreements include the United States-Morocco Free Trade Agreement,[94] the Energy

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[90] UNCTAD, *United Nations Centre on Transnational Corporation Evolution*, online: UNCTAD <http://unctc.unctad.org/aspx/UNCTCEvolution.aspx>; Sornaraja, s*upra* note 39 at 270.

[91] Peter T Muchlinski, *Multinational Enterprises and the Law*, 2nd ed (Oxford: Oxford University Press, 2007) 660-62.

[92] Sornarajah, *supra* note 40 at 271.

[93] Kristen Bondietti, "Inconsistencies in Treatment of Investment in Australia's Trade Agreements", *APEC Study Centre* (December 2008) online: APEC <http://www.apec.org.au/docs/08_aasc_iforeign direct investment.pdf>.

[94] *United States-Morocco Free Trade Agreement,* 16 June 2004, 44 ILM 544.

Charter Treaty[95] (ECT), and the North American Free Trade Agreement (NAFTA).[96] Chapter 11 of the NAFTA seems to be the most comprehensive Agreement on the regulation and liberalization of foreign investment. It provides high standards for the treatment of foreign investment, such as pre-entry and post-entry national treatment, including protection from direct and indirect expropriation by the host states. The NAFTA provides a model international minimum standard for the protection and security for foreign investment. Furthermore, the investor-State dispute resolution mechanism provided in the Agreement makes it unique - it grants investors direct access to defend their investment rights in a State that may have violated those rights.[97]

Another treaty worthy of note is the Energy Charter Treaty, which provides a multilateral framework for energy cooperation among members of the European Community. The ECT was designed "to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources".[98] These agreements help to regulate foreign direct investment on a country by country basis. Parties to the agreement are thus able to

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[95] *Energy Charter Treaty,* 17 December 1994, 34 ILM 381. The Energy Charter is discussed subsequently.

[96] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America*, 17 December 1992, 32 ILM 289 [NAFTA].

[97] Leal-Arcas, *supra* note 11 at 30.

[98] Leal-Arcas, *supra* note 11 at 38.

negotiate the terms of each agreement based on their respective domestic need for an inflow of foreign direct investment.

Non-state actors, such as the World Bank, also recognised the need to regulate foreign direct investment. The World Bank formulated its Guidelines on the Treatment of Foreign Direct Investment in 1992 (World Bank Guidelines).[99] The World Bank Guidelines are based on the general premise that "equal treatment of investors in similar circumstances and free competition among them is a prerequisite to positive investment environment".[100] It sets out the legal framework for regulating foreign direct investment through provisions on the admission, treatment, expropriation and settlement of disputes in relation to foreign investment.[101] The World Bank Guidelines recommend the liberalization of foreign direct investment subject to a "restricted list" of investments. This allows host states to restrict, prohibit, or screen foreign direct investment in certain sectors of their economies on the ground that an investment may conflict with domestic development objectives.

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[99] World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) 31 ILM 1379; See AV Ganesan, "Developing Countries and a Possible Multilateral Framework on Investment: Strategic Options" (1998) 7:2 Transnational Corporations at 4.

[100] World Bank, supra note 99 at paragraph 1 (3).

[101] Newcombe & Paradell, *supra* note 31 at 49.

The first attempt to formulate multilateral rules to regulate foreign investment was made by the United States during the Uruguay Round of the GATT[102] in 1986. The attempt was opposed by developing countries because they were concerned about the validity of negotiating investment rules under GATT. Thus, negotiations regarding investment during the Uruguay Round were restricted to trade related investment measures.[103]

The OECD also sought to regulate foreign direct investment through a Multilateral Agreement on Investment (MAI) in 1994.[104] The MAI[105] was formally proposed by the

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[102] Riyaz Dattu, "A Journey from Havana to Paris: Fifty Years of the Elusive Multilateral Agreement on Investment" (2000) 24:1 Fordham Int'l L J 275 at 287. The Uruguay Round was the eighth multilateral trade negotiation conducted on the platform of the GATT which aimed to liberalize the international trading regime. This was a follow up to several trade negotiations that came up after the GATT negotiation of 1947 which was aimed essentially at liberalizing trade. The Uruguay Round was the multilateral trade negotiation that established the WTO. See *Agreement Establishing the World Trade Organization,* 15 April 1994, 1867 UNTS 154, 33 ILM 1144.

[103] Amarasinha & Kokott, "Multilateral Investment Rules Revisited", in Peter Muchlinski et al, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 119 at 125.

[104] OECD, *The Multilateral Agreement on Investment Draft Consolidated Text*, OECD Doc. DAFFE/MAI(98)7/REV (April 22, 1998), online: OECD <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

[105] The MAI aimed to create legally binding rules for all types of investments which would limit the ability of parties to restrict the admission and establishment of foreign direct investment through national policies. Further discussions on the MAI will be made in subsequent chapters of this work.

United States under the auspices of the OECD[106] in 1995. This was never adopted because the developed countries opposed some of its text. Some OECD countries, mainly from the European Community, did not want to accord national treatment to the privatization of government enterprises.[107] Human and environmental rights groups also protested against the MAI on the ground that it did not address labour issues and environmental degradation problems caused by the activities of multinational corporations, but that it only sought to protect the investments of multinational corporations in host states. Stefan Amarasinha and Juliane Kokott are of the opinion that the MAI did not succeed because: it sought to simultaneously require national treatment standard at pre-establishment and post-establishment stages, and that there was an absence of precision in the relationship between the MAI and existing investment agreements.[108]

Some of the foregoing instruments[109] are guidelines and so are not binding. A more recent attempt to regulate foreign direct investment has been undertaken through the WTO, and to this, the discussion now turns.

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[106] OECD, OECD Handbook on Economic Globalisation Indicators 50 (OECD, 2005).

[107] Amarasinha & Kokott, supra note 101 at 127.

[108] *Ibid*.

[109] The instruments referred to are the World Bank Guidelines and the MAI.

1.3 Investment Regime under the World Trade Organization

The WTO Agreement[110], an offshoot of the Uruguay Round of the GATT negotiations established the WTO in 1995. Prior to the establishment of the WTO, the GATT[111] regulated international trade. The WTO established an institutional framework that took over this mandate and replaced the GATT. The WTO aims to promote and liberalize world trade by advancing market access and encouraging economic development among its members.[112] Several other agreements were concluded during the Uruguay Round. This thesis lays emphasis on investment related Agreements: GATS, TRIMS and TRIPS. These Agreements regulate investment peripherally and provides some elementary frameworks for the regulation of investment related subjects. Among the lot, this thesis focuses on the GATS because it is the most comprehensive agreement on investment to date under the auspices of the WTO.

The GATS promotes service liberalization and provides a multilateral framework for the regulation of trade in services.[113] It aims to promote economic development by increasing market access to trade in services and employment opportunities, and regulates trade in services through its four modes of service delivery, namely, cross-border supply,

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[110] *Agreement Establishing the World Trade Organization,* supra note 103.

[111] *General Agreement on Tariffs and Trade*, *30 October 1947, 58 UNTS 187, Can TS 1947No 27* [GATT 1947].

[112] WTO, "Understanding the WTO", online: WTO <http//:www.wto.org>.

[113] GATS, *supra* note 16 at preamble.

consumption abroad, commercial presence and presence of natural persons.[114] Under GATS, foreign direct investment is regulated through the "commercial presence" mode of service delivery. This arises where a service supplier sets up a corporation or business, or acquires foreign ownership of an extant corporation in a foreign country which provides the avenue to offer services related to its investment portfolio. In order to promote the liberalization of services and limit or eradicate barriers to foreign direct investment regarding trade in services, the GATS stipulates a minimum standard of treatment of foreign investors by the host state in order to protect their economic interests. In this context, foreign direct investment refers only to the supply of services.

The TRIMs Agreement is closely connected to the GATT. The GATT regulates trade in goods, and Article III provides for the national treatment standard to prohibit discrimination between foreign and domestic goods, while Article XI proscribes the use of quantitative restrictions.[115] The TRIMs Agreement is limited to the regulation of investments related to trade in goods.[116] It prohibits the use of trade related investment

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[114] GATS, *supra* note 16 at article 1(2) (a-d).

[115] Quantitative restrictions may include; restriction on the volume or value of imports that an enterprise can purchase or use for its production, or measures which require particular levels of local procurement by an enterprise.

[116] TRIMs, *supra* note 17 at article 1. See Victor Mosoti, "The WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge" (2003) Pace International Law Review 181 at 204, online: <http://digitalcommons.pace.edu/intlaw/204>.

measures to distort trade.[117] It mandates members of the WTO to notify it of any existing TRIMs[118] and stipulates the period within which to eradicate such measures. The Committee on TRIMs monitors and ensures the implementation of these obligations.[119]

The TRIPS Agreement aims to safeguard intellectual property rights and technological transfer.[120] In this context, foreign direct investment involves the relocation of technology by the foreign investor from its home state to the host state. The investor is thus able to perform adequately in the same manner as it would in the home country, hence the need for investment protection.

The TRIMs, TRIPS and GATS agreements do not regulate investment per se, but disciplines related to investment. At best, they are investment related agreements. However, the GATS seems to be the most comprehensive agreement regulating foreign direct investment due to its provision on the supply of services through "commercial presence". The GATS has, to an extent, contributed to the protection and liberalization of investment related subjects via its provisions on transparency, most favoured nation

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[117] TRIMs, *supra* note 17 at preamble. See Eric M Burt, "Developing Countries and the Framework for the Negotiations on Foreign Direct Investment in the World Trade Organization" (1997) 12 Am U J Int'l L & Pol'y 1015, online: < http://www.auilr.org/pdf/12/12-6-3.pdf >.

[118] TRIMs Agreement, *supra* note 17 at article 6.

[119] TRIMs Agreement, *supra* note 17 at article 7.

[120] TRIPS, *supra* note 20 at article 7.

treatment, market access, balance of payments and the national treatment standard which employs the positive-list approach to allow for the flexibility of its rules.[121]

Although the topic of investment has been at the hub of multilateral negotiations at the WTO since the 1996 WTO Ministerial Conference in Singapore,[122] no investment agreement has been concluded. Two opposing positions on the subject may have contributed to this stagnant situation. Opinions on the need for a multilateral framework for investment are divided mainly between developed and developing countries.

As noted above, the provisions of GATS, TRIMs and TRIPS in relation to the regulation of foreign direct investment, do not form a comprehensive framework for foreign direct investment. The developed countries have, therefore, tried to expand the scope of the regulation of foreign direct investment under the WTO by stressing the need for a multilateral framework achieved through multilateral negotiations. As observed by Nagesh Kumar, for the developed states, this is "part of their strategy to secure more

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[121] An analysis of these GATS obligations will be provided in chapter four of this thesis.

[122] See World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, online: WTO <http://www.wto.org/english/tratop_e/tradfa_e/dec.pdf>; World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, online: WTO <http://www.worldtradelaw.net/doha/mindec.pdf>; World Trade Organization, Ministerial Statement of 14 September 2003, WT/MIN(03)/20, online: WTO <http://www.wtopunjab.gov.pk/minis_declar/canc%C3%BAn_ministerial.pdf>; Decision Adopted by the General Council on 1 August 2004, Doha Work Programme, WT/L/579 (Aug. 2, 2004), online: WTO <https://www.ige.ch/e/jurinfo/documents/j10407e.pdf>.

favourable conditions for overseas operations of their enterprises that use foreign direct investment as a mode of servicing foreign markets more than trade".[123] The reason for this may be that foreign direct investment in some host states is less expensive than other modes of service delivery outline above. But the developing countries have resisted these attempts for fear of losing sovereignty and control to regulate the inflow of foreign direct investment to them.

The WTO set up a Working Group on the Relationship between Trade and Investment at the Singapore Ministerial Meeting in 1996 (Singapore Meeting)[124] to examine the relationship between trade and investment. Also at the Ministerial Conference held in 2001, the need for "a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment"[125] was discussed by WTO members. Various investment issues were discussed subsequently, such as the definition of investment; non-discrimination principles; expropriation and performance requirements;

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[123] Nagesh Kumar, "Investment on the WTO Agenda: A Developing Country Perspective and the Way Forward for the Cancun Ministerial Conference" (July 26, 2003) 38:30 Economic and Political Weekly 3177-3188 at 3177, online: <http://www.jstor.org/pss/4413832>.

[124] The World Trade Organization, Working Group on the Relationship between Trade and Investment, online: WTO <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm>.

[125] WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, (14 November 2001) 41 I.L.M. 746 at 749,online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

balance-of-payment safeguards; and dispute resolution.[126] However, due to the controversy between developed and developed countries on the scope of the above outlined issues, including the national treatment standard, the negotiation process for a multilateral framework for investment were stalled, and investment issues were eventually dropped from the WTO agenda in August 2004.[127]

CONCLUSION

The historical analysis provided above reveals that the quest for a multilateral framework for foreign investment has been a subject of interest to both developed and developing countries for a long time. The various attempts made through different international law principles and institutions ranging from the Havana Charter, attempts to create an ITO, the Shawcross Draft Convention, the OECD, the UNCTC, the World Bank and the WTO all point to the fact that the regulation of foreign direct investment is crucial to economic development and an increase in the flow of foreign direct investment. The treatment of foreign investors by host states has been the core of major disagreements between host states and investor states. As explained in this chapter, the divergence in opinions dates back to the disputes between Latin American States and the United States on the appropriate treatment of foreign investors. The demands for national treatment standard by the developed countries were rejected by the Latin American states who favoured the application of the Calvo doctrine which, today, represents the "national treatment

[126] These issues will be analysed in subsequent chapters of this thesis.

[127] WTO, *The Doha Declaration Explained*, online: WTO <http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm>.

standard" requiring equal treatment of domestic and foreign investors. But as shown above, the national treatment standard, which the developed countries now want to implement under a multilateral framework for investment, is no longer satisfactory to developing countries. Developing countries fear that when foreign direct investment is controlled by international standards, it would limit their sovereign right to pursue domestic policies. This disagreement has stalled progress in attempts to create a multilateral framework for investment.

