Legal Convergence and Interpretation of the Regimes of International Trade and Investment Law: Arguing a Sustainable Development Pathway

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This thesis is submitted in fulfillment of the requirements for the award of the degree of Doctor of Philosophy of the University of Portsmouth

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ABSTRACT

Elementarily, at least within the business environment, any discussions regarding an economic activity posit international trade and investment to be connected. Even to the discerning economist, businessman or policy maker, transfer of goods from one point to the other, provisions of services and direct investment ought to, rationally, be covered in one and the same agreement. However, this has not been possible under international law despite evident historical reasons approving such. International law manages trade and investment independently of each other. The separation of trade and investment has both historical and economic undertones that eventually led to the development of bifurcation in the legal regimes that regulate them. Though some commentators argued that the objectives of the two regimes are different, reality dictates otherwise, as both are seen to be ultimately deeply concerned with efficiency and the liberalization of economic activities; as such the investor and/or trader are not oblivious of the protections provided by the regimes of international trade and international investment law. So should the chicken come home to roost? The principle of non-discrimination, which offers the relative substantive standards of treatment, is at the heart of international economic law and is present in both regimes but has, at the same time, been interpreted and applied incoherently and inconsistently in both, significantly more in investment law than in trade law. As such, this thesis introduces the concept of sustainable development as a legal concept. The main idea is to see whether both investment treaty and trade tribunals can use it as an intellectual lens to interpret the non-discrimination standards in both regimes, aiming for their future convergence. The thesis traced the evolution of the concept, its scope and application. Flowing from the theme of the discussion, the main findings reached are that by employing the rules of the Vienna Convention on the Law of Treaties, the
concept of sustainable development can serve as a suitable interpretive tool for international courts and tribunals.
DECLARATION

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

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Abbreviations

ACHPR – African Commission on Human and People’s Rights
ACHPR – African Charter on Human and People’s Rights
APEC – Asia-Pacific Economic Cooperation
ASEAN – Association of South East Asian States
AU – African Union
AB – Appellate Board
BIT – Bilateral Investment Treaty
BEE – Black Economic Empowerment
CBD – Convention on Biological Diversity
DSB – Dispute Settlement Board
DSU – Dispute Settlement Understanding
ECJ – European Court of Justice
EC – European Community
ECOWAS – Economic Community of West African States
ECOSOC – Economic and Social Council
EIA – Environmental Impact Assessment
ECtHR – European Court of Human Rights
EU – European Union
ECT – Energy Charter Treaty
FET – Fair and Equitable Treatment
FDI – Foreign Direct Investment
FTA – Foreign Trade Agreements
GSP – Generalised System of Preferences
GDP – Gross Domestic Product
GATT – General Agreement on Tariff and Trades
GATS – General Agreement on Trade in Services
IIA – International Investment Agreements
ICCPR – International Covenant for Civil and Political Rights
IISD – International Institute of Sustainable Development
ISDS – Investor-State Dispute Settlement
ICC – International Centre of Commerce
ICSID – International Centre for Settlement of Investment Dispute
ILA- International Law Association
IMS – International Minimum Standard
ILC – International Law commission
IMF – International Monetary Fund
IPR – International Property Rights
ITO – International Trade Organisation
ITLOS – International Tribunal on the Law of the Sea
ICJ – International Court of Justice
ICFD – International Conference on Finance and Development
IACHR – Inter-American Court of Human Rights
JPOI – Johannesburg Plan of Implementation
LAT – Living Apart Together
LCIA – London Court of International Arbitration
MAI – Multilateral Agreement on Investment
MST – Minimum Standard of Treatment
MDG – Millennium Development Goals
MFN – Most Favoured Nation
MMPA – Marine Mammal Protection Act

NT – National Treatment

NAFTA – North American Free Trade Agreement

NIEO – New International Economic Order

NLCA – Nigerian Local Content Act

OECD – Organisation of Economic Cooperation and Development

PMFI – Possible Multilateral Framework on Investment

PCIJ – Permanent Court of International Justice

PCB – Polychlorinated Biphenyl

SD – Sustainable Development

TTIP – Trans-Atlantic Trade and Investment Partnership

TPP – Trans-Pacific Partnership

TRIMS – Trade-Related Investment Measures

TRIPS – Trade-Related Aspects of Intellectual Property Rights

UNCTAD – United Nations Conference on Trade and Development

UNDP – United Nations Development Programme

UNEP – United Nations Environment Programme

UNGA – United Nations General Assembly

UNFCC – United Nations Framework Convention on Climate Change

UNCHF – United Nations Conference on the Human Environment

UDHR – Universal Declaration on Human Rights

UNCESCR – United Nations Committee on Economic, Social and Cultural Rights

UNCSOD – United Nations Commission on Sustainable Development

UNHRC – United Nations Human Rights Committee

US – United States
VAT – Value Added Tax
VCLT – Vienna Convention on the Law of Treaties
WSSD – World Summit on Sustainable Development
WPA – World Plan of Action
WGTT – Working Group on the Relationship between Trade and Investment
WTO – World Trade Organisation
WCED – World Commission on Environment and Development
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DEDICATION

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Chapter One

Legal Convergence/Interpretation of the Regimes of International Economic Law: Arguing a Sustainable Development Pathway

1.0 Background

It is elementary that within the business environment, any discussions concerning an economic activity posit international trade and investment to be linked.\(^1\) Even to the discerning economist, businessman or policy maker, transfer of goods from one point to the other, provision of services and direct investment ought to, rationally, be covered in one and the same agreement, but this has not been possible. International businesses use goods or services when they trade and capital when they invest. Companies, as representatives of these businesses, participate in trade as a means of making their investments available and they also invest with a view to promoting and diversifying their trade, making trade and investment bound together in a symbiotic relationship. The separation of trade and investment has both historical and economic undertones, which eventually led to the development of bifurcation in the legal regimes that regulate them.\(^2\) International law manages trade and investment independently of each other.

Today, the foreign investment regime consists of over 3,324 treaties agreed upon between States, out of which 2,958 are Bilateral Investment Treaties (BITs) and 367 are other treaties with investment provisions.\(^3\) Developed, capital exporting states

conclude International Investment Agreements (IIAs) mainly for the protection of foreign investment.\(^4\)

International trade, on the other hand, is regulated multilaterally through the World Trade Organisation (WTO) covering wide ranging issues from trade in goods, trade in services, trade-related investment measures and trade-related intellectual property rights and over 320 preferential agreements with some having investment chapters in them.\(^5\) The WTO’s 164 members\(^6\) assume responsibility/commitments to each other for the development of international trade rules and the free flow of trade.\(^7\) Even though the WTO did not address foreign investment directly in any detail in any of its provisions, some of these provisions are related to investment.\(^8\) Trade regulation is macro, interested in access to market and trading opportunities while the investment regime is micro, concern with investment drive and protection of investments made by individuals and companies. However, governments, in policy formulation, taking into cognizance the fact that those operating in the business environment do not put trade and investment into different compartments, usually plan economic policies and development measures with both schemes in mind.\(^9\)

From the beginning, IIAs’ main focus was the protection of investments. Initially, these agreements were between the rich, developed countries and the poor, developing countries. The developed, capital-exporting states began the move for

\(^4\) M. Sornarajah, The International Law on Foreign Investment (CUP 2010) 173.
\(^5\) See UNCTAD (n 3).
\(^8\) For example see GATS Art.3, Commercial Presence.
investment treaties as a response to the New International Economic Order (NIEO) canvassed by the developing, investment recipient states.10

Generally, the multilateral nature of the WTO, its highly technical and sophisticated body of rules, a more settled jurisprudence governing trade, its Dispute Settlement Understanding (DSU) and an Appeal Panel to review its Panels’ decisions and ensure predictability, put it a step ahead of investment law with its bilateralism problem, legitimacy deficiency, incoherence, inconsistency and often shallow reasoning accompanying arbitral awards.

The laudable attempts to have a multilateral body of rules to regulate investment at the Organisation of Economic Co-operation and Development, (OECD) and the WTO, failed. Leading OECD countries, the EU and Canada, submitted a proposal at the first WTO Ministerial Conference in Singapore in 1996 for the creation of a Possible Multilateral Framework on Investment (PMFI) replicated upon the MAI under the umbrella of the WTO.11 The OECD countries idea was the creation of an encyclopedic, General Agreement on Tariffs and Trade, GATT-type MAI that will surpass the one under the WTO Agreements on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS).12 The failure of this attempt, as Weiss argued, was the opposition mounted by the developing countries that viewed it as akin to a usurpation of their “regulatory sovereignty”.13 In order to save the situation however, a compromise was worked out and a Working Group on the Relationship between Trade and Investment (WGTI) was created in the

10 M. Sornarajah (n 4).
11 For full access to these documents, see <http://www.oecd.org/daf/mai> accessed 1 December 2016.
13 Friedl Weiss.
WTO to review the issues and make recommendations for the need of a multilateral framework on investment within the WTO.\textsuperscript{14} Not much was achieved from the outcome, just as the other attempts at the fourth and fifth Ministerial Conferences could also not produce any agreement on the issue.\textsuperscript{15}

The WTO rules govern trade while customary international law; bilateral investment treaties and other investment treaties generally determine investment law.\textsuperscript{16} It is noteworthy however that the Energy Charter Treaty (ECT), which is a multilateral sectoral treaty, contain both trade and investment chapters. While trade agreements are concluded and applied between states through the instrumentality of sanctions, under investment treaties, companies can sue host states directly and claim damages. The consequences flowing from these differences for international economic law can be better imagined.