The push to create a multilateral framework for investment under the WTO may be due to the fact that the WTO was probably viewed as the best institution to facilitate this process because it has overseen the development of several multilateral agreements in the past. The success of this approach remains elusive, due to longstanding disagreements on many issues of controversy. The need to protect and regulate foreign direct investment is not controversial, though the scope of such regulation is the subject of disagreement.

One such element of contention is the divergent opinions on the inclusion of the national treatment standard in a multilateral framework for investment. The developed and developing countries view its implications differently. The developed countries argue that including the national treatment standard in the multilateral framework for investment will increase foreign direct investment flows, ensure equal rights to competition, ensure transparency and provide the necessary stability and protection for foreign investment. Developing countries, on the other hand, argue that uncontrolled foreign direct investment facilitated through national treatment standard will harm their economic development and deprive them of the right to determine the level of foreign direct

investment they would welcome. These conflicting views remain present in current negotiations for a multilateral framework for investment, and thus, require thorough analysis, as to its acceptability within a multilateral framework for investment framework for the regulation of foreign direct investment, and as a catalyst to facilitate the emergence of a multilateral framework for investment.

The foregoing historical background provides the necessary understanding of the pros and cons of a multilateral framework for investment. It also provides information on the reasons previous attempts have been unsuccessful as recurring oppositions mainly from developing countries have not really changed. Furthermore, it provides the platform from which to launch the analysis and make recommendations on the way forward towards achieving the multilateral framework for investment, while noting the problems of the past.

The next chapter of this thesis discusses in details the positions of developed and developing countries at the Doha negotiation rounds. It also analyzes how the perspective of both sides on the creation of a multilateral framework for investment, impacts on the economic development of the host states, and how it protects the interests of foreign investors. This analysis will facilitate appreciation of the standpoint of developing countries in their resistance to the establishment of a multilateral framework for investment. It will also provide the basis for the proposition of the thesis that the national treatment standard should be included in the multilateral framework for investment but its scope should be limited to specific economic sectors, to which members permit its

application as inherent in GATS, in order to balance its positive and negative effects on the economies of developing countries.

CHAPTER 3: NATIONAL TREATMENT STANDARD IN A MULTILATERAL FRAMEWORK FOR INVESTMENT: IMPACT ON DEVELOPING COUNTRIES

INTRODUCTION

As discussed in previous chapters of this thesis, several efforts to establish a multilateral framework for investment through various institutions were unsuccessful. Thus, foreign direct investment has been regulated largely by bilateral and regional investment agreements. Demands for a multilateral framework for investment by developed countries persisted and attempts were made through the WTO. By 2001, the stage was set for the negotiation of a multilateral framework for investment at the Doha[1] held in Qatar in 2001 under the auspices of the WTO. However, the divergent opinions of developed and developing countries have stalled progress in the Doha trade negotiations, and investment issues as explained in chapter 2 were dropped from the Doha agenda in 2004.[2] A major source of disagreement was whether the non-discrimination principle, particularly the national treatment standard, should be included in the multilateral framework for investment, and if so, what should be its scope.

Developed countries advocated for the inclusion of the national treatment standard because in their view, it would provide the much needed stability, security and transparency to the investment regime. Developing countries, on the other hand, strongly opposed this view because they feared that the national treatment standard would hamper

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[1] Further discussion on the Doha Development Round is provided in pages 60-63 of this chapter.

[2] World Trade Organization, *Understanding the WTO: The Doha Agenda*, online: WTO http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.

economic development and encroach on their right to pursue national development policies.

This chapter will discuss the role of the non-discrimination principle, particularly the national treatment standard, in the regulation of foreign direct investment. It will analyse the positions of developed and developing countries at the Doha negotiations, and the perspectives of both sides on how the creation of a multilateral framework for investment will impact the economic development of host states, and how it will protect the interests of foreign investors.

A. THE WORLD TRADE ORGANIZATION AND THE CREATION OF A MULTILATERAL FRAMEWORK FOR INVESTMENT

1.1 Background

As discussed in chapters 1 and 2, a working group was set up by the WTO to examine the relationship between trade and investment at the Singapore Ministerial Meeting in 1996.[3] The purpose of this meeting was to formulate a basis for the negotiation of a multilateral framework for investment. The Doha Round was a follow up to the Singapore meeting in 1996 and commenced during the fourth Ministerial Conference in Doha, Qatar in 2001.[4]

[3] The World Trade Organization, Working Group on the Relationship between Trade and Investment, online: The World Trade Organization <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm>.

[4] The WTO ministerial meetings rounds aim to establish liberalized trade regimes which would foster economic development and relations among members as was achieved with trade and services through series of negotiations. Subsequent ministerial meetings on international trade matters were held in Cancun in 2003; and Hong Kong in 2005. Similar negotiations also took place in Switzerland in 2004, 2006, 2008; Paris, France

The Doha Round is the current trade negotiation in the WTO which highlights development as its core objective. It seeks to pursue the needs and interest of developing countries by making efforts to ensure that they, and the least-developed countries,

> secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.[5]

The objective of the Doha round was to further reduce trade barriers and liberalize international trade which would enhance economic development as commenced by the GATT. Among other issues,[6] the creation of a multilateral framework for investment was one of the most controversial issues dealt with at the meeting.[7] Members of the WTO decided to commence negotiations on a multilateral framework on investment upon an agreement on the scope and content of the negotiations at the next ministerial meeting at Cancun in 2003.

2005; and Germany in 2007. Online: <http://en.wikipedia.org/wiki/Doha_Development_Round>.

[5] WTO, *Doha Development Agenda: Negotiations, Implementation and Development*, online: WTO <www.wto.org>.

[6] Such as the definition of investment, transparency, non-discrimination, provisions on development, balance of payments, pre-establishment rules on investment and dispute settlement etc.

[7] WTO, *supra* note 2.

The investment mandate of the WTO is set out in paragraphs 20-22 of the Doha Ministerial Declaration (Declaration).[8] It provides in paragraph 20, member states of the WTO recognize "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment".[9]

Also, paragraph 22 of the Declaration highlighted certain investment issues which were to be the focus of the working group on the relationship between trade and investment (WGTI) set up in 1996. These issues include,

> scope and definition; transparency; non-discrimination; modalities for commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; and consultation and the settlement.[10]

These issues generated huge controversies between developed and developing countries which thwarted the progress of negotiating a multilateral framework for investment during the Doha. Eventually, investment issues had to be dropped from the Doha agenda in 2004 during the Cancun meeting due to the conflicting views of developed and developing countries on the subject.[11] As explained in chapter 1, this thesis limits its

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[8] WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, (14 November 2001) 41 ILM 746 at 749, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

[9] *Ibid* at para 20.

[10] *Ibid* at para 22.

[11] WTO, *supra* note 2.

discussion to the non-discrimination principle investment issue, particularly the national treatment standard, because it is the most controversial issue regarding the formulation of a multilateral framework for investment.

Developed countries have advocated for a multilateral framework for investment in order to regulate, protect and ensure stability in foreign investment transactions. They believe that including the non-discrimination principle, which comprises both the most-favoured nation principle and the national treatment standard in the multilateral framework for investment, will help to achieve these objectives and increase the flow of foreign direct investment. Developing countries, on the other hand, fear that a multilateral framework for investment will encroach on their rights to regulate and determine the inflow of foreign direct investment. It would also interfere with their control over growth and development of their economies. Furthermore, they believe that including the national treatment standard in the multilateral framework for investment may harm the economic growth of developing host states.

1.2 **Investment Discussions at the Doha Development Round**

Developed countries like those of the European Community, Japan and Korea, took the position during the Doha Round that it is necessary to provide a comprehensive investment framework for the regulation of foreign investment. According to the European Community, this is because, "the patchwork of rules [relating to investment] is unsatisfactory and being increasingly seen as an inefficient and non-transparent

framework for making investments and protecting investments abroad"[12]. Switzerland expressed the view that,

> a transparent and predictable foreign direct investment regime is one of the key conditions to attract international investment. A multilateral agreement on such investment will provide a common basic framework in this important policy area.[13]

The aim of a multilateral agreement would be to create a foreign investment regime comparable to that which already exists for trade in goods and services.[14] Singh and

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[12] WTO, Working Group on the Relationship between Trade and Investment, *Communications from European Community and its Member States – Concept Paper on Non- discrimination*, Doc No. WT/WGTI/W/1, 30 May 1997, page 2, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W122-e.pdf.

[13] WTO, Working Group on the Relationship between Trade and Investment, *Communications from Switzerland-Multilateral Framework for Investment: An Approach to Development Provisions*, Doc. No. WT/WGTI/W/133, 18 July 2002, paragraph 24, online: WTO http://www.international.gc.ca/trade-agreements-accords commerciaux/assets/pdfs/W133-e.pdf.

[14] A Singh, "Foreign Direct Investment and International Agreements: South Perspective", South Centre Trade-Related Agenda, Development and Equity Series, Occasional Paper No. 6, October 2001, online: http://www.tradeobservatory.org/library.cfm?refID=25289.

Zammit[15] are of the opinion that such a regime may demand high investor protection standards and introduce obligations prohibiting the use of restrictions on the free flow of foreign direct investment. These obligations may include granting foreign investors the right of establishment, the right to exit the host country and repatriate capital, elimination of performance requirements put in place by host governments to restrict foreign direct investment and impose most-favoured nation and national treatment obligations on host states. Developed countries argued that:

> The creation of a multilateral framework for investment is a way to increase efficiency with which the world's scarce resources are used, and that failure to reach a multilateral agreement will result in a slowdown of foreign direct investment flows. These arguments are based on the perception that trade and foreign direct investments are simply two alternative but increasingly complementary and interlinked ways of servicing foreign markets.[16]

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[15] A Singh and A Zammit, "Foreign Direct Investment: Towards Co- operative Institutional arrangements between the North and the South?" in Jonathan Michie & John Grieve Smith, eds, *Global Instability and World Economic Governance*, (New York: Routledge Press, 1999) 30.

[16] Rafael Leal-Arcas, "The Multilateralization of International Investment Law" (2009) 35 North Carolina Journal of International Law and Commercial Regulation 33; On this issue, see also World Trade Organization, Press Release, 57, "Trade and Foreign Direct Investment", (9 October 1996) online: <http://www.wto.org/english/news_e/pres96_e/pr057_e.htm>.

During the Doha Round, the European Community called for an expansion of foreign direct investment obligations by the extension of the traditional trade regulations to investment, including the national treatment standard, thereby expanding the scope of the latter. This, it was proposed, would regulate and further liberalize foreign investment by creating easy market access at both the pre-entry and post-entry phases of an investment. The pre-establishment stage refers to the treatment of foreign investment when it is being admitted into the host state, while the post-establishment stage refers to its treatment after admission to the host state.[17] Furthermore, it was argued that a multilateral framework for investment would guarantee the protection of investment through a minimum international treatment standard which would overcome the shortcomings of bilateral, multilateral and regional agreements. It was also argued that a multilateral framework for investment would ensure stability and predictability in foreign investment.[18]

Indeed, foreign direct investment plays a role in the development of developing countries, as it increases their economic growth through the flow of capital, managerial skills and increase in production. However, developing countries in Asia, particularly India, are concerned that such an agreement will deprive them of the right to negotiate and weigh the benefits of future investments *vis-a-vis* the risk associated with them. Arvind Panagariya argued that foreign direct investment is unlike trade, because developing

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[17] An explanation of the pre-establishment and post-establishment stages of investment is provided in pages 30 and 108 of this thesis.

[18] Benno Ferarini, "A Multilateral Framework for Investment?" in Simon J Evenette, et al, *The Singapore Issues and World Trading System: The Road to Cancum and Beyond,* (Bern: Staatssekretariat fur Wirtschaft, 2003) 1.

countries are predominantly importers of investment and have few export activities in this area.[19] Although a multilateral framework for investment would increase capital and foster development in developing countries, it would bring with it additional obligations which restrict the freedom of these host countries to pursue their domestic development policies. Thus, the benefits of a multilateral framework for investment may not be commensurate with its disadvantages if the quality of foreign direct investment is not controlled. Furthermore, developed countries, being the major exporters of investment, benefit largely from this without having to bear additional obligations.[20]

Developing countries believe that such an outcome would disable them from being able to control the inflow of foreign direct investment, and could lead to excessive foreign control over their vital socio-economic areas.[21] In practice, developing countries could cease to be able to determine the kind of foreign investment to embrace. They could also be precluded from imposing restrictions to ensure that such investments are in

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[19] The continual development growth of some developing countries such as India, Brazil and China, and their impressive export activities shows that Panagariya's opinion on this issue may not be entirely true.

[20] Arvind Panagariya, "Developing Countries at Doha: A Political Economy Analysis", (2005) 25:9 The World Economy 1205-1233, online: <http://ideas.repec.org/p/wpa/wuwpit/0308015.html>.

[21] Robert Wade, "What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'", Crises States Programme Working Paper Series no. 31 (London: Crises States Programme, 2003), online: London School of Economics and Political Science Research <http://eprints.lse.ac.uk/id/eprint/28239>.

consonance with their national policies and objectives aimed at benefiting their economies as a whole.[22] Opponents of the multilateral framework for investment believe that the combined limit this imposes on developing state government intervention in foreign direct investment encroaches on their national sovereignties.[23]

These divergent opinions on creating a multilateral framework for investment were debated during deliberations at the Doha Round between 2001 and 2004. The principal focus of this debate was on the issue of the non-discrimination principle, which is the topic of the next section of this thesis.