However, the pertinent point here is that despite these fundamental differences, both the WTO and international investment law regimes majorly have provisions for similar standards of treatment for the protection of foreign investors and traders. The non-discrimination principle, for example, as a common denominator in both regimes, is embedded under National Treatment, Most Favoured Nation and Fair and Equitable treatment standards. The interpretation of these treaties is the main focus of this

\textsuperscript{14} Friedl Weiss. See also the decision of the Ministerial Conference of December 1996, WT/WGTI/1/Rev.1.
\textsuperscript{15} Fourth WTO Ministerial Conference, Doha, November 2001 and Fifth WTO Ministerial Conference, Cancun, September 2003. Though the Doha Ministerial Declaration provided for the launch of negotiations on trade and investment, (this happened after the Fifth WTO Ministerial Conference at Cancun).
\textsuperscript{16} August Reinisch, \textit{Recent Developments in International Investment Law} (Cours Et Travaux No.12, Institut Des Hautes Etudes Internationales De Paris 2009) 5, 23.
thesis. The concept of sustainable development is introduced as a possible interpretive tool for the analysis of the international investment law and international trade law.

1.1 Research Problem

The existing bifurcation of the legal regimes that regulate international trade and international investment law is attributable to the general fragmentation of international law.

Fragmentation of international law simply points to the increasing specialization in the different fields of international law and the possibility of conflict occurring between the different specialties. Potential conflict(s) between different legal norms or principles may be unavoidable since the principles applicable in one may not necessarily be applicable in the other. Under international law, legal norms are said to interact in two different ways. First, in a ‘complimentary’ way when the norms accumulate and is possible to apply them together and the second, in a ‘conflicting’ way when the two norms are in breach of each other.

International Economic Law is not bereft of the fragmentation in international law. Interestingly, the fragmentation occurring in international economic law seems to have a surprising twist. Despite the evident and far-reaching developments and ensuing conflicts in international investment law, it is the more settled jurisprudence

18 Caroline Henckels.
of the WTO that has elicited the attention of discussants on the fragmentation of international law.\textsuperscript{20}

As stated earlier, unlike what is obtained under international trade (in goods and services) international investment law is not settled and there is no any multilateral rule that regulates it despite the several attempts mentioned above.\textsuperscript{21} This, however, did not stop the development and even proliferation of regional treaties on investment and foreign trade agreements FTAs with chapters in them on investment.\textsuperscript{22} These chapters on investment are usually couched in the language of a BIT, incorporating issues like the aim of the agreement, the definition of investment, standards of treatment and procedures and remedies for the settlement of disputes that may ensue therein. As to whether IIAs have crystallized to reflect customary international law, there are two arguments. First, is that the evident and substantive differences between IIAs provisions made it a \textit{lex specialis} as between the parties to the agreement rather than customary international law.\textsuperscript{23} The second is that IIAs indeed mirror or are likely to crystallize into principles of customary international law.\textsuperscript{24} In such a situation, a tribunal is likely to use the provisions in one IIA to fill an existing gap in another IIA that is being tested before it.

Historically, foreign property and investors have been protected and where expropriated, they have been compensated under the principles of customary

\textsuperscript{21} P. Sauvé, ‘Multilateral Rules on Investment: Is Forward Movement Possible?’ (2006) 9 JIEL, 325, 326; M. Sornarajah (n 4); Anne van Aaken (n 20) 4.
\textsuperscript{23} M. Sornarajah (n 4) 177, 234.
\textsuperscript{24} UNCTAD (n 22) 7.
international law commonly found in the ‘Minimum Standard of Treatment’ (MST).\textsuperscript{25} BITs, as treaties of international law, have standards of treatment that protect both private persons and international corporations. The most important amongst these standards of treatment are National Treatment (NT) Most-Favoured Nation (MFN) and Fair and Equitable Treatment (FET). Under NT, contracting parties grant to foreign investors treatment no less favourable than that granted to their own nationals; while MFN requires a treatment for foreign investors no less favourable than that granted to another foreign investor or third party investor as is otherwise called.\textsuperscript{26} The FET is found in almost all bilateral and other investment treaties; for example Article II (2) of the BIT between Argentina and the United States states: ‘Investment shall at all times be accorded fair and equitable treatment’.\textsuperscript{27}

Investment disputes are usually resolved by arbitration with private persons or firms bringing their claims against host states before an impartial international forum that can award damages against the host State and the award is enforceable against the host State. For any dispute emerging out of the operation or the interpretation of the provisions of any treaty, most of the IIAs usually resort to the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID)\textsuperscript{28} tribunals.

The *WTO Agreements on Investment*

\textsuperscript{26} M. Somarajah (n 4) 201, 202.
\textsuperscript{27} Article II (2), Argentina-USA BIT.
\textsuperscript{28} Popularly called the Washington Convention; The International Centre for Settlement of Investment Disputes was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States. It has been ratified by at least 151 countries; see www.icsid.worldbank.org. Accessed 30 June 2015.
As stated above, there is not any substantive WTO agreement on foreign investment.\textsuperscript{29} All the attempts to include investment as a subject in the build up to the WTO failed though some rules that are applicable to investment were incorporated during the Uruguay Round.\textsuperscript{30} A brief look at some of the areas covered is significant here, as reference will be made to these areas in the subsequent chapters of the thesis.

\textit{GATS – The General Agreement on Trade in Services}\textsuperscript{31}

The GATS depict an important relationship with investment. In the first place, by including the third mode of services supply, “commercial presence”\textsuperscript{32} that constitutes a significant part of foreign direct investment (FDI), it can be said to regulate foreign investment.\textsuperscript{33} Secondly, it covers all the service sectors that in turn constitute a significant part of Gross Domestic Product (GDP).\textsuperscript{34} Thirdly, the GATS ‘specific commitment’ shows that the standards of treatment like the NT and MFN can only apply to such sectors agreed upon by the parties and as such market access is restricted to sectors not listed by each country.\textsuperscript{35}

\textit{The Agreement on Trade-Related Investment Measures - TRIMS}\textsuperscript{36}

The Agreement on Trade-Related Investment Measures – TRIMS postulate a careful connection between trade and investment; it discusses only trade-restrictive and trade-

\textsuperscript{29} UNCTAD (n 22) 17
\textsuperscript{30} M. Sornarajah, (n 4) 229; See also S. Lester, et. al, \textit{World Trade Law: Text, Materials and Commentary} (Hart Publishing, Oxford, 2012) 67
\textsuperscript{32} GATS, Arts 1:2 (c), XXV111 (d).
\textsuperscript{34} Hoekman and Kostecki
\textsuperscript{35} M. Sornarajah (n 4) 264.
distorting effects of investment measures only but failed to address issues such as transfer of technology, domestic employment and incentives.

Though the agreement omits to define what the term trade-related investment measure (TRIMS) entails, it can be deduced from the WTO jurisprudence that characterizing an ‘investment measure’ is fact driven and will essentially depend on the effect of such measure on the investment itself. The TRIMS however include the General Agreement on Tariffs and Trade (GATT) exceptions that guarantee the rights of member countries to apply necessary measures in order to protect public morals, human, animal or plant life. Developing countries further enjoy the right to special and deferential treatment in the case of balance-of-payment problems that can negatively impact on the drive for foreign investment.

The main role of the TRIMS is the prohibition of any trade-related investment measures in the form of quantitative restrictions or violation of the principle of national treatment.

_trade-related aspects of intellectual property rights - TRIPS_

International Investment Agreement’s definition necessarily includes intellectual property rights (IPR) and the Agreement on Trade-Related Aspects of Intellectual

37 TRIMS (n 36), See also WTO – Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel (23 July 1998) WT/DS 54,59,64/R (14.73)
38 TRIMS (n 36) Art.3
39 TRIMS (n 36) Art.4
40 TRIMS (n 36) Art.2.1
41 See the Multilateral General Agreement on Trade in Goods – GATT (15 April 1994) LT/UR/A-1A <http://docsonline.wto.org>, Art.XI
42 GATT Art.III
Property Rights (TRIPS) is directly linked to FDI.\textsuperscript{45} The TRIPS is furthermore important here as it contains crosscutting provisions on NT, MFN, FET and exhaustion.\textsuperscript{46}

\textit{The Dispute Settlement Understanding - DSU}\textsuperscript{47}

The WTO, as a self-contained legal regime, include the Understanding on Rules and Procedures Governing the Settlement of Disputes popularly called the Dispute Settlement Understanding (DSU), open and applicable to all members.\textsuperscript{48}

Any dispute arising out of any agreement concluded under the WTO must be settled via the WTO dispute settlement mechanism.\textsuperscript{49} Dispute settlement under the DSU involves five stages – consultations\textsuperscript{50}, request for a panel\textsuperscript{51}, panel at work\textsuperscript{52}, adoption decision or appeal\textsuperscript{53} and implementation.\textsuperscript{54} The Dispute Settlement Body (DSB) establishes the panel and the panel’s report may be reviewed by the WTO Appellate Body (AB) while the implementation of the recommendation of the WTO Panel/AB decisions usually require the removal of the inconsistent measure, and where there is a failure of compliance, then the complaining party can ask for compensation.\textsuperscript{55}

\begin{flushright}
\footnotesize
\textsuperscript{44} See for example Agreement between the Government of the Kingdom of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments (adopted at Copenhagen on 4 November 1993), Art.1.1, 2009, UNTS 450, Art.1.
\textsuperscript{45} TRIPS (n 43)
\textsuperscript{46} TRIPS (n 43) Arts.3, 4 and 6.
\textsuperscript{48} DSU
\textsuperscript{49} B.Hoekman (n 33) 87
\textsuperscript{50} DSU (n 47) Art.3.7
\textsuperscript{51} DSU (n 47) Art.4.11
\textsuperscript{52} DSU (n 47) Art. 10, Art.13
\textsuperscript{53} DSU (n 47) Art.17.3
\textsuperscript{54} DSU (n 47) Art.21.3
\textsuperscript{55} S.Lester (n 30) 153-234 for a detailed analysis of the DSU stages.
\end{flushright}
The principle of non-discrimination embodied in NT, FET and MFN is relevant and applicable to both fields of international economic law – international investment law and international trade law considering the economic rationale in both fields.\(^{56}\) Non-discrimination is a right that has been originally recognised under customary international law and treaty practice.\(^{57}\)

One of the effects of the fragmentation of international law is clearly seen within international investment law in the contradicting arbitral awards’ definition and interpretation of the non-discrimination principle applicable to NT, FET and MFN. The effects of fragmentation are also visible in the investment-related trade rules embodied in the WTO System as it relates to the non-discrimination principle embedded in NT and MFN. The fragmentation occurring in these fields is, regrettably, without any systematic coordination. It is the effect of this and the need for the harmonisation of the interpretation of the non-discrimination principle evidence in these standards that will be the main focus of this thesis. Though the principle of non-discrimination as covered by the relative protection standards is said to be the focus, this is simply geared towards the greater goal of using it as a basis to show how sustainable development can use it for the convergence of the regimes of trade and investment. This is because of the understanding that harmony in interpretation can lead to greater convergence.

It is against this background that the main research question is raised thus:

*‘How can Sustainable Development be used to achieve Legal Convergence between International Trade Law and International Investment Law?’*

\(^{56}\) Nicolas F. Diebold, ‘Standards of Non-Discrimination in International Economic Law’ (2011) ICQL 60, 831, 832.

\(^{57}\) A.F.M Maniruzzaman, (n 25).
In an attempt to answer the above, the following questions further appear as follow:

- **How can Sustainable Development help in reducing the inconsistent interpretation in these fields of international economic law?**

- **How can the Principle of Systemic Integration under the provisions of Article 31(3)(c) of the Vienna Convention on the Law of Treaties VCLT be used to integrate Sustainable Development in the Interpretation of Treaty Provisions in the Regimes of International Investment Law and International Trade Law?**

1.2 Research Methodology

This thesis will use the qualitative research methodology approach. It will adopt the doctrinal method. In different parts of the thesis, this will necessitate the use of either or a combination of the following:

1. Comparative legal analysis to compare the definition and interpretation of treaties generally using the non-discrimination principles of NT, MFN and FET in particular from certain bodies of international law generally and more particularly under international investment law and under the law of the WTO. This is with a view to seeing how different courts and tribunals define and interpret the standards involved and the resultant contradiction in the various interpretations.

2. Deductive legal reasoning; here, the principle of systemic integration in Art. 31(3) (c) of the VCLT will be analysed to see whether it can be used to invoke sustainable development as a cure of the fragmentation existing in these two contending regimes of international economic law.
In using the above methodologies, the thesis will, doctrinally, use content analysis of issues and the philosophical undertones underpinning the two fields in order to analyse data from both primary and secondary sources. Primary data will be from relevant case law and arbitral awards (especially those that invoke sustainable development concerns) in the decisions of the International Court of Justice (ICJ), the WTO, the International Tribunal of the Law of the Sea (ITLOS), investment arbitration tribunals of the ICSID and NAFTA and some national courts decisions, especially of the US and Canada supreme courts. Further to this, the research will use secondary sources such as journal articles, textbooks, international legal instruments, investment and trade regulations, periodicals, annual reports of the ICSID, NAFTA, WTO, UNCTAD etc. and other relevant internet sources.

The use of primary data is obviously for the purpose of sifting out applicable laws and judicial pronouncements on the main theme of the research. This is with a view to seeing whether there is any harmony in the interpretation of the non-discrimination principle by these judicial bodies. The use of secondary data is to reflect and critique, where relevant, how some academic writers analyse the entire issues central to the research and then marshal the arguments within the applicable legal provisions.

1.3 Review of Similar Research Studies

Enormous literature exists on the principle of non-discrimination as is embedded in national treatment, most-favoured-nation and fair and equitable treatment even as it is applied in both international trade and international investment law. However, of all the existing book chapters and journal articles, none has advocated for the doctrine of legal convergence and sustainable development interpretation as a possible integration principle that can be used to bring the two legal regimes together. This review will
use well-researched and sound academic contributions in order to provide an analytical and critical study on the subject matter of the thesis. The topic cut across a range of other areas such as the fragmentation of international law and the doctrine of legal convergence – simplified introductory remarks on these areas are also provided.

This introductory fusion of the literature will adopt the ‘integrated approach’. From the name, it will integrate scholarly contributions of academic writers in the body of the thesis by revisiting, in some detail, all the works cited in this review. This thesis will look into the possibilities of the integration of the regimes of international trade and international investment law into one regime under international economic law. The literatures reviewed in this thesis do not in any way exhaust all the discourse as other literature will eventually develop as this interesting area of research progresses. The following review is an analysis of the major works that have examined non-discrimination standards of national treatment, fair and equitable treatment and most-favoured-nation in both trade and investment regimes generally, and then the available works that reviewed the development and application of the concept of sustainable development in the applicable regimes. The review will place the thesis in the context of the literature with a view to sharing the relevance of this research and the future need of further research in the area.

At the commencement of this thesis, the academic sphere was enriched by the publication of five important works that have either a direct or substantial bearing on the direction of this thesis. Almost all the publications generally focused on the relationship between investment and trade, future prospects of investment law and policy, the interpretation of international investment law and the interplay between
WTO litigation and international investment arbitration. This is hardly surprising in view of the topicality and the continuous discussion of the fragmentation occurring in international law. These publications essentially strengthen this thesis’ position that the continuous bifurcation of the legal regimes of international trade and investment law merit detailed, further study. However, there are considerable differences and overall focus between the present thesis and these publications. All the publications asked different though sometimes-relative research questions to the ones to be explored in this thesis. As the review of the monographs and some of the articles contained in other books will show, this thesis profound an argument that has not been previously examined in any literature.

Iona Tudor’s monograph undertook a comparative approach in identifying the scope and meaning of the FET. She argued that the principle is a *lex specialis* that is constituted by the treaty in question, so in applying the FET, particular attention must be paid to the wordings of the relevant treaty provision depicting the FET. She concluded by showing the need for striking a balance between law and fact to determine a breach of the FET standard.\(^58\)

Paparinskis’ approach was normative. He studied the role, relationship and content of the FET and the international minimum standard through the application of the classical or customary and the modern or treaty concepts. He concluded that the international human rights could serve as an effective method that can be used to fill the gaps between the two concepts.\(^59\)

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The Conceptual approach, as used by Klager to study the doctrinal foundations and impact of the FET in the context of the international legal system, seems to be a better approach. The article rejected the FET customary character, arguing that it is yet to undergo the transformation necessary to qualify it as a conventional norm and suggest the integration of the arguments in other sub-systems of international law into international investment law.\textsuperscript{60} This thesis will suggest ways of bringing about cohesion between the regimes of international trade and international investment law using the principle of non-discrimination through the application of sustainable development.