B. NATIONAL TREATMENT STANDARD AND A MULTILATERAL FRAMEWORK FOR INVESTMENT

1.1 Principle of Non-discrimination under the World Trade Organization

Non-discrimination is a core principle of international trade; it is central to almost all international trade and investment agreements. According to the WTO Secretariat:

> it is the principle that underwrites most directly the process of international economic integration, since it binds a treaty's participants together by guaranteeing that none of

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[22] Kumar, Nagesh. *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (London: Zed Books, 2003) 128.

[23] Stephen S Golub, *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*, OECD Economic Studies No. 36 (2003) 86, online: OECD <http://www.oecd.org/dataoecd/22/20/33638671.pdf>.

> them will be picked out and treated unfavourably on the grounds of their nationality.[24]

It prohibits the use of discriminatory measures on the basis of origin or destination of a service or service supplier by member countries against foreigners. As explained in chapter 2, the operation of this principle is achieved through the most-favoured-nation and national treatment standards which are provided in some WTO Agreements such as the GATT[25], the TRIMs[26] and the TRIPs[27]. The non-discrimination principle has many advantages, such as fostering healthy competition that can lead to increased allocation of resources. It also encourages stability, liberalization and easy market access, and promotes transparency and predictability of government policies, thereby limiting commercial risks. The principle was originally applied in trade agreements, but is now incorporated in bilateral and multilateral investment agreements.

The inclusion of the non-discrimination principle in the multilateral framework for investment was a sensitive issue at the Doha Round, particularly the national treatment

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[24] WTO Secretariat, *Note on Non-Discrimination: Most-Favoured-Nation Treatment and National Treatment,* Doc. No. WT/WGTI/W/118, online**:** WTO <http://www.International.Gc.Ca/Trade-Agreements-AccordsCommerciaux/Assets/Pdfs/W118-E.Pdf>.

[25] *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187 [GATT].

[26] A*greement on Trade-Related Investment Measures*, 15 April 1994, 1868 UNTS 186. [TRIMs].

[27] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 1197 [TRIPS].

standard. The national treatment standard requires the equal treatment of foreign and domestic investors in like circumstances. It obligates a host state to treat foreign investors the same way it treats its local investors, and to refrain from granting preferential treatment or conditions to local investors that would operate to the detriment of foreign investors. This ensures that foreign investors are given an equal opportunity to compete in the domestic market. Discrimination may take various forms, such as imposing stringent screening procedures and heavy tax duties on foreign investors, and restrictions on the importation of certain equipment necessary for service delivery.

The national treatment standard may be applied at pre-establishment or post-establishment stages.[28] WTO Agreements like the GATS,[29] apply the national treatment standard only at the post-investment stage. This enables host states to retain the power to control and regulate the entry of foreign direct investment. It is important to note that only American-Canadian treaties provide for pre-entry establishment. An example of such an agreement is the NAFTA[30] which provides for both pre-entry and post-entry national treatment obligations.

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[28] Further explanation of the pre-establishment and post-establishment stages of investment is provided on pages 30 and 108.

[29] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167.

[30] *North American Free Trade Agreement Between the Government of Canada, The Government of Mexico and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289.

The scope of the national treatment standard, if included in the multilateral framework for investment, is a source of disagreement among developed countries, and between developed and developing countries. The question is whether it is at the pre-establishment or post-establishment stage that the national treatment standard should be applied. A further issue is, whether the standard should adopt the "top-down" or "bottom up" approach.[31] As discussed in chapter 1, the "top-down" approach would make the national treatment standard a general obligation that would apply to all measures affecting investments, unless where exceptions are made.[32] The "bottom up" approach refers to a specific obligation which applies only to those sectors that a member has committed to in its schedule.[33]

The essence of defining the scope of operation of the national treatment standard in the multilateral framework for investment is to strike a balance between enhancing the protection of foreign investment, and securing flexibility for host countries to pursue domestic policy. The non-discrimination principle plays a great role in the regulation and liberalization of foreign direct investment, however, the effects of such liberalization on

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[31] The "top-down" and "bottom up" approach is often used interchangeably with the negative and positive list approach respectively.

[32] David P Fidler & GATS Legal Review Team for the World Health Organization, *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective,* Globalization, Trade and Health Working Papers Series, online: <http://whqlibdoc.who.int/gats/GATS_Legal_Review_eng.pdf>.

[33] M. Sornarajah*, The International Law on Foreign Investment* (New York: Cambridge University Press, Grotius Publications, 1994) 269 at 300.

host states must be considered. An analysis of the divergent perspectives on this subject matter at the Doha Round between 2001 and 2004 will provide insight on this debate.

1.2 Developed and Developing Countries' Views on the Need for a Multilateral Framework for Investment

(a) Developed Countries' Perspectives

The major players that demand a multilateral framework for investment are the European Community, Canada, the US and Japan.[34] Although some of the content of their demands differed, their desire for a multilateral framework for investment was clear. The key elements of the developed countries' proposal for a multilateral framework for investment range between, the definition of investment, transparency, non-discrimination, provisions on development, balance of payments, pre-establishment rules on investment and dispute settlement.[35] The non-discrimination principle is the focus here, and I now turn to the submissions of some developed countries on this subject.

(i) Communications from the European Community

The European Community was of the view that host countries treat foreign investors in discriminatory ways for various reasons which may be justified.[36] Some of the reasons

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[34] Ferrarini, *supra* note 18 at 6.

[35] WTO, *supra* note 2.

[36] WTO, Working Group on the Relationship between Trade and Investment, *Communications from European Community and its Member States – Concept Paper on Non- discrimination*, Doc No. WT/WGTI/W/1, 30 May 1997, page 2, online: WTO <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W122-e.pdf.

are to ensure national security and promote environmental protection. The European Community stated that the absence of a customary international law principle on the subject emphasised the need to include it in the multilateral framework for investment.[37] The European Community argued that this would level the playing field for foreign direct investment between host and home states, increase the distribution of capital, promote transparency and minimize distortions in the growth of foreign investment.[38]

The European Community also argued that all countries acknowledge that foreign investors can only be attracted to host states by the provision of certain pre-conditions, such as "a predictable, transparent and non-discrimination regulatory framework, beyond macroeconomic and political stability, infrastructure and labour skills".[39] This seems to be why most bilateral investment treaties, as well as regional and multilateral investment agreements have provisions on the non-discrimination principle. The European Community argued that it was time for a consolidation of non-discrimination provisions in a multilateral framework for investment.

Consequently, the European Community proposed that the multilateral framework for investment should include a general national treatment obligation binding on all member states of the WTO at the post-establishment stage, giving room for possible exceptions.[40]

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[37] *Ibid* at 2.

[38] *Ibid.*

[39] *Ibid*.

[40] *Ibid.*

Also, they suggested that specific obligations on national treatment should be applied at the pre-establishment stage when foreign investment is being admitted. However, the European Community argued that the application of national treatment should be restricted to the sectors listed in each country's schedule of commitments, including each member's limitations on the applicability of the national treatment standard.[41] They also took the position that other exceptions, such as subject-[42] and country-specific[43] exceptions to national treatment, should also be considered.

The European Community concluded that the above regulatory measures for foreign investment would contribute greatly towards enhancing the legal security and coherence of international investment rules and, at the same time, would not hinder host countries, particularly developing countries, from achieving their domestic policies.[44]

ii. Communications from Canada

Canada had views similar to those of the European Community on the need for a multilateral framework for investment. Canada argued that the multilateral framework for investment reflects the Doha mandate, which is to balance the interests of home and host

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[41] *Ibid* at 4.

[42] Subject-specific exceptions may exclude the application of national treatment standards on certain subjects such as taxation, intellectual property and public procurement.

[43] Country –specific exceptions permits certain countries to derogate from applying the national treatment standard in certain sectors of their economy.

[44] *Ibid* at 4.

countries, taking into consideration the desire of host governments to pursue development policies and objectives.[45]

Canada took the position that "policies conducive to attracting foreign investment, such as transparent and non-discrimination administrative norms and legal standards, are an essential condition for economic growth".[46] Canada also argued that the non-discrimination principle must be the cornerstone of the multilateral framework for investment, and it is necessary to safeguard the financial interests of foreign investors in host countries. Canada suggested, like the European Community, that a national treatment provision in the multilateral framework for investment be made a general obligation with defined exceptions or reservations to certain provisions which it considers to be a more transparent approach than a positive list approach. Canada took the position that the negative list approach undermines the power of the non-discrimination principle by limiting its scope and providing avenues for host countries to derogate from it. [47]

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[45] WTO Ministerial Declaration, *supra* note 8.

[46] WTO, Working Group on the Relationship Between Trade And Investment, *Communications From Canada – Non-discrimination and Modalities for Pre-Establishment Commitments based on a GATS-Type, Positive List Approach*, Doc. No. WT/WGTI/W/131, 3 July 2002, paragraph 1, online: WTO <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W130-e.pdf>.

[47] The positive list approach permits members of the WTO to choose the specific sectors of their economies in which national treatment would apply or stipulate conditions

However, Canada also argued that a distinction between pre- and post-establishment national treatment may undermine the meaning of the national treatment standard, and suggested that the principle be applied like the most-favoured nation principle[48] which does not make such distinctions. This will enable foreign investors to determine the existence of the non-discrimination principle by its application from the onset, that is, at the pre-establishment stage. This principle encourages the increase of foreign direct investment flows as foreign investors are more willing to commit capital, manpower and technology for the long term, as they believe that the national treatment standard provides the necessary security for their investments.

Canada argued that the economic development interests of host states, particularly developing and least developed countries, are protected by the exceptions permitted under the negative list approach. This is because parties are permitted to exempt broad sectors of their economy from the national treatment standard which allows for flexibility to pursue national policies. The NAFTA provided an example of how this can work.

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under which it would apply. The negative list approach mandates all members to comply with an obligation but permits certain exceptions.

[48] The most favoured nation rule as explained in chapter 1 restrains members from granting preferences to certain members while excluding others. Members of the WTO are entitled to any condition of trade or service granted to another member, whether favourable or restrictive in nature.

Annex 3 of the NAFTA permits Mexico, a developing country, to exempt certain sectors like petroleum, electricity and railroads from the non-discrimination principle.[49]

Canada pointed out that transparency is crucial and underlines the non-discrimination principle.[50] An important factor in making reservations and exemptions to the national treatment standard is the need for exempted sectors to be properly stated, along with a description of how the permitted discrimination would apply in those sectors. Canada suggested comprehensive transparency obligations similar to those in the GATS to ensure transparency in the multilateral framework for investment.[51] The GATS' provision on transparency in Article III of the Agreement requires member states of the WTO to bring existing national laws, regulations, administrative guidelines and policies, new laws or change in existing laws which affect trade in services to the knowledge of all other member states upon its entry into force, or upon demand by member states. A publication of commitments to international agreements relating to trade in services is also required.[52] Canada argued that a similar provision in the multilateral framework for investment

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[49] NAFTA, *supra* note 30 at Annex 3.

[50] WTO, Working Group on the Relationship between Trade and Investment, *supra* note 46 at 5.

[51] *Ibid*.

[52] GATS, *supra* note 29 at article III.

regarding exemptions and reservations will promote predictability and stability in the regulation of foreign investment.[53]

Canada concluded that these measures would assist in the development of a multilateral framework for investment under the auspices of the WTO, and would appropriately take into account the concerns of developing countries regarding economic development.

iii. Communications from Japan

Japan, like the other developed countries discussed above, supported the inclusion of the national treatment standard in the multilateral framework for investment, because it would improve predictability and promote the growth of foreign investment in host countries. Japan noted that existing investment agreements already provide for the national treatment standard, though the agreements include certain exceptions which take into account the development stage of each country and the need to retain the right to regulate national policies. Japan has expressed the opinion that too many exceptions would hamper the principle of national treatment, and advocates for a progressive liberalization technique that would ensure the gradual removal of exceptions depending on changes in the social and economic development of host states. This is because Japan took the position that national treatment is an essential factor for maintaining a balance

[53] WTO, Working Group on the Relationship between Trade and Investment, *supra* note 46 at 5.

between countries' rights and obligations, and the multilateral trade and investment system.[54]

Japan argued that national treatment should cover both pre- and post-establishment stages of investment in order to ensure predictability in the multilateral investment system. It concluded that member states need to discuss whether the treatment standard should be a general or specific obligation, and to agree on the type and scope of exceptions to be accepted within the multilateral framework.[55]

iv. Communications from the United States

The United States did not argue much on the need to include a national treatment standard in a multilateral framework for investment. More emphasis was laid on the definition and scope of foreign direct investment. The United States argued that the multilateral framework for investment is crucial to the development of an investment regime for investment. The United States' position on the scope of the non-discrimination principle to be applied differs from those of the developed countries discussed above, however. The United States advocated for the inclusion of the national treatment standard as a general obligation at both the pre-establishment and post-establishment stages of

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[54] WTO, Working Group on the Relationship between Trade And Investment, *Communications From Japan – Non-discrimination, Doc. No.* WT/WGTI/W/124**,** *June 28 2002,* 5 at para 25, online: WT*O* < http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W124-e.pdf>.

[55] WTO, Working Group on the Relationship between Trade And Investment, *supra* note 54 at para 38.

investment. Also, the United States sought to employ the negative list approach in the application of the treatment standard. The United States argued that this will increase the growth of foreign direct investment and enhance economic development.

v. Overview

The foregoing summarizes the views of many developed countries on the need for the multilateral framework for investment and the inclusion of the national treatment standard in the agreement. They shared similar beliefs: that a multilateral framework for investment would increase the flow of foreign direct investment, promote economic development; and improve the transparency, stability and predictability of international investment. They also took the position that the multilateral framework for investment would reduce investment risks, such as the fear of corrupt practices, political and legal instability in host states, thereby reducing investment risks. Also, they agreed that the multilateral framework for investment would enhance the credibility of host government investment policies thus promoting a positive climate for foreign investment.[56] They also agreed that transparent investment practices would attract more capital and investment, which would work to the economic advantage of host states. Developed countries also seemed to agree on the suggestion that inspiration for the multilateral framework for investment should be sought from the GATS. The system of exemptions in the GATS addressed the concerns of developing countries somewhat, through its flexibility mechanism with respect to the national treatment standard.