FET in the context of NAFTA Article 1105 was the focus of Patrick Dumberry’s book as he argued that the construction and interpretation under NAFTA Article 1105 differ considerably from the FET provisions in majority of BITs. He concluded that NAFTA Article 1105 recognised only the prohibition of arbitrary conduct, denial of justice and the obligation of due process as stand-alone elements of the FET. This thesis will revisit NAFTA interpretation of all the protection standards in suggesting convergence between trade and investment regime.\textsuperscript{61}

Todd Weiler’s book was essentially an incisive historical approach to the discussion of the standards. He argued that as fundamental norms in international investment

\textsuperscript{60} Roland Klager, \textit{Fair and Equitable Treatment in International Investment Law}, Cambridge Studies in International and Comparative Law (CUP 2011).

law, the nature and importance of these standards could only be understood through an in-depth historical analysis.\textsuperscript{62}

National Treatment, Most-Favoured-Nation and Fair and Equitable Treatment as concepts connoting the principle of Non-Discrimination have also been written on as stand alone or in relation to each other or with other standards. Among prominent investment law writers that have extensively written on the interpretation of these standards are Rudolf Dolzer and Christoph Schreuer, Andrew Newcombe, Andrea Bjorklund, August Reinisch, Todd Weiler, Thomas Wälde, AFM Maniruzzaman, Jurgen Kurtz and Stephan Schill.\textsuperscript{63} In reviewing all the standards, Dolzer put forward the argument that though some differences exist in the treaty wordings, they are almost always identically couched. He further observed that despite the similarities in the NT provisions, the awards are littered with many inconsistencies in its interpretation.\textsuperscript{64} This is a problem this research seeks to address by suggesting not only coherence in the interpretation of standards but also a form of convergence between the two regimes, hence the need for the concept of sustainable development.


\textsuperscript{64} Dolzer & Schreuer (n 63).
as a suitable legal framework to help achieve this. Christoph Schreuer emphasized the impact investment arbitration has had on the way these protection standards are applied. In summing up the interrelationship between the standards, he posits the FET to be the most promising, all encompassing standard. His argument about the NT standard is that despite its independent nature, it has connections to other standards while the MFN’s main strength is the extent to which it is employed to import other standards not provided for in a particular treaty.65

Bjorklund’s article suggests that the inconsistency in the interpretation of the non-discrimination principle has consistently made it difficult for arbitrators to canvass any relevant, prior decision even on a persuasive ground, something that could aid the development of what is presently referred to as jurisprudence constanté.66 This problem in turn will result in incoherence and inconsistency in international investment law. Writing in the same vein, Reinisch used NT to point out the lack of coherence in international investment law and concluded that the problem is sure to diminish the appeal of investment arbitration and the confidence claimants and respondents have in the system.67

Maniruzzaman looked at the principle of non-discrimination from the background of foreign investment and firmly put the argument across that each of the standards, NT, FET and MFN is an integral part of the principle. The article’s conclusion was more forward looking by contending that since the principle has no sweeping application, it must be appreciated in the context of its application in the hope for the development

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65 Schreuer (n 63).
66 Andrea Bjorklund (n 63).
67 August Reinisch (n 63).
of a future Multilateral Agreement on Investment.\textsuperscript{68} This thesis will build on this approach to suggest sustainable development as a future framework for a future Multilateral Agreement to cover both Trade and Investment.

Jurgen Kurtz approached the interpretation of the national treatment provision from the perspective of its connectivity to protectionism and canvassed the argument that a more positive approach in the interpretation of national treatment in investment treaties is to put forward the obligation as a constraint against protectionism.\textsuperscript{69}

From the GATT/WTO angle, the works of Verhoosel\textsuperscript{70}, Huerta-Goldman\textsuperscript{71} and Joost Pauwelyn\textsuperscript{72} remain instructive and need a fresh look here.

Basically, this research was primarily triggered by the continuous bifurcation of the legal regimes governing international economic law and the inconsistency in the interpretation of the above standards by arbitral tribunals and most importantly by some existing works. Debra Steger argued that convergence in the face of economic reality and policy sense is impractical since only States can support such kind of harmonization.\textsuperscript{73} Tomer Broude’s own argument was the unjustifiable bifurcation of the trade and investment institutional regulatory family despite the strong, practical linkage between the two. Though this is an interesting argument that is similar to the position of this thesis, his thesis is, however, mainly concerned with subsidies

\begin{footnotesize}
\begin{enumerate}
\item AFM Maniruzzaman, (n 63).
\item Jurgen Kurtz (n 63).
\item Joost Pauwelyn, \textit{The Use, Non-Use and Abuse of Economics in WTO and Investment Litigation, in Huerta-Goldman, Romanetti and Stirnimann} (n 70)
\end{enumerate}
\end{footnotesize}
regulation though it did called for a halt in the separation of trade and investment today.\textsuperscript{74}

Kurtz brought forward the argument strongly that it is the continuous misuse of WTO law that contributed highly to the inconsistency in the investment law jurisprudence. Though he criticized the wrong way WTO law was transposed in resolving investment disputes, this thesis will analyse the jurisprudences with a view to suggesting how investment law learning from the WTO’s application of the VCLT in the interpretation of the non-discrimination principle and the invocation of the concept of sustainable development therein can achieve harmony.\textsuperscript{75}

The standards of investment protection, especially national treatment, most-favoured-nation and fair and equitable standard have all elicited comparative studies within the WTO either by scholars of international trade law or those of international investment law. The references of international investment arbitration to the WTO jurisprudence seem to provide the stimulus for these comparative studies. Walde observed that despite evident differences there is an increasing proximity and as such reason for partial convergence between the WTO and international investment treaties. His article informed this thesis by showing that there is a basis of comparative study between non-discrimination standards in investment treaty and the WTO in particular and the regimes of trade and investment in general.\textsuperscript{76}

\textsuperscript{75} Jurgen Kurtz, \textit{The Use and Abuse of WTO Law in Investor-State Arbitration} (n 58).
\textsuperscript{76} Thomas Walde, \textit{Comments on the Discipline of National Treatment: Boosting Good Governance and Intruding into Domestic Regulatory Space?} (n.58).
In another article by Verhoosel, a more direct argument was postulated that some relevant provisions of the WTO could possibly allow customary international law standards of treatment to be applied to investment arbitration cases. Alternatively, he argued, pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the application of WTO principles, as interpretive tool in disputes relating to BITs is something realizable. This thesis will expand on this idea with a view to seeing how Article 31(3)(c) VCLT and the principle of Systemic Integration can be applied to invoke sustainable development in the interpretation of these relative standards of treatment. Furthermore, it will explore how to use the VCLT and the doctrine of legal convergence in transposing the WTO exceptions into investment arbitration so as to strength the argument for a more harmonious interpretation of the applicable standards that will assist in the future convergence of the two contending regimes.

Mary Footer’s article traced the nexus between trade and investment law using the ‘Living Apart Together’ or ‘LAT’ context, this is akin to ‘being married but living apart’ and feeling the pain. The article agued that the challenge lies not in the possibility of having a multilateral instrument covering the two regimes but in the extent to which the interaction between the regimes is leading to greater convergence or divergence in their rule-making and dispute settlement systems.77 In another article, Footer examined trade and investment regimes by contextualizing them historically. Her review of the effect of intra-firm investment on trade patterns, the interaction of IIA and WTO law concluded that though on the face of the principle of non-discrimination, MFN and exceptione clauses they appear to unite the legal principles underpinning FDI and international trade, the fundamental rules governing them are

77 Mary Footer, ‘International Investment and Trade: the Relationship that Never Went Away’ in Freya Baetens, (n 63).
not necessarily the same in their evolution and application. Though the article dealt with the interaction between trade and investment, it only took a holistic approach, it did not look at the interaction of the principle of non-discrimination under national treatment, most-favoured-nation and fair and equitable treatment from a sustainable development perspective, something this thesis will do. DiMascio and Pauwelyn’s article traced the common roots of the WTO and investment law regimes and the possibility of a positive interaction between them.

It is observed that direct, in-depth studies dedicated to comparing international investment law and international trade/WTO law in the context of the principle of non-discrimination are quiet meager that is until very recently, while studying the regimes through the lens of sustainable development virtually non-existent. As seen in the above literatures, studies comparing the two regimes as a pair are available. Literatures comparing the investment regime and the WTO, the WTO with EU or investment law with HR as pairs are also available.

Studying them as a pair, Anastasios Gourgourinis has made a direct connection of the use of the same minimum standards of treatment protecting foreign traders/investors by the WTO multilateral trade regime and international investment law. He argued for a triangular normative relationship regarding the administration of domestic regulation between the customary rule as *lex generalis* and the provisions of the trade and investment regimes as *leges speciales*. He concluded that investors can foresee

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78 Mary Footer, *On the Laws of Attraction: Examining the relationship between Foreign Investment and International Trade* in Freya Baetens (n.63)


success on a FET claim if their country has earlier succeeded on similar claim at the WTO and vice versa.\footnote{Anastasios Gourgourinis, ‘Reviewing the Administration of Domestic Regulation in WTO and Investment Law: the International Minimum Standard as ‘One Standard to Rule Them All’, in Freya Baetens, (n.63).}

Much later during the write-up stage of this thesis there emerged three fundamental pieces of work that have impacted profoundly on the overall theme. Jurgen Kurtz’s *The WTO and International Investment Law, Converging Systems* expertly advocated for the convergence of trade and investment law by undertaking both a descriptive and analytical approach supported by empirical evidence.\footnote{Jurgen Kurtz, *The WTO and International Investment Law: Converging System*, (CUP 2016).} Also using an interdisciplinary approach, the author looked at the legal, economic and sociological factors that he argued seem to be pushing the two pillars of economic law together. Jurgen agreed that the regimes shared treaty standards and narrowed his discussion majorly to national treatment only, postulating that investment tribunals in their interpretation of similar standards therein could draw on the jurisprudence of the WTO, though he criticised how the WTO jurisprudence in this area is applied in investment arbitration. Overall, though the main theme the book dwelled a lot on was what investment law could generally learn from trade law, it cannot be missed that the book set out to provide basis for the reform of the two systems. It seems to do this by critically dealing with the intricate issue of how the evident conflict between the liberalization of trade and the regulation of investment for public purposes can be tackled. Among all the important works reviewed so far, this book has one of the strongest bearings and impacted strongly on the issues discussed in this thesis. Suffice it to say, both the methodologies used and the perspectives taken are different. Jurgen Kurtz, of all the treatment standards, only applied the national treatment in his
discourse and interpretation of this standard was not really his most important thesis. In this work, the three most important investment protection standards were all applied, as the focus is on the quest for a harmonious interpretation of these standards across the two regimes, hence the employment of the provisions of Article 31(3) (c) to invoke the concept of sustainable development in that regard.

Away from the substantive analysis of the standards of treatment that are in focus in this thesis, the interpretative tools used also merit some discussion. A take on the doctrine of legal convergence, the provisions of Article 31(3)(c) of the VCLT and the concept of sustainable development is needed here. The doctrine of legal convergence seems to be sparsely recognised and applied in legal discourse. Mads Andenas and Eirik Bjorge’s *A Farewell to Fragmentation* is seen as a welcome addition to this sparsely covered area of legal analysis. Even though the authors recognised the existence of fragmentation as an existential threat to international law, they argued that this has been countered by the relative/evident convergence going on in various disciplines of international law. It is the conclusion of the work that international tribunals always find ways to adapt to the existence of fragmentation by accounting for each other through the interaction of emerging fields in international law, a position this thesis did not seem to agree with when it comes to investment treaty arbitration. Various cases drawn from international tribunals were reviewed to show how convergence is happening.

Antonio Platsas article viewed the doctrine of legal convergence as a firm, verifiable tool that can aid the positive harmonisation of contending legal regimes, reunification

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of interpretive discrepancies and ensure certainty in the law. In chapter two, a detailed discussion of the concept of legal convergence is undertaken and the elements therein tested in the analysis in chapters five and six, especially in chapter six that makes a case for convergence.

Article 31(3)(c) of the VCLT and the Principle of Systemic Integration were applied as tools of treaty interpretation. The rules governing treaty interpretation are different from the typical rules domestic courts apply when interpreting other municipal legal instruments, documents or legislations. As such, a look at the rules governing the interpretation of treaties is necessary. In this regard, a good starting point seems to be Richard Gardiner’s celebrated book on treaty interpretation. Gardiner’s book is a general introduction to treaty interpretation though he did that through a detailed systematic analysis of the constituent elements of the Vienna rules. Through a contextual/theoretical approach and critical case analysis that developed out of the Convention, the author has presented an overall guide on how treaties are interpreted. The book is placed within the context of the debates of the International Law Commission and the Vienna Conference. The analysis of the application of the VCLT to both investment and the WTO treaties drew from this authority.

More importantly however, among all the provisions of the Vienna Convention, it is Article 31(3)(c) of the VCLT more than any other, which has elicited critical academic commentary. Campbell McLachlan’s article is celebrated and highly cited


85 Richard Gardiner, Treaty Interpretation (OUP 2010).

86 See generally, Campbell McLachlan ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, (ICLQ col.54, April 2005) 279-320, Daniel Rosentreter, Article 31(3)(c) of
as a critical discourse on the provisions of Article 31(3)(c) VCLT and the principle of Systemic Integration. His lucid arguments draw on the constituent norms in the article and the way these were applied by various tribunals and concluded with a pragmatic insight on the future application of systemic integration. He argued that Article 31(3)(c), as a reflection of the principle of systemic integration, ‘seeks to avert apparent conflict of norms, and to achieve instead, through interpretation, the harmonisation of rules of international law’. In chapter two on the framework of analysis and in the synthesis in chapter six, this is what the thesis has demonstrated.

Article 31(3)(c) VCLT and the Principle of Systemic Integration is the title of Merkouris book in which he provided a fresh, detailed and quite compelling understanding of this critical interpretive provision. Applying excerpts from Plato’s Allegory of the Cave as contained in the Republic, he undertook a deconstruction of the article using the Vienna rules and presented what should be ‘the place and function of Article 31(3)(c) within both the interpretative process of the VCLT and the system of international law as a whole’. In the three answers he reached in his conclusion, this thesis drew from all especially the third, that ‘Article 31(3)(c) is just one of the tools that allow the judge to start from a blurry vision of what a norm is, and reach judicial conviction of how the norm is to be understood in the light of other norms, …to go from uncertainty to judicial certainty’.


87 Campbell McLachlan, 318.
88 Panos Merkouris, (n86) 304.
89 Panos Merkouris.
The discussion of the principle of non-discrimination in the twin pillars of international economic law, the fields of trade and investment, benefitted from another later contribution. The book undertook an analysis of the non-discrimination principle through a critique of the way tribunals have applied the notion of regulatory purpose in order to see whether or not discrimination has occurred. The authors proposed a new meaning of regulatory purpose that can be used by the tribunals to develop applicable test for deciphering unlawful discrimination. The applicable test developed in the book used systematic and structured analysis to show how regulatory purpose should and should not be used in implementing non-discrimination standards.

While the analytical framework of the thesis uses legal convergence using the provisions of Article 31(3)(c) in chapter two, the conceptual framework uses sustainable development in chapter five. In coming to terms with the challenges facing the investment law regime today, an edited book with expert articles was added to the literature in this field. The book explored alternative shifts away from the long held view of investment law being mainly concerned with the protection of the economic interests of investors and their investment to recent developments in the field as being influenced by the UNCTAD framework for the reform of investment treaties. This is well suited within the context of the thesis in the sense that the articles mainly directed the paradigm shift to the concept of sustainable development. The perspectives ranged from a call for the reconciliation of investment protection and sustainable development, sustainable development initiatives in the negotiation of new generation IIAs and the lessons international investment law can learn from trade

law’s sustainable development provisions. It is Katharina Berner’s article that is most relevant to our discussion as it calls for an interpretative U-turn in reconciling investment protection and sustainable development. Berner argued that if faithfully applied, the provisions of Articles 31-33 VCLT could serve as a feasible substitute that will assist in the accommodation of investment protection and sustainable development in a treaty. Using the principle of systemic integration and the provisions of Article 31(3)(c) VCLT, the thesis will show the VCLT can be applied to employ sustainable development in the interpretation of not only investment but also trade treaties.

As Judge Weeramantry posit ‘the concept of sustainable development is one of those forward-looking legal concepts on which the future of the human family very heavily depends’.92 This observation is contained in the latest addition to the emerging literature in this area – the area of sustainable development. The collection of expert articles is to shift the discussion of the existing literature from decisions of courts and tribunals that are tilted to addressing sustainable development ‘within the ‘silo’ of one pillar of sustainable development, be it economic, environmental or human rights’ to one that balances and integrate all these areas through the activation of the New Delhi Principles of Sustainable Development.93 The book explored the interpretation and application of the international law principles on sustainable development by international and regional courts, tribunals and other dispute settlement bodies and highlighted how these judicial bodies applied the seven New Delhi Principles of Sustainable Development. All these were done to show how, globally, the justice system is spearheading the drive towards sustainable justice by ‘imagination and

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93 Marie-Claire Cordonier Segger and C.G.Weeramantry, 14.
intuition’ in rendering decisions in matters swarming with sustainable development
concerns. The book has five sections and thirty five articles and the thesis will, in
chapter six especially, draw from some of the analysis and cases considered in
showing that the concept of sustainable development can indeed serve as a veritable
intellectual/interpretative lens that can be applied by jurists not only in the
interpretation of treaties generally but also specifically in harmoniously interpreting
the principle of non-discrimination in the regimes of international economic law so as
to assist in achieving convergence in the two fields.
All the above body of works reviewed provides a glimpse into the relationship
between existing literature and this research. This thesis will be situated within the
above and other existing literature and contribute to the scholarship with its in-depth
study on the negative effects of the bifurcation of the regimes of international law,
which is necessitating the need for convergence between the regimes of international
investment law and that of international trade law. This, it is hoped, will be achieved
by showing how the concept of sustainable development can serve as an interpretative
lens for the interpretation of both investment and trade treaties, employing the
principle of non-discrimination in trade and investment law, as exist today.