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[56] Luisa E Bernal et al, *The World Development Report 2005: An Unbalanced Message on Investment Liberalization* (Geneva: World Bank, 2004) 1 at 2.

These views were opposed by developing countries on the grounds that though the promises of the multilateral framework for investment are attainable, without adequate control, they may have negative consequences on their economic development. The views of developing countries are discussed below.

(b) Developing Countries' Perspectives

The growth of foreign direct investment may be viewed as an opportunity for developing countries to encourage economic development. This is because, by it, they may tap into economic resources and technology, and thus reduce poverty and create new jobs for their economies.[57] However, in order to retain this source of resources, developing countries may be required to adjust their economies to meet the investment standards required by foreign investors. Failure to do this may result in resources being diverted to other countries willing to make such compromise.[58] Hence, the competition for increased capital is quite stiff among developing countries as the country that practices a liberalised business economy will most likely receive more inflow of foreign direct investment. The scope of the required adjustments, coupled with the need for developmental growth in a particular economic sector, may be determine the extent of the compromise to be made, and the willingness to open up markets to foreign direct investment.

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[57] World Bank, *Private Capital Flows to Developing Countries: The Road to Financial Integration* (New York: Oxford University Press, 1997).

[58] *Kevin Gallagher and Lyuba Zarsky,"*Searching for the Holy Grail? Making Foreign Direct Investment Work for Sustainable Development" in Liane Schalatek**,** *Allies or Antagonists? Investment, Sustainable Development and the WTO (Washington DC:* Heinrich Böll Foundation North America, 2003) 7-25 at 8.

Developing countries are at different stages of economic development, which is one of the reasons why opinions on the need for the inclusion of the national treatment standards in the multilateral framework for investment vary.

i Communications from Brazil, Malaysia, Mexico and South Africa

Fast growing developing countries like Brazil,[59] Malaysia[60] and Mexico[61] supported the multilateral framework for investment and the inclusion of the national treatment standard, where it is fashioned after the GATS style on treatment standards. The GATS style, as previously outlined, requires members to apply the national treatment standard when commitments are made in that regard. It employs the positive list approach, which permits members to choose the specific sectors in which national treatment would apply or stipulate conditions under which it would apply. Some developing countries, like Mexico, argued that this will grant them the necessary flexibility to determine the level of foreign direct investment to embrace.[62] Furthermore, it would provide them the necessary policy space to regulate foreign investment and pursue national goals and interests. Malaysia, for instance, devised its New Economic Policy to boost the equity participation

[59] Ferrarini, *supra* note 18 at 16.

[60] *Ibid*.

[61] *Ibid*.

[62] *Ibid*.

of Malaysians in some sectors of its economy.[63] The New Economic Policy limits the proportion of equity that foreign investors may possess in various economic sectors. It also stipulates that citizens should own a certain fraction of the shares of foreign corporations. The New Economic Policy aims to safeguard the business of local enterprises and companies. In 1970,

> foreign investors held 70 percent of the entire share equity of corporations in Malaysia. This percentage has reduced to about 30 per cent, whilst the share of the indigenous community has increased from two to around 30 percent.[64]

This "social engineering" policy may have contributed to the growth of the domestic sector and, ultimately, socio-economic development in Malaysia. South Africa took the position that, negotiations on a multilateral framework for investment should be framed along the lines of the GATS, which allows for exceptions to the national treatment standard through its specific obligation technique.[65] This approach would provide the necessary flexibility required by developing countries in pursuing national policies.[66]

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[63] Martin Khor, "The WTO and the South: Implications and Recent Developments", online: The Third World Network <http://www.twnside.org.sg/title/pli-cn.htm> (Retrieved on April 12, 2011).

[64] *Ibid* at 1.

[65] An explanation of the GATS' specific obligation technique is provided in Pages 114.

[66] Boodhoo, "Trade and Investment – SADC Situation, Content of Declaration and Emerging Controversies in Interpretation of what was Agreed in Doha and Conflict of

ii Communications from Indonesia and Morocco

Indonesia expressed the opinion that although the non-discrimination principle is essential, it should be applied in the appropriate context.[67] Indonesia argued that a general obligatory application of the national treatment standard is inappropriate for a multilateral investment regime because it could hamper development interests. This is because the flow of investments varies from the movement of goods; therefore, they argue that, national treatment standards used under the multilateral trade regime cannot be applied automatically to an investment regime.[68] Indonesia argued that developing countries should be able to employ investment restrictive measures that regulate the quantity of investment received, control investor entry and exit, and ensure the allocation of foreign investment based on economic needs. Indonesia stated that flexibility of the right to put these measures in place and adjust them when necessary is vital to the economic interest of developing countries. The dynamic nature of investment calls for dynamic investment

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Interest between North and South" in Medicine Masiiwa and Phoecena Nyatanga, eds., *WTO New Round of Negotiations: The Doha Ministerial Conference And Post Doha Agenda* (Harare: Friedrich-Ebert-Stiftung, 2002) 75 at 80.

[67] WTO, Working Group on the Relationship between Trade and Investment, *Report on the Meeting held on 14 and 15 April 2003-Note by the Secretariat*, WTO Doc Wt/Wgti/M/21, 1 at 38, online: WTO <http://Docsonline.Wto.Org/Gen_Highlightparent.Asp?Qu=%28+%40meta%5fsymbol+Wt%Fcwgti%Fcm%Fc%2a%29+&Doc=D%3a%2fddfdocuments%2ft%2fwt%2fwgti%2fm21%2edoc%2ehtm> (Accessed on May 30, 2011).

[68] *Ibid* at 38.

restrictive measures.[69] Indonesia further stated that the complementarities between national development policies and a possible multilateral framework for investment required further study.

Morocco shared the views of other developing countries. It said that the need to safeguard domestic development goals is the first step in considering a multilateral framework for investment.[70] It suggested that the multilateral framework for investment could be fashioned in the GATS style if certain adjustments were made to the GATS. It argued that further study was necessary to fully understand the complexities between preserving policy space and negotiating a multilateral framework on investment.[71]

On the other hand, some developing countries in Africa and Asia opposed the view that the GATS style multilateral framework for investment would benefit host states on the ground that the national treatment standard would harm the economic growth of developing countries.

iii Other Developing Countries

(a) China, Cuba, India, Kenya, Pakistan, Zimbabwe, Hong Kong, China and Egypt

A group of developing countries consisting of China, Cuba, India,[72] Kenya, Pakistan and Zimbabwe submitted a paper at the Doha Round,[73] in which they emphasised that

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[69] *Ibid* at 38.

[70] WTO*, supra* note 67 at 45.

[71] WTO, *supra* note 67 at 45.

[72] India's position will be discussed in more detail in the next sub-section.

discussions and negotiations on the need for a multilateral framework on for investment should be in consonance with the Doha Declaration which aims to balance the interests of both host and home members of the WTO. These countries argued that this balance can be achieved if members take into account the right of host states to regulate foreign investment, and foreign investors undertake obligations that do not undercut the development interest and policies of the host states.[74] These arguments should form an indispensable part of the Doha discussions on investment, as foreign investors should be obliged to abide by the domestic laws and regulations of the host states and to engage in investment practices that are in line with their economic goals and development objectives.

These countries also made suggestions that domestic policy regarding ownership and control of foreign investments. Their suggestions include: insisting on local equity participation and granting priority to nationals in employment, training and promotion to managerial posts. They asserted that this would enhance the developmental growth of host states.[75] The proposal by these countries may suggest that the national treatment

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[73] WTO, Working Group on the Relationship between Trade and Investment, *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe, "Investors' and Home Governments' Obligations,* WTO Document No. WT/WGTI/W/152 (19 November 2002), online: WTO <http://www2.weed-online.org/uploads/WGTI-Eingaben-pdf.pdf>.

[74] *Ibid* at 3.

[75] *Ibid* at 5.

standard should not be included in a multilateral framework for investment, as the measures they advocated seem to ensure favourable treatment for national investors. They viewed these discriminatory measures as a means of "retaining regulatory powers and adequate policy space in relation to foreign investment and the foreign investors".[76]

Another opposition to the quest for a multilateral framework for investment was from Egypt. Egypt expressed the opinion that most developing countries lack the required level of experience which would provide the necessary platform from which to better assess the implications of a multilateral framework for investment for their development and institutional policy goals. It pointed out that "technical assistance and capacity building in respect of WTO agreements had not met the expectations of developing countries, which were now facing severe implementation problems".[77] Egypt argued that the multilateral framework for investment would worsen the problem of implementation if developing countries sign the agreement without proper understanding of its effects and implications. Therefore, there was a need for further consideration of the issues of non-discrimination "from the perspective of how the development dimension of the Doha Round could be reflected in appropriate flexibility for developing countries to regulate investment". [78]

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[76] *Ibid* at 7.

[77] *WTO, supra* note 67 at 51.

[78] *Ibid*.

Pakistan expressed the view[79] that a multilateral framework for investment is unnecessary because it would diminish the bargaining power of developing host countries when they negotiated the inflow of foreign direct investment. Preservation of bargaining power is provided by BITs due to its limited scope of operation between parties. As earlier explained, this seems to be why BITs are preferred to regulate foreign direct investment as opposed to a multilateral framework for investment.

The representative of Hong Kong, China stated that negotiated obligations for the multilateral framework for investment should be flexible enough to accommodate the specific development needs of each country since members of the WTO are at different stages of economic development.[80]

b. Communications from India

India's position reflects the views of most low-income developing countries. As such it should be considered in detail.

India, though a fast growing developing country, is a major opponent of the inclusion of the national treatment standard in the multilateral framework for investment. India argued that the GATS style is not an appropriate model upon which to design the multilateral framework for investment because the GATS does not regulate investment *per se,* but

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[79] International Working Group on Doha Agenda, Policy Brief, *Multilateral Framework on Investment*, 1 at 20, online: WTO <http://www.wto.org/english/forums_e/ngo_e/policy_brief_investment_e.pdf>.

[80] WTO, *supra* note 67 at 42.

merely investment through the supply of services.[81] Furthermore, it argued that the dynamic and uncertain nature of investment makes it difficult to transfer existing rules on trade in services to investment.

India expressed the view that applying the non-discrimination principle in an international investment agreement raises more complexities than including it in a trade agreement. India argued that these complexities may be associated with the nature of investment which involves the movement of capital through diverse channels. India took the position that investment lacked the clear buyer-seller linkage, as is the case of goods and services. There is no certainty of the source of capital, nor the manner in which the capital will be retained and controlled by the host states. This is because the "money market is more opaque, less predictable, far more subject to purely speculative movements".[82] Investors may divert their capital at anytime, and this may result in an unexpected heavy outflow of funds from the economy. This, it is argued, will have damaging effects on the socio-economic development and stability of host states. Thus, it is necessary for host states to preserve their discretionary power to regulate the inflow of foreign investment.

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[81] WTO, Working Group on the Relationship between Trade and Investment, *Communication from India – Non-discrimination*, Doc No. WT/WGTI/W/149 (October 7 2002) 3 at para 9, online: WTO<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W149-e.pdf>.

[82] *Ibid* at 2.

India also expressed the view that the application of non-discrimination principles on a multilateral framework should be resisted, as it is only suitable for a trading regime and not for investment. India argued that the application of the non-discrimination principle in the GATS[83] is essentially for the purpose of service supply and not investment. Although the commercial mode of service supply in GATS[84] involves foreign direct investment, it is not a regulation of investment *per se*, but a means to facilitate service delivery. Also, India noted that national treatment standard is only applied in the GATS where commitments are made in that regard, which limits the scope of the non-discrimination principle. Hence they argued that the GATS rules of national treatment should not be considered as a model for the inclusion of the national treatment standard in the multilateral framework for investment.

On the scope of the national treatment standard if included in the multilateral framework for investment, India noted that traditionally, international law rules vest the power to control and regulate investments in the host states, being an exercise of their sovereignty. Therefore, suggestions that the national treatment standard be applied at the pre-establishment stage would infringe on the sovereign rights of host states. India further notes that apart from the NAFTA, no other investment agreement provides for national treatment at the pre-establishment stages, except for non-binding agreements, such as the

[83] Further discussion on the regulation of foreign direct investment under the GATS will be made in the next chapter of this thesis.

[84] GATS, *supra* note 29 at article 1 (2) (c).

OECD Code for the Liberalization of Capital Movements, 1984.[85] Consequently, there is no basis to apply national treatment measures at the pre-establishment stage of investment.

India concluded that "given the complex nature of capital flows/investments, application of the non-discrimination principle as it exists in goods and services, to investment, cannot be automatic".[86] Because, they argued, developing countries need to preserve their right to screen and conduct foreign direct investment in manners that support their domestic goals and interests.

iv. Overview

The arguments put forward by developing countries made the case that if a multilateral framework for investment is deemed necessary to ensure transparency and protection of foreign investment, existing international trade rules of non-discrimination should not be applied automatically due to the nature of investment. Also, the national treatment standard should not be applied at the pre-investment stage, as this would encroach on host state sovereignty. There seems to be agreement that a multilateral framework for investment should consider the development needs of developing countries and make room for flexibility to permit host states to pursue development goals. This may be

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[85] See OECD, Directorate of Financial and Enterprise Affairs, *The Experience of the OECD with the OECD Code of Liberalization of Capital Movements*, online: OECD <http://www.oecd.org/document/10/0,3746,en_2649_34889_1933130_1_1_1_1,00.html>.

[86] WTO, Communications from India, *supra* note 80 at 3.

achieved by allowing host states to determine the economic sectors to which, the national treatment standard would apply. This approach is similar to the GATS approach which is being canvassed by some developed countries, particularly the European Community.