1.4 Significance of the Research

This research seeks to provide suggestions for the convergence of the trade and
investment regimes through the process of a harmonious interpretative framework of
the principle of non-discrimination as embedded in national treatment, most-
favoured-nation and fair and equitable treatment in investment/trade under the
umbrella of international economic law. Sustainable development is the conceptual
framework the thesis suggests can be used to achieve this feat.
1.5 Contribution of the Research

The contribution of this research is in its innovative approach in explaining the possible harmonisation/convergence of international trade and international investment law as a single regime based on the underlying rationalities of the two regimes. This was done using the sustainable development negotiation, drafting and interpretation of treaties and treaty standards in investment/trade protection standards.

The research, at the end, provided legal clarification of all the pertinent norms involved and the way they operate in the proposed convergence framework. Due to the existing inconsistencies in the interpretation of the norms, a new interpretation of the existing normative content of the pertinent norms and the usefulness of such in the wider area of international economic law is also suggested.

The suggested framework will bring about cohesion between international trade and international investment using the concept of sustainable development. The probable impact of the development of cohesion among erstwhile conflicting regimes is in the way it will facilitate regulatory coherence, trade and investment liberalization, increased productivity and economic activity, reduction in no-tariff barriers and increased global income especially in the face of the ambitious US-EU Trans-Atlantic Trade and Investment Partnership (TTIP) and Brexit. This cohesion will also point the way forward for the possible development of a multilateral investment and trade agreement to substitute the WTO in the future. The investment horizon is already ripe for this novel approach as can be seen in the Trans-Pacific Partnership (TPP) agreement, the ongoing discussion in the US-EU Trans-Atlantic Trade and Investment
Agreement (TTIP), the OECD countries approaches and the recent Yukos arbitral award delivered based on the Energy Charter Treaty\textsuperscript{94}.

1.6 Structure of the Thesis

The thesis is divided into seven chapters. Chapter one, which is the introductory chapter, provides the general background of the research, identified the research problems and research questions the thesis set out to answer, the scope of the research and its significance and the methodology the thesis applies. The chapter further provides a detailed review of similar research studies in the area and other associated areas so as to situate the research within the context of similar literature analysed. In reviewing the literature, the chapter introduces both the analytical and conceptual framework of the thesis.

Chapter two examines the doctrine of legal convergence and the principle of systemic integration under the provisions of Article 31(3)(c) of the Vienna Convention of the Law of Treaties (VCLT). The chapter traces the origin and development of the doctrine and its application by international courts and tribunals. For the VCLT, the chapter identifies the elements of the Convention in order to assess its suitability in invoking sustainable development when interpreting investment/trade treaties and protection standards.

Chapters three and four cover the non-discrimination standards of treatment – NT, MFN and FET. Chapter three examines the principle of non-discrimination as covered by the protection standards in international investment law. The aim of the chapter is to establish a foundation for giving an insight into the way investment tribunals formulate, interpret and apply these treaty protection standards in investor-State

\textsuperscript{94} For a solid and informed understanding of the background and workings of the Energy Charter Treaty, see Peter D. Cameron, International Energy Investment Law, The Pursuit of Stability, (OUP 2010).
disputes. On the other hand, chapter four, devoted to the WTO, traces how the Panels and the Appellate Board use sustainable development in the application of the Vienna Convention in the interpretation of the WTO treaty and the NT and MFN non-discrimination protection standards. The WTO jurisprudence and decisions are reviewed so as to distill relevant elements in the interpretation of the standards so as to see if these can serve as learning curves for the investment regime.

Chapter five concerns the substantive application of the concept of sustainable development. The chapter first traces the evolution of sustainable development from its origin as an environmental law concept to its present acceptance as customary international law with emphasis on its invocation in the decisions of international courts and tribunals. The decisions from these courts provide investment treaty and trade tribunals with a veritable tool that will assist in understanding the problems beleaguering the coherent interpretation of the non-discrimination principle in trade and investment.

Chapter six of the thesis assembles the justifications for the convergence of the regimes of trade and investment. It assembles these justifications based on the lessons learnt from the discussions in chapters three, four and five. The chapter shows how sustainable development can be employed in the design of new BITs and provides examples from new BITs already designed in such way. The chapter further explains the need for convergence of the regimes due to the commonality of their legal terrains and shared history; this is in addition to other justifications for convergence of the regimes like movement of actors from one regime to the other rendering decisions, arbitrators reasoning in rendering their awards and the regimes jurisdictional overlap. The conclusion in the chapter is that there are several justifications for the
convergence of the regimes of trade and investment and the concept of sustainable
development remains at the forefront of this convergence thesis.

Chapter seven, which is the concluding chapter, provides a summary of the preceding
chapters and conclusions from the findings in the research. The chapter also points to
some recommendations for further research.
Chapter Two


2.0 Introduction

The framework chapter for analysis is designed to introduce two important tools, the doctrine of legal convergence and the Vienna Convention on the Law of Treaties. These two tools will be used as the framework of analysis in answering the research questions that were raised in chapter one.

2.1 The Doctrine of Legal Convergence

Though not exhaustively explored and developed academically, the doctrine of legal convergence has however achieved some level of appreciation and application in the combined jurisprudences of the ICJ, the ECJ, the WTO and NAFTA and even in other lesser-developed regional economic law instruments. The application of the principle in the mentioned bodies and organisations could provide a basis for the exploration of the idea of the ultimate harmonisation of the non-discrimination standards applicable to the fields of international trade law and international investment law.

As a theory, ‘convergence implies the increasing adoption by all governance systems throughout the world of a common set of institutions and practices, portrayed as an ideal rational/legal system…’

convergence is generally viewed as the coming together of two contending legal systems. Viewed in this context, the doctrine can serve as a veritable tool for a constructive harmonisation of legal principles, the reconciliation of inconsistency in interpretation, provision of greater clarity and certainty in the law and the shaping of future legal policy in both trade and investment regimes. In order to achieve all the above, the chapter will first trace the origin of the doctrine of legal convergence. Secondly, it will examine the evidence of the existence of the doctrine, and thirdly it will analyse the application of the doctrine by various judicial bodies and organisations. The fundamental reasoning reached in the chapter is the proposition that legal convergence is an effective mechanism that can be used in bringing together the two contending legal regimes of trade and investment using the sustainable development interpretation, for example using the non-discrimination principle as a common denominator.

The idea here, as will be shown in the subsequent chapters, is not one for the full convergence or seamless fusion of the two regimes as one. This may prove to be a futile exercise for several reasons. For example, in the last two decades, a considerable number of WTO members (prominently among developing states), have shown their aversion to the inclusion of foreign investment as an all-inclusive negotiating item at both the 1996 Singapore and 2003 Cancun ministerial meetings. This position is a pointer to the fact that building convergence entirely on complete borrowing from the WTO will necessarily fail, no matter how tempting that jurisprudence looks.

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Evidently, states do not seem to have the political appetite for a bold treaty reform needed to ensconce hard, systemic unification of the regimes of trade and investment.\(^4\) Even the Uruguay round that led to the formation of the WTO experienced some ideological horse-trading concerning the role of the States and of the markets.\(^5\) Furthermore, despite the strong bond between them, even the members of the Organisation for Economic Co-operation and Development (OECD) could not agree on a Multilateral Agreement on Investment.\(^6\)

2.2 An Overview of the Doctrine

As an answer to the increasing fragmentation of international law, the idea of convergence seems to be gaining increased attention. Tracing the origin of convergence has not been easy as different theses point to varying origins of the doctrine.

Academically, one favoured view has been that the idea of legal convergence originated from Cicero’s terse call for “no different laws in Athens and in Rome”\(^7\). Other arguments have been that the idea is traceable to Socrates but Antonios Platas maintained that the philosophical origin of the idea of legal convergence indeed goes back to both Socrates and Plato, and especially to Plato’s theory for the postulation of universals.\(^8\) Plato’s theory for the postulation of universals argued that it is in the nature of man to present and further accept the plural as singular, and this

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\(^7\) Cicero, *De Republica*, III, xxii, 33, as quoted by Antonios E. Platas (n.2).

\(^8\) Antonios E. Platas (n.2), see also Plato’s *Rep.* 596a wherein he stated: ‘We are in the habit of posting a single form for each plurality of things to which we give the same name’.
fundamentally mean that in substance, all leads to one as opposed to many. Thus, by a way of correlation to law, Plato’s theory of seeing the one as opposed to the many as something inherently built in human thinking and behavior can be used, by way of analogy, to lend credence to the argument against the continuance of divergent legal regimes or even divergent legal systems.

It is contended that though fragmentation has been accepted and prominently discussed as a major threat to international law, the idea of convergence has not been so explored and advanced. However, as fragmentation continues to pose a serious threat to the unity and coherence of international law, convergence is equally receiving continuous attention within international legal scholarship more than the opposing claims to independence and uniqueness of varying legal regimes.