The fears of developing countries is understandable, as most developed countries still engage in foreign direct investment restriction practices in some specific areas of their economies such as defence, transportation and banking. This suggests that the inflow of foreign direct investment can only be beneficial to an economy if it is adequately controlled and regulated by the host government. Measures for ensuring such regulation may vary from country to country. Hence, introducing a multilateral framework for investment without flexibility options for host states to strategize on how best they intend to utilize potential inflow of foreign direct investment may not lead to the economic growth desired by host states. This principle applies irrespective of whether the host state is a developed or developing country.

Therefore, to provide the much needed investment security sought by developed countries, and to allay the fears of policy space encroachment voiced by developing countries, a multilateral framework for investment must be structured in a manner to address the needs of all members of the WTO. The thesis argues that this can be achieved through the GATS's positive list approach, which would allow each member state to dictate the pace at which it liberalises foreign direct investment in each economic sector.

In order to better appreciate the positions of develop and developing countries, and proffer a workable solution that would be agreeable to both sides, the importance of a multilateral framework for investment needs to be addressed. A major question that needs

to be answered is whether the multilateral framework for investment is really necessary. The next section analyzes the possible advantages of a multilateral framework for investment.

C. IS A MULTILATERAL FRAMEWORK FOR INVESTMENT NECESSARY?

The preceding section discussed the perspectives of developed and developing countries on the need for a multilateral framework for investment. It is necessary to analyse the potential benefits of multilateral framework for investment if it comes into existence. This would provide a platform on which the thesis makes recommendations for the establishment of a multilateral framework for investment in the next chapter.

According to World Development Report of 2005,[87] there are four main arguments to support the need for establishing a multilateral framework for investment. Scholars like Benno Feranini[88] have discussed and analyzed these arguments. First is the "transaction costs argument",[89] which reflects the fact that foreign investors face huge transaction costs and uncertainties when investing in host states because of the divergent national rules and policies governing foreign direct investment. A multilateral framework for investment may therefore reduce transaction costs and give room for increased allocation of foreign direct investment.[90]

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[87] Luisa Bernal, *supra* note 56 at 1.

[88] Ferranini, *supra* note 18 at 36.

[89] *Ibid*.

[90] *Ibid*.

The second view is the uncertainty argument which states that, a multilateral framework for investment will reduce the risks of foreign investors when they deal with host states, which are at presently at liberty to change investment policies as often as they wish, and whose promises to reform unfavourable investment rules may be unreliable. The multilateral framework for investment will therefore boost the confidence of foreign investors in host states reformation processes, by ensuring predictability in investment rules. This would presumably result in increased flow of foreign direct investment to host states.[91] Hoekman and Saggi's statement on the role of international agreements buttresses this view:

> …an international agreement may serve as a mechanism through which government makes irrevocable commitments and 'guarantees' against policy reversals, thereby anchoring expectations of investors.[92]

A multilateral framework for investment would provide a form of binding commitment which host states cannot breach without consequences. This commitment prevents host states from amending their policies in such a way that would legalise direct or indirect expropriation of foreign investments, which operates to the detriment of foreign investors who have invested huge sums of moneys. A multilateral framework for investment would therefore provide necessary investment security.

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[91] *Ibid*.

[92] B Hoekman and K Saggi, *Multilateral Disciplines for Investment related Policies?* Policy Research Working Papers No. 2138 (Washington, DC : World Bank, Development Research Group, Trade,1999).

Another argument justifying the need for multilateral framework for investment is founded in politics. A multilateral framework for investment would enable governments to engage in national reformatory practices which would bring their domestic investment policies into conformity with their multilateral framework for investment obligations. The multilateral framework for investment would make it difficult for host states to restrict the inflow of foreign direct investment under the guise of upholding national policies.

Another argument is international policy spill-over, which occurs when host countries' foreign direct investment policies have negative effects on other countries. The multilateral framework for investment would increase global welfare by ensuring that domestic regulations which restrict and impede foreign direct investment at the global level and cause investment distortions in the distribution of investment are eliminated. This would be achieved through the provision of general investment obligations which should be complied with by parties to the agreement.

Overall, a multilateral framework for investment would enhance the investment climate in host states, particularly developing countries. In turn, this will lead to increased inflows of foreign direct investment and greater economic growth and development.[93] A transparent and predictable investment regime would attract more foreign investment, thereby creating jobs and expanding markets in host states. However, the fears of

[93] World Development Report, *supra* note 55.

countries like India is genuine as the inflow of foreign direct control must be adequately controlled to reap its benefits.[94]

From the foregoing, it is clear that the multilateral framework for investment will coordinate and harmonise the various bilateral and regional investment rules which currently regulate foreign direct investment. This will bring predictability and comprehensiveness to foreign direct investment rules. The downside for developing countries is that the multilateral framework for investment may require high investor protection standards and introduce obligations prohibiting the use of restrictions on the free flow of foreign direct investment. These standards may limit the freedom of host states to provide favourable investment atmosphere for local investors. Also, it could lead to excessive foreign control over vital socio-economic areas if developing countries grant increased market access to foreign investors. However, the benefits outweigh the negative effects of the multilateral framework for investment, particularly the fear of policy space encroachment of host states, and the fear of developing countries can be allayed through the GATS-style approach, which permits members to decide the extent of their national treatment and market access obligations.

CONCLUSION

A multilateral framework on investment would provide comprehensive and harmonized international investment standards, though its advantages are accompanied by potential

[94] The concerns of India are addressed in the paper they submitted during Doha. See WTO, Working Group on the Relationship between Trade and Investment, *supra* note 80.

disadvantageous implications if the multilateral framework for investment regime is not adequately regulated. This means that it is the scope and effect of such an agreement that will determine what may be the more favourable approach open to developing countries.

The foregoing analysis shows that developed and developing countries share some common grounds on the need for a multilateral framework for investment, which is to ensure security, stability, predictability and transparency in the regulation of foreign transactions, as canvassed by the developed countries. However, it is the fear of developing countries that the investment guarantees of the multilateral framework for investment may infringe on their sovereign right to impose investment regulatory measures to protect their policy space and to further the development of their economies. Thus, it is the scope of obligations of the multilateral framework for investment, that is the subject of contention between both sides.

Otherwise, the developed and developing countries agree that the multilateral framework for investment could be fashioned after the GATS, with certain amendments which would increase the power of the developing host states to preserve their policy space and development objectives. Apart from India, most of the developing countries support this conclusion, though some have requested further study and technical assistance to enable them understand the full implication of the multilateral framework for investment on their economies.

The developed country perspective, particularly that of the European Community which suggested a GATS style approach to the multilateral framework for investment, seems to be a fair recommendation, considering the fear of developing countries on their need to

preserve policy space. The GATS style may provide the necessary flexibility required by the developing countries to pursue their national policies. However, the positive effects of such flexibility *vis a vis* the need to encourage the inflow of foreign direct investment remains to be ascertained. Since the GATS is the model agreement for such provisions, a discussion of the provisions and operation of GATS is essential. The next chapter looks at the operation of GATS and its success in regulating trade in services. The discussion proposes that the GATS is an appropriate model upon which the multilateral framework for investment should be modelled in order to effectively regulate foreign direct investment, while preserving preserve the regulatory rights of host states.

CHAPTER FOUR: FOREIGN DIRECT INVESTMENT STANDARDS IN THE GENERAL AGREEMENT ON TRADE IN SERVICES: A MODEL FOR A MULTILATERAL FRAMEWORK FOR INVESTMENT

INTRODUCTION

As explained in chapter 2, the World Trade Organization (WTO) was established by the Uruguay Round of GATT negotiations in 1995. The aim of the WTO is to regulate and liberalize world trade by improving market access and fostering economic growth among its members. The WTO Agreement established several agreements to achieve its liberalization goals with respect to trade, though no agreement was established to regulate and liberalise foreign investment.

The growth of foreign direct investment over the years has fuelled deliberations on the need to provide a multilateral framework for investment. The need to create a stable, transparent and predictable environment for foreign investment regime plays a major role in this effort. However, fears of the effects of uncontrolled inflows of foreign direct investment are a source of concern to host states as discussed in the preceding chapters of this thesis. Finding a balance between the desire for a comprehensive investment agreement, and the desire of host states to retain control over the inflow of foreign investment, is of utmost importance to making progress towards establishing a multilateral framework for investment.

Lessons from past attempts to create a framework for investment[1] made it obvious that a successful attempt could only arise from a compromise between developed and developing countries, as their divergent opinions on the subject have contributed to the stalled progress in establishing such a framework. The World Trade Organization (WTO) set out to find a balance on this issue, and investment was included on the agenda of the Doha Development Round in 2001.[2] A working group was set up in 2001 to deliberate on the relationship between trade and investment,[3] and to formulate modalities for negotiations on establishing a multilateral framework for investment.

As discussed in chapter 3, deliberations on the establishment of the multilateral framework for investment among members of the WTO were met with stiff opposition from developing countries. These countries were of the opinion that a multilateral framework for investment would unduly constrain their rights to regulate and control the inflow of foreign direct investment. Also, they were fearful that the agreement would interfere with their desire to pursue domestic policies, as the agreement may prohibit the

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[1] Detailed discussions on previous attempts to establish a multilateral framework for investment can be found in sub-section 1.2, Section B of the second chapter of this thesis.

[2] WTO, *Doha Development Agenda: Negotiations, Implementation and Development*, online: WTO <www.wto.org>.

[3]The World Trade Organization, Working Group on the Relationship between Trade and Investment, online: The World Trade Organization <http://www.wto.org/english/tratop_e/invest_e/invest_e.htm**>.**

use of restrictive investment mechanisms. Developed countries, on the other hand, argued that a multilateral framework for investment was necessary to ensure investment protection, and to provide the much needed stability and predictability in the investment regime. They argued that existing WTO multilateral agreements on trade, services and intellectual property had facilitated the growth and expansion of those industries, and a similar regulatory environment was needed for investment.

Both sides in this debate have genuine concerns which must be considered before a multilateral framework for investment can be successfully established. Without the multilateral framework for investment, foreign investors may be exposed to the whims and caprices of host states government who are at liberty to change investment policies at will. Sudden changes and variations in investment policies may work to the detriment of unsuspecting foreign investors who may have invested heavily in a particular economic sector in the hope of reaping benefits within a speculated period. It may be argued that bilateral investment agreements already provide this security. However, these do not offer comprehensive protection as host governments can avoid the application of bilateral investment commitments under the guise of a change in government policy. A multilateral investment agreement would provide a check on such practices. It is a common principle of international law that international agreements are binding irrespective of the laws and policies of the host state where the host state is a party to that agreement.[4] Therefore, a multilateral framework for investment would safeguard foreign

[4] AFM Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies" (2001) 12:2 EJIL 309 -328 at 309.

investments, providing an enabling atmosphere for increased flows of foreign direct investment.

But it could also be argued that the reservations of developing countries on the effect of a multilateral framework for investment are well founded. Though developing countries desire foreign direct investment to enhance economic growth and technological advancement, its reception must be adequately controlled, otherwise, the anticipated benefits may not be reaped. Flooding the domestic economy with foreign multinationals may inhibit the growth of domestic companies, as the competition could be insurmountable. In order to even the playing field, developing host states may require favourable policies for domestic investors, and put in place certain mechanism, to increase the participation of domestic companies in the economy.

Having consideration for all of these factors, the way forward to establish a multilateral framework on investment is to ensure a balance between the positive and negative impacts of the agreement. This can be achieved by ensuring that the multilateral framework for investment accounts for the desire of developed countries *vis a vis* the fears of developing countries. A workable solution may be to model the multilateral framework for investment after the GATS[5] as suggested by the European Community and others.

The GATT is one of the multilateral agreements enacted by the WTO to regulate trade in services. The agreement was necessitated by the considerable increase in the demand for

[5] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 [*GATS*].

services, resulting in a move from trade in goods to trade in services. The purpose of the GATS is to ensure the liberalization of trade in services by securing a balance of rights and obligations, and giving due respect to national policy objectives.[6] Furthermore, the GATS recognises the right of Members, particularly the need of developing countries, to regulate and pursue national policy objectives which would promote economic growth by increasing production and employment opportunities. This is achieved through the four modes of service delivery provided in the GATS, namely: cross-border supply, consumption abroad, commercial presence, and natural presence.

A key function of the GATS is its regulation of foreign direct investment. In the absence of a multilateral investment agreement, GATS is the most comprehensive agreement related to investment that currently exists under the auspices of the WTO. The GATS regulates foreign direct investment through its provision on "commercial presence" as a mode of service delivery. Among other provisions, the GATS regulates foreign direct investment through its provision on market access and non-discrimination. The non-discrimination principle has two major components: the most-favoured-nation rule, and the national treatment standard. The national treatment standard requires members of the WTO to provide equal treatment to both domestic and foreign investors in services.[7] This obligation is, however, subjected to exceptions on account of countries' reservations based on domestic policy priorities.[8]

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[6] *Ibid* at preamble.

[7] GATS, *supra* note 5 at article XVII.

[8] GATS, *supra* note 5 at article XX.

The first part of this chapter assesses the operation of the GATS and its scope of obligations with particular emphasis on the liberalization of foreign direct investment, while the second part analyses the benefits of the GATS and its potential as a possible model for the multilateral framework for investment.

This chapter demonstrates that the GATS is a workable model for the multilateral framework for investment because while ensuring the regulation and liberalization of trade in services, it also provides flexibility for host states to control and direct their economic growth in line with their interests and goals. This is achieved through its provision of a positive list Schedule of Specific Commitments which permits members to determine which economic sectors they wish to expose to national treatment obligations. An investment agreement of this nature would allay the fears of developing countries and also satisfy the investment security needs of developed countries. A multilateral framework for investment fashioned after the GATS would lead to progress in the quest to enact a multilateral framework for investment.

For a proper appreciation of the GATS style as a model agreement for investment, it is necessary to provide an overview of its structure and the obligations it requires of WTO members. This is discussed in section A. Section B then provides an analysis of the operation of GATS regarding the regulation of foreign direct investment, and discusses its flexibility and benefits.