Even though the idea of legal convergence has not been actively canvassed through rigorous scholarship, nevertheless, it is gaining currency in the current reassertion of the role of the International Court of Justice and in State practice, the workings and practices of the European Union, the International Monetary Fund (IMF), the North American Free Trade Agreement (NAFTA) and, most importantly, the World Trade Organisation (WTO) and many other, though lesser, regional economic law arrangements. It is then argued that the effectiveness of international law to assert itself as a generalist discipline lays in how it is able to manage divergent legal regimes by ensuring that these regimes take account of each other and address any existing

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9 Plato.
10 Mads Andenas and Eirik Bjorge, ‘Introduction: From Fragmentation to Convergence in International Law’ in A Farewell to Fragmentation: Reassertion and Convergence in International Law, Mads Andenas and Eirik Bjorge (eds), (CUP 2015) 1.
11 Mads Andenas and Eirik Bjorge, (n.10) 2.
12 Mads Andenas and Eirik Bjorge, (n.10) 2.
conflict. Convergence and or harmonisation of relevant, similar regimes seem the way to go at present.

The idea of legal convergence seem more relevant now than ever before due to the increasing, widespread and unique developments in the internationalisation and transnationalisation of law.\(^\text{13}\) A Treaty concluded by two States can be the subject of interpretation by an international arbitral panel and the WTO Panel or Appellate Body can hear a trade dispute, the decision rendered can resonate beyond the borders of the disputants and have effect on similar disputes before other tribunals or panels.

It is maintained that even within the same legal regime, any expression of conflicting legal views usually lead to the refinement and restatement of the correct position of the law based on sounder and more refined principle/argument, whilst dispensing with confusing, irrational and less coherent ones.\(^\text{14}\) The idea of legal convergence is one whose movement is not plainly referenced from the understanding of the jurists any more than it is indebted to the external construct of international law but rather that of logic.\(^\text{15}\)

The idea of common sense logic is as convincing in its currency as that of law. Practically, the logic behind legal doctrines is to encourage the determination of overlapping of legal regimes thereby giving endorsement for the refinement and convergence of these regimes. This clearly shows that logic stands as an authoritative beginning that guide the planning of law and legal convergence. This idea clearly

\(^{15}\) Alexander W. Street SC.
supports the argument for the regimes of international trade and international investment law to go back to their root and converge.

It has been argued that the predominant authority behind the push for legal convergence has been the quest for existence and interdependent economic costs and benefits. These economic thoughts are the guiding light behind the unification of the laws of international trade and international investment law. As such, this support the theory that there are identical benefits that flow from harmonisation of divergent international economic laws so as to facilitate trade and investment.

International law has been at the forefront in the quest for legal convergence. Varying fields of public international law are experiencing tensions and conflicts as they strive to establish a balance of the competing stakeholder interests in these fields. The relevant positions of the State, foreign traders and foreign investors readily come to mind and this has strengthened the desirability for common or uniform interpretation of major international instruments. Thus international law set out to be the fundamental driver of the idea of legal convergence by the dissipation of common standards and the resultant application of uniform interpretation of applicable laws.

At the world stage, and before various dispute settlement bodies, both international trade law and international investment law on the one hand and public international law seem to overlap. Each of these fields also has played important role in very many other areas of law. For example in the field of international trade, the regime has profound impact in such areas like intellectual property law, taxation, derivatives,

16 Alexander W. Street SC (n.14).
investment law, competition law and anti-trust law. The same apply to international investment law. It is emphasized that all these legal areas overlap and interact on the world stage. As such, it is the idea of legal convergence that all these fields need to fuse together based on their relevance to one another, this is with a view to having uniform laws that will promote free trade, protect investment and integrate both regimes for increased productivity.

2.3 Why Legal Convergence? The Fragmentation and Divergence of International Law

A clear, in-depth and focused application of the concept of legal convergence cannot be fully appreciated without going back to what necessitated the development of the concept. It is arguable that the continuous fragmentation of international law through the emergence of autonomous and specialized regimes has continued to pose a threat to international law itself as a legal system.

Over half a century ago, Wilfred Jenks provided the context within which fragmentation developed. The first phenomenon was the evident lack of established legislative body in the world that Jenks explained thus:

“…law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.”


Jenks argument remains true today just like it was fifty years ago. The second phenomenon, linked directly to the law, was stated thus:

“One of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision.” 19

The above can be attested to not only by the number of multilateral treaties concluded by States but also by the many other formal regulatory regimes. Public international law is so fragmented by the emergence of specialized, autonomous regimes in wide-ranging fields like “human rights law”, “environmental law”, “trade law” and even “investment law”, each with its own general body of rules, institutions and some even with their own internal dispute settlement mechanisms. Most of these specialized and relatively autonomous rules or regimes work in isolation of other contiguous regimes and institutions within the larger body of the principles and practices of international law. 20 The resultant effects of these are the gradual erosion of the principles of general international law, inconsistency in interpretation, conflicts between rules, conflicting jurisprudence, forum shopping, incoherence, divergent institutional practices and eroding legal security.

Other publicists see the issue as merely a technical one, which is a result of the increasing legal activity across disciplines, and are convinced the problem can be resolved simply by cooperation.21 Practically, this assumption is over simplifying the issue and will not address the problem. As the International Law Commission

20 Martti Koskenniemi, (n.17) 11.
reasoned in its critique of fragmentation, the development of ‘self-contained regimes’ is posing serious problems to the coherence in international law.\textsuperscript{22} It seems to be the case that these specialized, self-contained regimes did not come into existence by accident rather as an answer to emerging technical and functional requirements.\textsuperscript{23} An example of this will show that “Trade law”, for example, evolves as a mechanism to manage international economic relations.\textsuperscript{24} And as such, it becomes imperative to resort to the application of certain developed techniques in the resolution of tension and conflicts in these regimes – in this case, trade and investment regimes.

The end of the Second World War saw states agreeing to the General Agreement on Tariffs and Trade 1947 in order to liberalize barriers to foreign trade and also to treaty protections for foreign investments. Despite their coming into existence around the same time and their shared attributes, these two regimes of international economic law have developed distinctly, with their differences sometimes seen to outweigh their similarities.\textsuperscript{25} For example, while the WTO uses the default state-to-state dispute settlement system, the investment regime augment that by allowing foreign investors of a signatory home state the legal standing to challenge a breach of relevant aspects of the treaty in question. On the other hand also, there seems to be a fundamental sociological divide among actors and or practitioners spread throughout both fields. While the Appellate Body’s objective application of the WTO treaty members’ agreement helped in no small measure in the coherence and integrity of the trade law jurisprudence, its equivalent, that could have avouch for a correct interpretation of

\begin{footnotesize}
\textsuperscript{22} As explained by Koskenniemi, see Martti Koskenniemi, (n.17) 14.
\textsuperscript{23} Martti Koskenniemi, (n.17) 14.
\textsuperscript{24} Martti Koskenniemi, (n.17) 14.
\textsuperscript{25} Jurgen Kurtz, (n.4) 1.
\end{footnotesize}
investment treaties, is almost completely absent in the investor-state arbitration system.\textsuperscript{26}

As is central to this argument, the divergence between these two contending systems has led to deeply fractured and disturbing pathologies, with poor interpretative methods in investment arbitration, which in turn has led to the inconsistencies in arbitral awards. Further to these disturbing pathologies, Jurgen Kurtz moved the narrative by canvassing a new opinion that this problem of inconsistency in methodology and results stand different from that of incoherence.\textsuperscript{27}

Jurgen Kurtz, in postulating what he called ‘five convergence factors’, argued that the two regimes could not continue in the present divergent ways despite the gaping disconnection in their treaty texts, jurisprudence, methodologies and stakeholder perception.\textsuperscript{28} These convergence factors\textsuperscript{29} are worth reproducing and explained here to show how the argument for harmonisation of the two regimes is gaining steam, and most importantly to set the phase and show how this thesis will canvass and forge a different pathway from Jürgen’s position.

First, the two systems evidently share common legal terrain. Trade and investment share common legal terrain despite the seeming airtight separation of the two systems. Foreign investment in the services sector is regulated extensively within the WTO against the vital role of that sector as a proportion of global foreign direct investment (FDI) flows. The two regimes incorporate a number of shared micro norms notably

\textsuperscript{26} Jurgen Kurtz, (n.4) 5.
\textsuperscript{27} Jurgen Kurtz (n.4) 6.
\textsuperscript{28} Jurgen Kurtz (n.4) 11.
\textsuperscript{29} Jurgen Kurtz (n.4) 10 – 20 for an exhaustive analysis of these factors.
their restrictions against state discrimination in the form of both national and most-favoured-nation treatment. Both trade and investment regimes inherently assure competitive opportunity between foreign and domestic goods, services and investors. A more interesting dimension this first convergence factor is taking is the way States are becoming more engaged in managing likely conflicts between investment treaty norms and WTO law. In fact, they have moved further to review their commitments by inserting flexibilities for State regulation in relation to foreign investors and their investments, and, interestingly, they do this by drawing on the WTO model to guide their reform efforts. In many modern FTA’s, full WTO exceptions are simply incorporated into investment chapters by reference.  