A. OVERVIEW OF THE GENERAL AGREEMENT ON TRADE IN SERVICES[9]

The growth of services in world trade and foreign direct investment may have contributed to the emergence of the GATS in 1995. Although a service agreement was not originally on the agenda of the Uruguay Round negotiations, it was introduced by proponents largely made up of developed countries, with the United States in the lead. Developing countries, such as India and Brazil, were of the view that the regulation of services should be left to domestic regulation and that multilateral rules on services would undermine and restrict their rights to maintain policy goals aimed at achieving developmental objectives.[10] Despite opposition, negotiations on an agreement for services were undertaken and the Agreement was signed by WTO members to ensure liberalization of trade in services. The aim was,

> to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the

[9] Some parts of this section were discussed in my international Trade Law term paper submitted last term to Professor Gilbert Winham, titled: "The Scope of Foreign Direct Investment Obligations under the GATS: A Developing Country perspective regarding Investment in Services", 6 April 2011 (Schulich School of Law, Dalhousie University).

[10] Rupa Chanda, "GATS and its Implications for Developing Countries: Key Issues and Concerns", United Nations Department of Economic and Social Affairs, Discussion Paper No. 25, online: <http://www.un.org/esa/desa/papers/2002/esa02dp25.pdf> (Retrieved 4th February 2011).

> economic growth of all trading partners and the development of developing countries.[11]

According to the WTO, the main objectives of the GATS is to "create a credible and reliable system of international trade rules; ensure fair and equitable treatment of all participants stimulate economic activity through guaranteed policy bindings; and promote trade and development through progressive liberalization".[12] The GATS seeks to achieve these objectives through the several obligations provided therein. This section considers the structure and obligations of GATS which includes general, conditional, and specific obligations. It also discusses GATS' schedule of commitments and its progressive liberalization goal.

I. Structure of the General Agreement on Trade in Services

The GATS is divided into three main sections. The first section sets out the framework of the agreement, including its general principles and rules. The second section contains annexes for specific limitations for commitments in certain service sectors, and the third section provides a list of the national schedules to which members state their specific market access commitments. The GATS is made up 12 classified sectors divided into 161 service activities. Trade services contemplated by the GATS include: business,

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[11] GATS, *supra* note 5, preamble.

[12] WTO, *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, online: WTO <http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> (Retrieved February 14, 2011).

telecommunication, education, health, transport, environmental, maritime, energy and financial services.

Article I of GATS provides that the agreement applies to measures taken by Members affecting trade in services at the central, regional, and local government levels, as well as by non-governmental bodies to whom regulatory powers have been delegated.[13] It does not define "services", but clearly exempts services provided in the exercise of governmental authority from its contemplation of "services".[14] As well, that services supplied in the "exercise of governmental authority" includes those that are done neither on a commercial basis, nor in competition with one or more service suppliers.[15]

Although the GATS does not give an express definition of "services", it provides for four modes of service delivery that gives an understanding of the concept of "services". The first mode is *cross-border supply.* This does not necessitate the movement of either the provider or end user of the service. The service is provided across the border through mail or any other method. The second mode of supply is *consumption abroad,* where the consumers go to a different country to enjoy the service. An example is a tourist who goes to another country to enjoy a service. The third mode is by *commercial presence*,

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[13] GATS, *supra* note 5 at article 1.

[14] The Dispute Settlement Body of the WTO defined the word "services" in Canada-Certain Measures Affecting Automotive Industries (Complaint by the European Communities and Japan), (2000) WTO Doc. WT/DS142/AB/R, WT/DS139/AB/R (Appellate Body Report) at 157.

[15] GATS, *supra* note 5 at article 1 (3) (a) & (b).

where a service supplier sets up a corporation or venture, or obtains foreign ownership of an extant company in a foreign nation, in a bid to supply services in that nation. The fourth mode is by the *presence of natural persons,*[16] where the provider of the service goes personally to another country to render his services.

The operation of the GATS is enabled through the several obligations it stipulates. Adherence to, and performance of the obligations by member states are intent to ensure the achievement of GATS' objective, which is to liberalize trade in services while allowing for flexibility in the pursuit of domestic obligations. These obligations are discussed next.

II. Scope of Obligations under the General Agreement on Trade in Services

The GATS regulates trade in services through three sets of obligations: general obligations, conditional obligations and specific obligations.[17] General obligations apply directly to all measures affecting trade in services and bind every member of the WTO, regardless of sectoral commitments. This is usually referred to as the "top-down" approach.[18] Conditional obligations are usually qualified and only apply when certain

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[16] GATS, *supra* note 5 at article 1 (2) (a)–(d).

[17] Gabela, Zandile. Trade in Health-Care Related Services in the Global Economy: The Perspectives of South Africa and Canada (LL.M Thesis, Dalhousie University Faculty of Law, 2009).

[18] David P Fidler & GATS Legal Review Team for the World Health Organization, *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective,* Globalization, Trade and Health Working Papers Series, online:

conditions are fulfilled. Specific obligations[19] only apply to those sectors that a member has committed to in its list of national schedules. The extent of application of the obligations listed in the schedule is determined by each member state. This approach is known as the bottom-up approach.[20] The general obligations will be discussed now.

1.1 General Obligations

There are various general obligations in GATS, but the most important are the most-favoured-nation principle, and the transparency principle. These I next discuss.

(a) The Most Favoured Nation Principle

The GATS provides for two non-discrimination principles, the most-favoured-nation principle and the national treatment standard.[21] These principles seek to ensure that barriers to free trade in services through discriminatory practices among members of the WTO are eliminated or, at least, greatly reduced. The most-favoured-nation principle is the core general obligation in the GATS.

It was imperative to provide non-discrimination principle because of the protectionism practiced by various countries, and which had stifled the free flow of trade in services.

<http://whqlibdoc.who.int/gats/GATS_Legal_Review_eng.pdf>. (Retrieved February 14, 2010).

[19] An explanation of the specific commitment mechanism is provided on page 114.

[20] M. Sornarajah, *The International Law on Foreign Investment* (New York: Cambridge University Press, Grotius Publications, 1994) 269 at 300.

[21] The national treatment standard is discussed in later parts of this thesis.

The GATS provided an opportunity to deal with this cancer that had eaten deep into the fabric of both trade and service liberalization. The most-favoured-nation principle requires that each Member shall "accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country".[22] Members of the WTO are not allowed to discriminate among one another and are obliged to accord all member states the same treatment regarding trade in services. Hence, where a service treatment is granted to one member, all member states are immediately entitled to similar treatment regarding like services.

The most-favoured-nation principle applies to all measures of trade in services and cuts across all service sectors. The only permitted most-favoured-nation exemption is provided under the Annex on Article II Exemptions[23] which allows member states to exempt certain service sectors from the most-favoured-nation treatment for a period not exceeding ten years after accession to the WTO. As stated above, this is known as the "top-down" approach, as the most-favoured-nation principle is generally binding on all members and applies to all service sectors and measures relating to trade in services.[24] This provision allows for flexibility, and enables member states to adjust their domestic laws and regulation to comply with WTO obligations.

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[22] GATS, *supra* note 5 at article II.

[23] GATS, *supra* note 5 at article II (2).

[24] Fidler & GATS Legal Review Team for the World Health Organization, *supra* note 18 at 4.

(b) Transparency Principle

This principle requires member states to provide information on all measures that affect their obligations under the GATS. This is a disclosure principle which brings existing national laws, regulations, administrative guidelines and policies of a WTO member which affect trade in services to the knowledge of all other member states.[25] Member states are also required to provide information on new, or a change in existing national laws and regulations which affect their GATS commitments upon its entry into force, or upon demand by member states. An avenue for such inquiry must be provided by member states within two years of the entering into force of the WTO Agreement.[26] A publication of commitments to international agreements relating to trade in services is also required.

Beyond the general obligations in GATS, are its conditional obligations which, though general in nature, are limited in their application due to the several conditions put in place by the GATS. I consider these obligations now.

1.2 Conditional Obligations

The conditional obligations under the GATS relate to domestic regulations which affect trade in services, economic integration and monopolies.

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[25] GATS, *supra* note 5at article III.

[26] Mary Footer, "The International Regulation of Trade in Services following Completion of the Uruguay Round" (1995) 29 Int'l L 453.

(a) Domestic Regulation

Article VI of GATS recognises the sovereignty of member states by acknowledging their right to domestic regulations regarding national policies. However, where specific commitments regarding certain sectors are undertaken in GATS, the domestic regulations which relate to trade in services are required to be administered in a reasonable, objective and impartial manner in order not to constitute a barrier to trade in services.[27] The GATS also requires member states to set up judicial, arbitral or administrative tribunals or procedures to provide for review and grant of remedies for administrative decisions that adversely affect trade in services. This process should be transparent and not more burdensome than necessary.[28]

Members are, however, exempted from this obligation where it conflicts with domestic constitutional requirements. The GATS ensures that while member states can apply domestic measures, such as qualification requirements, technical standards and licensing requirements in the grant of market access, such measures should not constitute a barrier, nor nullify specific commitments made in their national schedules.[29] This encourages the liberalization of trade in services, at the same time as they are free to make domestic regulations on services and the supply of services.

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[27] GATS, *supra* note 5 at article VI.

[28] *Ibid* at article VI (4).

[29] *Ibid* at article VI (5).

(b) Economic Integration

Article V of GATS permits member states to integrate their economies by entering into agreements that promote service liberalization covering substantial service sectors and which eliminates discriminatory measures. Doing this helps to harmonise the regulatory framework of member states, and furthers service liberalization.[30]

(c) Monopolies

Although the monopoly rights of service suppliers seem to impede free trade in services, it is not prohibited in GATS. Monopoly rights are, however, limited by GATS obligations which require member states to ensure that monopoly suppliers within their jurisdictions do not act contrary to their obligations under its specific commitments.[31] Furthermore, member states have an obligation to prevent a monopoly supplier from competing outside the scope of its monopoly rights, and from abusing its monopoly position in a manner inconsistent with such a member's commitments under GATS. [32]

The general and conditional obligations earlier discussed reflect obligations which are binding on all members of the WTO. However, there are also specific obligations in the

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[30] An example of such agreement is the *North American Free Trade Agreement Between the Government of Canada, The Government of Mexico and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289.

[31] *Ibid* at article VIII (1) & (2).

[32] An illustration of this can be found in the case of Mexico-Measures Affecting Telecommunications Services (Complaints by the United States) (2004) WTO Doc. WT/DS204/R (Panel Report).

GATS, the application of which is largely left to the discretion of member states. These are referred to as specific commitments and they are treated below.

1.3 Specific Commitments

Specific commitments are the GATS mechanism that allows countries to "tailor-make" their commitments under national treatment and market access. It is important to understand this in order to apply this mechanism to an agreement on foreign direct investment. The mechanism works as follows:

i. All countries are obliged to have a Schedule of Commitments in Services
ii. If a country enters a service sector into its Schedule of Commitments, then all provisions of the GATS are binding on that sector unless the country has listed specific limitations to its commitments under "market access" (Article XVI) and "national treatment" (Article XVII). Without this limitations being scheduled, all provisions of market access and national treatment will be obligatory and binding on the country.
iii. Such limitations are negotiated with trade partners.

(a) National Treatment

The national treatment standard is related to the most-favoured-nation principle. Article XVII of GATS mandates member states to grant the same treatment to foreign and domestic services and service suppliers. Hence, foreign services and service providers ought not to be treated less favourably than domestic services and service providers. This non-discrimination principle ensures that domestic service providers are not granted favourable conditions to the disadvantage of foreign suppliers. The National treatment

standard guarantees equal treatment regarding "like services" and "like service suppliers" and makes sure that service competitors have equal access to a commercial environment.[33] The national treatment standard applies to sectors to which commitments have been made by members in their list of specific-sector schedules.

(b) Market Access

Similar to the national treatment standard is the market access principle. This states that "each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule".[34] These limitations include:

> limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment, limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test and, measures which restrict or require specific types of legal entity or

[33] Further discussions on the national treatment standard will be provided in subsequent sections of this thesis.

[34] GATS, *supra* note 5 at article XVI.

> joint venture through which a service supplier may supply a service.[35]

This principle grants a member state the freedom to determine and control what foreign services and service suppliers to receive in its domestic market in accordance with its market access commitments in the GATS schedule. Markus Krajewski is of the view that the obligation to accord foreign services and service suppliers "treatment no less favourable" does not require such treatment to be similar to treatment granted to domestic services and service suppliers. It is limited to the treatment standard stated in each member's commitment and is put in place to ensure that members comply with their obligations, notwithstanding the treatment standard provided to domestic services and services suppliers.[36] Member states can, thus, list the above limitations in their commitment schedule whether or not they are discriminatory.[37] Furthermore, full market access commitment means that members are prevented from employing Article XVI measures even if they do not discriminate between foreign and domestic and foreign services and service suppliers.[38] In essence, the market access principle reduces non-

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[35] GATS, supra note 5 at article XVI (20).

[36] Markus Krajewski, *National Regulation and the Liberalization of Trade in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (The Hague: Kluwer Law International, 2003) at 95.

[37] Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime* (Oxford: Hart Publishing Limited, 2010) at 155.

[38] *Ibid* at 185.

discrimination measures which restrict free trade in services. This differentiates the market access principle from the national treatment standard.

The national treatment standard in GATS only applies after market access has been granted; hence, it applies to the further treatment of foreign services and service suppliers after reception to the domestic market.[39] The ability to control the effect of the market access principle through the conditions and limitations specified in the commitments made by each member in its schedule helps to retain domestic regulatory autonomy.

As noted above, specific obligations only apply to sectors where specific commitments have been made. These commitments are stated in the Schedule of Specific Commitments provided by GATS.[40] The schedule helps to ensure transparency and predictability in trade in services. A cursory look at a member state's schedule of specific commitments gives insight to other members, and assists them in making trade and investment decisions when dealing with one another. These commitments are discussed next.

1.4 Commitments under the General Agreement on Services

A requirement of GATS is that member states have a Schedule of Specific Commitments in respect of the four modes of service supply. This Schedule lists the commitments of each member regarding the market access principle and the national treatment obligation

[39] Footer, *supra* note 25 at 472.

[40] GATS, *supra* note 5 at article XX.

in respect of various economic service sectors and sub-sectors. Members are permitted to state limitations, qualifications and conditions which determine the extent of application of the market access and national treatment obligation regarding the specific sectors they have indentified.[41] The GATS does not mandate commitments in any specific sector, and member states have discretionary rights to determine the level of liberalization of a service sector based on national policy. Members may decide to be fully bound by GATS obligations in certain sectors, while deciding to be free of the obligations in other sectors. They may also decide to be bound to a certain extent in other sectors. Members are required to comply with the non-discrimination principle in sectors to which they make full commitments. Negotiation on the schedule of specific commitments may be viewed as favourable to developing countries, as it recognises their developmental inadequacies and provides a slow liberalization option which can be achieved through a gradual increase of commitments in their schedules.

It is important to note that once commitments are made in certain service sectors, they have general application, extend to all members of the WTO, and no form of discrimination is permitted. GATS commitments also have impacts on domestic regulations, as members are expected to bring their domestic regulations in compliance with their GATS commitments. Hence, commitments in the national schedule must be made with caution.[42] Although members are permitted to modify or withdraw

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[41] GATS, *supra* note 5 at articles XVI, XVII and XX.

[42] Zandile, *supra* note 17 at 39. An illustration of the effect of GATS commitment is evident in the United States – Measures Affecting the Cross-Border Supply of

commitments after three years of making them, withdrawal or modification triggers compensation where it affects the benefits enjoyed by another member, and negotiation on compensation is requested by the affected member.[43] Such compensations are granted on an most-favoured-nation basis.

Against the backdrop of these various obligations and commitments under GATS, the next sub-section considers the aim of GATS to ensure further liberalization of trade in services.

1.5 Progressive Liberalization

The GATS aims at securing higher levels of service liberalization through successive rounds of negotiations to promote the interests of members and to achieve a balance of rights and obligations through the reduction or elimination of barriers to free trade in services. It stipulates that the interest of developing countries should be considered during such negotiations by respecting their national policy goals and allowing for flexibility in their making of GATS commitments.

The above discussion represents a brief overview of the GATS framework and its operation. This provides the necessary background and information on the scope of GATS, and offers grounds on which to make arguments and draw conclusions regarding the use of GATS as a model agreement after which to fashion the multilateral framework

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Gambling and Betting (Complaints by Antigua), (2005) WTO Doc. WT/DS285/AB/R (Appellate Body Report).

[43] GATS, *supra* note 5 at article XXI.

for investment. As indicated, the focus of this chapter is how GATS obligations, particularly the national treatment and market access obligations, could provide a workable multilateral framework for the regulation of investment, it is imperative to analyse the liberalising role played by the GATS' provisions discussed above. The next section gives a brief analysis of the regulation of foreign direct investment, and assesses the flexibility of the GATS' regime in relation to investment in services. It also considers the benefits of the GATS's style in providing a framework for an investment agreement.

B. Scope of Foreign Direct Investment Obligations in the General Agreement on Trade in Services

Background information on foreign direct investment and its place in host state economic development was provided in Chapter 2.[44] The GATS recognises foreign direct investment as a means of promoting economic growth in developing countries. It makes provision for foreign direct investment through its third mode of service delivery, and the scope of GATS's in the liberalization of foreign direct investment is now considered.

I. Scope of Regulation

As previously noted, commercial presence is a mode of service delivery. Commercial presence is applicable to foreign direct investment, as certain services, such as banking, can only be rendered through commercial presence. In a bid to encourage service liberalization, facilitate and eradicate barriers to foreign direct investment regarding trade services, GATS, like Article III of the GATT, stipulates a minimum standard of

[44] Chapter 2 Section B at pages 35-39.

treatment of foreign investors by the host state in a bid to protect its economic interests. It is important to note that foreign direct investment here refers only to services and the supply of services.

The national treatment standard is provided in Article XVII of the GATS. It mandates each member of the WTO to accord services and service suppliers of any other member, treatment no less favourable than what it accords to its own like services and service suppliers.[45] The national treatment standard is only applicable to "like services" or "service suppliers"[46]. The rule is only applicable where the foreign investor has commercial presence in the host state, and is involved in the delivery of the similar services, and supplies a service similar to that of the domestic company.

Under the GATS, "Identical treatment of domestic and foreign investors shall be considered to be less favourable if it modifies the conditions of competition in favour of

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[45] GATS, *supra* note 5 at article XVII; WTO, Report of Panel on *China* – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R (2009), online:<http://www.worldtradelaw.net/reports/wtopanels/china-publications(panel).pdf> (Retrieved December 20, 2010).

[46] GATS does not provide a definition for "like" and the interpretation of this has generated a lot of controversies. For further reading on this see: K Nicolaïdis & JP Trachtman, "From Policed Regulation to Managed Recognition in GATS" in: P. Sauvé & RM Stern, eds, *GATS 2000, New Directions in Services Trade Liberalization* (Washington DC: The Brookings Institution/Harvard University, 2000) 241at 252; Peter M Gerhart & Michael S Baron "Understanding National Treatment: The Participatory Vision of the WTO" (2003-2004) 14 Ind Int'l & Comp L Rev 505.

services or service suppliers of the Member compared to like services or service suppliers of any other Member".[47] This is often known as *de jure* and *de facto* discrimination.[48] This provision aims to prevent discrimination and to guarantee equal competition between foreign investors and domestic investors. This provision was interpreted by a WTO panel to include non-discrimination measures which do not directly affect trade in services but are able to distort trade.[49] The probable risk of loss of capital returns faced by foreign investors in host states is thus, greatly reduced. Foreign investors are subject to the laws of the host state and the national treatment standard prevents the government from enacting laws and rules that will have harmful effects on the investment of foreigners. The laws could provide market incentives to domestic investors without proportionate provisions for foreign investors, limitations on the importation of some equipment required for service delivery, stringent licensing requirements and technological standards, and impose discriminatory tax levies on foreign investors,[50] etc.

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[47] GATS, *supra* note 5 at article XVII (3).

[48] See A Mattoo, "National Treatment in the GATS-Corner Stone or Pandora's Box?" (1997) 31 Journal of World Trade 107 at 110.

[49] Canada-Certain Measures Affecting Automotive Industries (Complaint by the European Communities and Japan), (2000), WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R at para10 (Appellate Body Report) 130, online: <http://docsonline.wto.org>.

[50] Footer, *supra* note 25 at 467.

The above provisions of GATS were put in place to liberalize trade in services and to prevent discrimination between domestic and foreign trade in services. Although they are advantageous and rigid, flexibility is introduced by its provisions on the Schedule of Commitment, to which is considered next.

II. Flexibility in the General Agreement on Trade in Services

The market access and national treatment standards are made flexible by the provision of Article XX. This provision allows a member state to "set out in a schedule, the specific commitments it undertakes under Part III of this Agreement"[51]. It excludes Part III from the general obligations applicable to all trade in services provided in GATS.[52] This means that market access and national treatment apply only if a Member makes commitments in this regard. Delimatsis is of the view that the market access and national treatment standards are founded on a positive lists approach and are only applicable to specific sectors and modes of supply based on a Member's commitments.[53]

Therefore, a member may limit its GATS' commitment by stating the condition under which the national treatment or market access principle will apply in certain sectors of its economy. It could even state that it is unbound by the national treatment standard.

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[51] GATS, *supra* note 5 at article XX (1).

[52] Part III of GATS includes the market access and national treatment standards.

[53] The positive list approach is also referred to as the bottom-up approach. P Delimatsis, "Don't gamble with GATS – the interaction between articles VI, XVI, XVII and XVIII GATS in the light of the US – Gambling Case" (2006) 40 Journal of World Trade 1059 at 1060.

Canada's health care policy, for instance, exempts the application of the national treatment standard to the delivery of health care services. Canada is, therefore, permitted to discriminate between foreign and domestic services and service providers who supply like services in the healthcare sector. There may be several rationales for this restriction, namely, the need to make available inexpensive health care to Canadian residents, and to guarantee the distribution of wealth between the rich and the poor.[54] Canada's health policy gives a clear example of practices in other WTO member states. Many member states restrict foreign direct investment in sectors such as telecommunications, finance, transportation, electricity and defence.

The GATS further provides that members may withdraw or modify any commitment in their schedule upon giving three months notice to the WTO Council on Trade in Services.[55] However, the withdrawal or modification may require making other trade compromises where they affect the benefits of other members under the Agreement.[56]

Article XIII controls the effective eradication of foreign direct investment barriers in GATS. The reason for this is that many member states have put in place restrictions on the application of market access or national treatment in regard to service delivery under

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[54] Eugene Vayda, "The Canadian Health Care System: An Overview", (1986) 7:2 Journal of Public Health Policy 205-210.

[55] GATS, *supra* note 5 at article XX (3).

[56] Anthony J VanDuzer, "Health, Education and Social Services in Canada: The Impact of the GATS" in J.M Curtis & D. Ciuriak eds, Trade Ploicy Research Research (Ottawa: International Trade Canada, 2004) 287-518, online:< http://ssrn.com/abstract=747545>. (Retrieved December 20, 2010).

mode three.[57] Most member states implement national policies that restrict the free access of foreign services and service providers to domestic markets. An example of such policies is the limitation of foreign participation in certain economic sectors. According to Stephen Golub,

> majority domestic ownership requirements include airlines in the European Community and North American countries, telecommunications in Japan, and coastal and freshwater shipping in the United States. Exclusive domestic ownership is also often applied to natural resource sectors with the aim of giving citizens access to the associated rents. For example, foreign ownership is banned in the fishing and energy sectors in Iceland, and in the oil sector in Mexico.[58]

These reservations may be based on what significance a member state places on a sector, such as the economic importance of that sector. As well, to a reasonable extent, it may determine the echelon of commitment it is prepared to make to liberalize that sector. There may be several reasons for these restrictions. They include: the desire to safeguard

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[57] Australian Government Productivity Commission & Alexis Hardin and Leanne Holmes, *Service Trade and Foreign Direct Investment*, Industry Commission Staff Research Paper (27 November 1997), online: Australian Government Productivity Commission <http://www.pc.gov.au/ic/research/information/servtrad> (Retrieved November 25, 2010).

[58] Stephen S Golub, *Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries*, OECD Economic Studies No. 36 (2003) 86, online: OECD <http://www.oecd.org/dataoecd/22/20/33638671.pdf>.

domestic policies; the need to prevent environmental degradation; to ensure national security; to guarantee the welfare of residents;[59] and to prevent extensive control by foreign investors. The reservations approach limits liberalization of foreign direct investment in trade in services. The scope of liberalization is controlled by national policies which limit the application of the stated principles to the areas reserved.

The GATS allows reservations from specific commitments to promote flexibility in GATS rules and to increase the participation of developing countries in GATS negotiations. This position is supported by arguments that member states "should have sufficient policy space to pursue regulatory, developmental, prudential, and other goals in the public interest."[60] The role of GATS in the liberalization of trade in services is commendable and similar success can be achieved with the multilateral framework for investment if it is fashioned after the GATS. An analysis of the benefits of the GATS's style for the regulation of foreign direct investment follows.

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[59] Bilgehan Karabay, "Foreign direct investment and host country policies: A Rationale for using Ownership Restrictions" (2010) 93 Journal of Development Economics at 218–225.

[60] Foreign Affairs and International Trade Canada, *Investment in the WTO: The Working Group on the Relationship between Trade and Investment (WGTI)*, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/invest/wgti-gtci.aspx>.

III. Benefits of the General Agreement on Trade in Services Model for Investment

The main objectives of the GATS are to ensure transparency, stability and liberalization of services.[61] These goals are sought to be achieved through various provisions in the Agreement. According to Oliver Hilger, the GATS has three broad advantages, namely, "increased competition, increased market access, and predictability and transparency".[62] This thesis argues that similar benefits can be achieved through the multilateral framework for investment if the GATS style approach, discussed in section II of this chapter, is embraced and applied in the regulation of foreign direct investment.

Oliver Hilger argued that service liberalization can be achieved through an effective competitive system. This thesis argues that this can also be achieved in an investment regime because competition in the investment industry encourages increased foreign direct investment, faster innovations, efficient technology transfer, lower prices, better delivery of investment services, different investment choices for host states, willingness of foreign investors to negotiate on terms of operation, and increased bargaining power

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[61] Sherry M Stephenson, "Regional and Multilateral Approaches to Services Liberalization" (2002) Paper delivered at the Organization of American States PECC Trade Forum Seminar 1 at 4, online: http://www.pecc.org/resources/doc_details/174-regional-and-multilateral-approaches-to-services-liberalization.

[62] Oliver Hilger, "The Pros and Cons of the General Agreement on Trade in Services" *European School of Business*, Working Paper 2005-3, online: European School of Business <www.esb-reutlingen.de>.

of host states to determine which investments to embrace. These benefits lead to greater economic performance and developmental growth.

Increased market access also plays a role in guaranteeing effective market competition. An optimised application of Article XVI of GATS, fashioned in the context of investment would ensure the free inflow of foreign direct investment to member states, particularly developing countries, and provide the necessary access to sophisticated foreign investors. The competitive strength of foreign multinational companies could then help to ignite the economic passion of domestic markets, and drive them to increase quality and output in order to measure up to the standards provided by foreign investors. This could enhance product and process innovations, including easy access to economic development.[63]

An example of this is the telecommunications industry in Nigeria. Prior to 2001, residents had no access to mobile telephone lines and were hugely dependent on land lines. This seemed satisfactory and the situation did not appear to hamper effective communication until the arrival of a multinational telecommunications company; MTN Nigeria (MTN) in 2001. This investment, worth billions of dollars, brought about huge transformation in the industry, as mobile devices were introduced into the system. Soon it became a crucial factor in the day to day living of individuals and businesses. Initially, only a few could afford to obtain a mobile device due to the cost of securing it and in view of the cost of the rechargeable cards needed to place calls. Hence, ease of

[63] WTO*: Facts and Fiction, Six Benefits of Service Liberalization*, online: WTO <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction3_e.htm>.

communication for residents, which was the agenda of the government, could not be achieved as only the wealthy could afford the mobile devices. Consequently, the foreign multinational enjoyed monopoly of the industry and was not in a hurry to reduce the prices it charged. However, in 2003, a domestic company, Globacom Nigeria Limited, ventured into the same industry and was able to provide mobile devices at affordable prices. This presented the much needed competition to make MTN reduce its prices. Now, almost everyone in Nigeria has a mobile device, as there are so many telecommunication companies in Nigeria that provide mobile services at affordable prices. It seems that the benefit of opening up the telecommunication industry to foreign investors was only realised when effective competition was introduced into the system. The overall outcome has been increased employment opportunities, technological and infrastructural advancement.

The above example demonstrates that developing host states can be inspired by foreign investors to engage in new activities similar to those in which they invest. It also reflects the fact that foreign direct investment, though necessary for economic development, should be designed to benefit host states by creating the right atmosphere to encourage local investors to acquire the necessary skills and technology.

The GATS provides predictability and transparency in the service industry. Its provisions on transparency and the requirement of listing for general and specific commitments in the national schedule of member states,[64] provides information and helps to keep potential foreign investors abreast with each other's commitments regarding several

[64] GATS, *supra* note 5 at article XX.

economic sectors and sub-sectors. The GATS provisions aim to secure transparent, stable and predictable conditions for long-term cross-border investment,[65] which would contribute to the growth foreign direct investment. Similar provisions in the multilateral framework for investment would lead to increased foreign direct investment. Foreign investors will not be left in the dark regarding a member state's investment policy and will be able to predict the market, thereby influencing the host state's foreign investment decisions. Such growth of foreign direct investment would, no doubt, lead to increased economic growth in member states through the flow of capital, managerial skills, technological transfer and increase in production.

Also, the GATS approach, if applied in the multilateral framework for investment, should include the positive list approach to specific obligations. As stated above, obligations, such as the national treatment standard, only apply to those sectors that a member has committed to in its list of national schedules. This approach allows host states to determine which areas of their economy they wish to open to foreign direct investment, and has been referred to as development-friendly.[66] The GATS allows

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[65] WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, (14 November 2001) 4 1 I.L.M. 746 at 749, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

[66] Martín Molinuevo, "WTO Disciplines on Foreign Investment Wasn't the GATS about Trade in Services?" 65, online: *<http://phase1.nccrtrade.org/images/stories/publications/Molinuevo.Tesis%20UniBo.Wasnt%20the%20GATS%20about%20trade.pdf>*.

member states of the WTO to prioritize policy flexibility, by preserving economic sectors from national treatment and market access obligations.[67]

Developing countries like India have argued that this does not work in favour of developing countries because they lack the wherewithal to effectively bargain with developed countries.[68] Alongside this problem, stiff competition among developing countries for the little foreign direct investment opportunities available is a factor to be considered. Therefore, developing countries fear that their liberty to determine the economic sectors they would accommodate foreign direct investment may not yield positive results where potential investors insist on terms which they do not favour. The fear of losing potential foreign investors to neighbouring developing countries is a major consideration for them when they make national treatment and market access decisions.

The above problem may be resolved if developed countries can identify the interests of potential foreign investors. Developed countries sometimes look upon developing countries for natural resources which are not so abundant in their home countries. An example is the oil sector. The United States, for instance, invests heavily in developing oil producing states like Nigeria and Libya. These states can use their status as oil

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[67] *Ibid* at 66.

[68] WTO, Working Group on the Relationship between Trade and Investment, *Communication from India – Non-discrimination*, Doc No. WT/WGTI/W/149, October 7 2002, Page 3 paragraph 9, online: WTO <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W149-e.pdf>.

producing states, or other natural resource producers, as a bargaining chip when negotiating for foreign direct investment. They can insist that potential investors in the oil sector the value of which exceeds a particular sum, must also invest in another economic sector, which the host state hopes to develop. This would serve as an investment triggering mechanism to ensure that the agenda of developed foreign investors match the agenda of developing host states. This way, developing host states can effectively distribute and regulate foreign direct investment in line with their domestic policy and agenda. This approach may provide the necessary flexibility required by host states in the regulation of foreign direct investment, and also allay the fears of developing countries when they negotiate a multilateral framework for investment.

Another advantage of the GATS which should be emulated by the multilateral framework for investment is the market access principle which adopts the positive list approach at the pre-establishment stage and the national treatment standard at the post-establishment stage of foreign direct investment. Article XVI of GATS prohibits certain limitations which constitute major obstacles to the admission of foreign direct investment. However, member states are only bound by this obligation if commitments have been made in this regard. This approach permits host states to control and regulate investment at the point of entry, thereby safeguarding their sovereignty. Thus, propositions by some developed countries like Canada to apply the national treatment standard at both the pre- and post- establishment stages should not be accepted, as this would diminish the rights of host states to control the inflow of foreign direct investment. Also, apart from the NAFTA, no other investment agreement provides for the national

treatment standard at the pre-establishment stage. Introducing the national treatment standard at the pre-establishment stage in the multilateral framework for investment would not only disrupt existing bilateral and multilateral investment treaties; but it will also delay the process of negotiating a multilateral framework for investment as more countries will oppose the agreement. Therefore, the national treatment standard should be included in the multilateral framework for investment but within the limits of the GATS framework which allows for the positive list approach.

The progressive liberalization technique of the GATS could also be emulated in the multilateral framework for investment because it would balance rights and obligations and further reduce or eliminate foreign direct investment barriers.

CONCLUSION

A multilateral agreement on investment is essential to provide a comprehensive framework for investment, and to protect and ensure predictability in the regulation of foreign direct investment. Progress in the deliberations towards establishing a multilateral framework for investment under the auspices of the WTO stalled and was eventually dropped from the Doha agenda due to the opposing views of developed and developing countries on the subject. Developed countries advocated for a multilateral framework for investment to ensure predictability, stability, transparency and protection for their investments, while developed countries oppose it because they fear that it would encroach on their right to control and regulate foreign direct investment. To reach a compromise, the GATS may be a workable model after which to fashion the multilateral framework for investment.

The GATS's aim to liberalise trade in services is evident through the broad principles and obligations included in it. These range from general obligations, such as most-favoured-nation and transparency principle, to conditional obligations on domestic regulation and monopolies. It also provides for specific obligations, including the national treatment and market access principles. The desire to encourage the participation of developing countries in securing service liberalization is apparent in the schedule of specific commitments. The GATS obligations play different roles to ensure eradication or limitation of barriers to trade in services, including the regulation of foreign direct investment.

The analysis of this chapter demonstrates that the GATS has contributed to the expansion of trade in services and its liberalization in an effective manner. Its flexibility provisions for host states help to preserve their desired power and control over their economic growth and development policies. The Doha development round had similar purposes on its agenda on the relationship between trade and investment. The overall agenda of the Doha Round is to reduce trade barriers and liberalise international trade. It aimed to pursue the needs and interests of developing countries by making efforts to ensure that developing countries and least-developed countries "secure a share in the growth of world trade commensurate with the needs of their economic development".[69] The GATS has, to some extent, been successful in achieving these goals, particularly regarding the regulation of investment.

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[69] TO, *Doha Development Agenda: Negotiations, Implementation and Development*, online: WTO <www.wto.org>.

A number of the GATS' rules, especially the provision on host state flexibility, should be incorporated in the multilateral framework for investment. This recommendation already has support from numerous developed and developing countries as previously discussed in chapter 3.[70] Although the GATS may not be perfect, its provision on the regulation of foreign direct investment may provide a platform on which prospective multilateral investment agreements can be modelled. Perhaps, similar positive results as enunciated above would be achieved.[71] This would, at least, provide a structure for the multilateral framework for investment which may be later modified through progressive liberalization.

[70] See pages 10-25 of Chapter 3.

[71] See pages 24-28 of this Chapter.

CHAPTER 5: CONCLUSION

This thesis has discussed and analyzed the need for a multilateral framework for investment, setting out its benefits and possible disadvantages as well as the challenges to negotiation and implementation. It has sought to demonstrate that the national treatment standard should be included in the multilateral framework for investment, but that its scope should be limited to specific economic sectors to which members permit its application as exemplified in GATS. In this way, both the needs of developed and developing countries, and the positive and negative effects of the multilateral framework for investment on the economies of developing countries can be balanced.

The quest for a multilateral framework for investment has been the subject of negotiation since 1948, when negotiations for the Havana Charter was unsuccessful. Further attempts made through different institutions and Conventions such as, the Shawcross Draft Convention, the OECD, the UNCTC, the World Bank and the WTO, show that the regulation of foreign direct investment is vital to economic development and growth.

The major stumbling block to the establishment of a multilateral Agreement has been the lack of agreement between developed and developing countries on the subject. The scope of such an Agreement, particularly the inclusion of the national treatment standard, has been one of the main subjects of disagreement. This divergence of opinion dates back to the disputes between Latin America states and the United States on the appropriate treatment of foreign investors in the 1800s'. Since that time, developed countries have been persistent in their demand for a minimum international standard for the treatment of foreign investors. This was rejected by the Latin Americans who favoured the

application of the Calvo doctrine which, today, is exemplified by the "national treatment standard".

Ironically, negotiating positions in this regard have come to a full-circle and suggestions by developed countries to expand the scope of obligations, to include the national treatment standard in the multilateral framework for investment, are now opposed by developing countries. Developing countries fear that uncontrolled national treatment rights would limit their desire to preserve policy space and protect their domestic industries. This disagreement has stalled progress in attempts to create a multilateral framework for investment.

The most recent attempt, which ceased in 2004 to create a multilateral framework for investment was sought under the auspices of the WTO in 1996 because of its previous success in the establishment of multilateral agreements. The WTO is seen as an ideal venue for this negotiation. However, the age-long controversy on the scope of foreign direct investment regulation has remained constant.

One element of the controversy is the differing opinions regarding the inclusion of the national treatment standard in the multilateral framework for investment. This became apparent during the Doha Development Round held in 2001 when a working group was set up to examine the relationship between trade and investment. The implications of a multilateral framework for investment are viewed differently by developed and developing countries. The developed countries, led by the European Community and the United States, expressed the view that including the national treatment standard in the multilateral framework for investment will increase foreign direct investment flows,

ensure transparency and provide the necessary stability and security for foreign investment. Developing countries, on the other hand, argued that uncontrolled foreign direct investment, facilitated through national treatment, would stall their economic growth and deprive them of the right to control the inflow of foreign direct investment. These conflicting views form the foundation of the analysis provided in this work as to its acceptability within a multilateral framework for investment framework for the regulation of foreign direct investment.

The analysis of this thesis has shown that despite the controversies relating to the need for a multilateral framework for investment, developed and developing countries share the view: that the multilateral framework for investment is necessary to ensure security, stability, predictability and transparency in the regulation of foreign transactions as required by the investor states. The disagreement relates to the scope of obligations of the multilateral framework for investment. Developing countries, as likely host states, fear that the advantages of the multilateral framework for investment are accompanied by potential harmful economic consequences if the right to regulate the inflow of foreign direct investment is not retained. However, this analysis has demonstrated that this fear can be allayed if the multilateral framework for investment is designed to accommodate the desire of developing countries to retain control over the inflow of foreign direct investment, which would provide host countries with the necessary flexibility to determine the level of foreign direct investment to embrace depending on their economic developmental needs.

This thesis has shown that a workable model for the successful creation of a multilateral framework for investment is the GATS. The GATS regulates investment in services through the commercial presence mode of service supply. Its success in the liberalization and regulation of trade in services is commendable, and similar feats may be achieved for investment through the multilateral framework for investment. The GATS obligations play different roles to ensure eradication or limitation of barriers to trade in services, including the regulation of foreign direct investment.

The GATS' positive list approach to the regulation of trade in services through specific obligations, such as the national treatment and market access principles are worthy of emulation. The positive list approach provides the necessary flexibility to host states for the proper regulation of foreign direct investment. This affords host states, particularly developing countries, the much desired freedom to determine which foreign direct investment to embrace, and what investment restrictive policies to adopt in order to safeguard growing domestic companies, thereby, securing national economic growth.

With the exception of India, it is clear that some developing countries are willing to negotiate a multilateral framework for investment fashioned after the GATS. They believe that this would further increase the power of developing host states to preserve their policy spaces and development objectives. Some developing countries have requested further study and technical assistance to enable them understand the full implication of the multilateral framework for investment on their economies. This will enable them to fully understand and appreciate the implications of the multilateral framework for investment, and how they can employ it to their advantage. It would also

contribute to strengthening their bargaining power. Also, limiting the application of the national treatment standard to the post-establishment stage of investment, and not the pre-investment stage, would further allay the fears of developing countries. The overall benefits of the GATS' style are that it would lead to increased competition, increased market access and predictability and transparency which would accelerate the growth foreign direct investment.

This thesis concludes that to progress towards establishing a multilateral framework for investment, the WTO needs to set up a new Working Group on the Relationship between Trade and Investment which must consider the worries of developing countries and to balance them against the benefits the multilateral framework for investment would bring. This can be achieved by modelling the agreement after the GATS. The GATS may not be the perfect agreement to serve as a template for the multilateral framework for investment; but it is the most comprehensive agreement on investment under the auspices of the WTO, and it seems to address the major concerns of developing countries regarding the regulation of foreign direct investment. With this start, there is room for progressive liberalization at a later date.

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