Second is the jurisdictional connection between the two regimes. There are times a measure can fall within the jurisdictional competence of both regimes and even adjudicated concurrently. This jurisdictional interrelationship is evident in the Softwood Lumber dispute between the United States and Canada, which triggered both WTO and NAFTA claims. The complicated ‘soft drinks’ dispute between Mexico and the United States had triggered national treatment claims both by the US as a State party in the WTO and by a scope of US investors under NAFTA Chapter 11. It should be noted that the fact that these proceedings have been completed does not stop the possibility of overlapping litigation or parallel proceedings.

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30 Jurgen Kurtz (n.4) 12, see also Australia-ASEAN-New Zealand Free Trade Agreement, 27 February 2009, Ch.15, Art.1 (2).
31 Softwood Lumber Case (United States v. Canada).
33 Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico, Award (ICSID, 12 November 2007); Corn Products International, Inc. v. Mexico, Decision on Responsibility (ICSID, 15 January 2008); Cargill, Inc. v. United Mexican States, Award (ICSID Case No. ARB (AF)/05/2, 18 September 2009).
Third, the likelihood of the above parallel proceedings is simply informed by both economic logic and reality with clear example in the inter-dependence of cross-border trade and foreign investment.

The fourth is the cross-fertilization of the jurisprudence of the two regimes especially their dispute settlement systems. For over two decades now, the two regimes have advanced dispute settlement systems with adjudicators now drawing on jurisprudence from one system when constructing readings on treaty obligations in the other. For example, it is evident the problematic transplant on the use of WTO law in investment arbitration – with arbitrators borrowing substantially from WTO jurisprudence especially when defining readings on national treatment in investment law.\(^{34}\) Though the growing phenomenon of cross-fertilization of method and substance flow largely from the more established WTO law to investor-state arbitration, the WTO Appellate Board has also cited an investor-state arbitral award.\(^{35}\)

The fifth convergence factor explored by Jurgen Kurtz is the movement of actors across the two fields. The more settled jurisprudence of the WTO law is presently being diffused to elements of investment treaty law by the deliberate choice of specific and identifiable judges. A good example is the Continental Award where the award draws extensively from the WTO law, not only that, the fact that even the president of the tribunal was a WTO Appellate Board member.\(^{36}\) The combined effect

\(^{34}\) Occidental Exploration & Production Co. v. Ecuador, Final Award (UNCITRAL, 1 July 2004), paras 174-176, Methanex Corp. v. US, Final Award, Pt. IV, Ch.B, paras 28-30.


\(^{36}\) Continental Casualty Co. v. Argentine Republic, Award (ICSID Case No. ARB/03/9, 5 September 2008).
of these two factors in the Continental Award is sure to be reflected in many future arbitral awards.

Even though the argument for convergence advocated by Jürgen’s work rhyme with this thesis, his solution for the future engagement between the fields of international trade and international investment law was to create research models that he termed the double helix metaphor. This thesis takes a different position and attempt to fill in the gaps as shown in the subsequent chapters. His model fell short of engaging the most fundamental convergent point in international economic law as the basis of analysis, which is the principle of non-discrimination. Though he agreed with the shared history between the two field, he neglected, and in certain areas even completely refused the economic rationale that binds them together, hence falling short of seeing reason in the idea of firm convergence or harmonisation of the principles of the two regimes to be one, and most importantly sustainable development was never his thesis. This thesis is using the principle of non-discrimination as a convergent point because economic law is centrally about non-discrimination. The principle of non-discrimination maintains its superiority over any other standard and the principle’s permeability throughout all other standards has never been in contention.

2.4 Functions and Application of Legal Convergence by International Judicial Bodies and Organisations

In different texts, legal convergence and harmonisation have often been used interchangeably. The increased fragmentation of international law evident in the diversity of legal regimes and specialist fields solidify the argument for coherence and
integration of relevant regimes. Convergence functions primarily to deal with fragmentation of international law generally, and its future seems positive in view of the reassertion of the doctrine by the International Court of Justice. The reassertion of the doctrine has gone a long way in ensuring that not only the methodology but also the principles of international law are changing with tacit support of the ICJ, treaty bodies and other relevant tribunals.

Further to the reassertion of the doctrine by the ICJ, convergence is also gaining momentum in the way State practice is changing with governments’ increasing support using both national and international medium. The jurisprudence of the highest domestic courts are becoming more adaptive of and giving effect to international law.

a. The International Court of Justice (ICJ)

According to Judge Christopher Greenwood, it was the proliferation of various courts and tribunals that animated the fear of the fragmentation of international law. The ICJ has been supplemented by many other tribunals like the ITLOS, ad hoc criminal tribunals or courts for Rwanda, the former Yugoslavia, Sierra Leone, Cambodia, Lebanon, the DSU of the WTO and other regional human rights tribunals, all busy with settling various cases or arbitrations between States or between States and investors. The above courts and tribunals, established under no any judicial or quasi-judicial hierarchy, have the chance of interpreting and applying the rules of international law in their decisions in contradiction of the rules and jurisprudence of international law in their decisions in contradiction of the rules and jurisprudence of

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37 Mads Andenas and Eirik Bjorge, (n.10) 12.
38 Mads Andenas and Eirik Bjorge, (n.10) 3. The position of the ICJ as the principal judicial organ of the United Nations will further give lots of credibility to the doctrine.
39 Mads Andenas and Eirik Bjorge (n.10) 2
40 Mads Andenas and Eirik Bjorge (n.10) 2.
41 Christopher Greenwood, ‘Unity and Diversity in International Law’, in Mads Andenas and Eirik Bjorge (n.10) 46.
many other courts and tribunals, making fragmentation of international law a more serious concern.\textsuperscript{42}

The progressive move towards convergence through the cross-fertilisation of jurisprudence has made the above fears to wither away based on the consistency and coherence in the approach of the ICJ and other arbitral tribunals in their judgments and awards and the extensive reference of these judicial and quasi-judicial bodies to the jurisprudence of many other relevant courts and tribunals.\textsuperscript{43} In the \textit{Bay of Bengal}\textsuperscript{44} case, the International Tribunal on the Law of the Sea, ITLOS, based its 2012 judgment on the compelling jurisprudence of the International Court of Justice by drawing heavily from it. A more convincing argument for convergence related to the Bay of Bengal case was when the International Court of Justice, while deciding the case of \textit{Nicaragua v. Columbia}\textsuperscript{45} in turn also relied on the reasoning of the tribunal in Bay of Bengal thereby enhancing the development of a coherent body of law and practice.\textsuperscript{46}

In the recent and well known \textit{Diallo}\textsuperscript{47} case, the International Court of Justice was, among others, to determine the amount of compensation to be given to the Republic of Guinea by the Democratic Republic of the Congo over the latter’s treatment of a Guinean national. The court, in a judgment that points to the increasing convergence

\textsuperscript{42} Christopher Greenwood (n.41).
\textsuperscript{43} Christopher Greenwood (n.41) 47.
\textsuperscript{44} Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), ICJ, Judgment of 14 March 2012.
\textsuperscript{45} Territorial and Maritime Dispute (Nicaragua v. Colombia), I.C.J Reports 2012.
\textsuperscript{46} Christopher Greenwood (n.41) 47.
\textsuperscript{47} Ahmadu Sadio Diallo (Guinea v. the Democratic Republic of Congo), Compensation Judgment, I.C.J Reports 2012, 324.
of international law, drew both from the jurisprudence and experience of the Iran-U.S Claims Tribunal and other human rights tribunals.\textsuperscript{48}

What is seen in the above examples did not only represent convergence or harmonisation of contending legal regimes per se but more of the assertion of the drive towards the unity of international law from within. More of this will be seen in the following discussion of other courts and tribunals. Most definitely the convergence thesis this research is mainly focused on is that between the trade and investment disciplines in the quest for coherence in the interpretation of the treaties applicable in the two regimes. Chapters five and six of the thesis will bring out the position clearly. Coherence, certainty and consistency from within are necessary corollaries to convergence between contending regimes generally and among relevant standards applicable to the regimes.

\textbf{b. The World Trade Organisation (WTO)}

Among all international economic law regimes, the WTO seems to be the most advanced in the promotion of legal convergence of regimes especially in the areas of subsidies and countervailing measures by offering liberal economic principles to which all the WTO Members must adhere.\textsuperscript{49} From the construction of the WTO Agreement, it is evident that all the rules of the organisation are applicable to all the

\textsuperscript{48} Though a relatively short judgment, however, it did invoked the practice of the European Court of Human Rights, the UN Human Rights Committee, ITLOS, the African Commission on Human and People’s Rights, the UN Compensation Commission, the Inter-American Court of Human Rights, the Eritrea-Ethiopia Claims Commission, the Iran-US Claims Tribunal and the award in the \textit{Lusitania} claims.

\textsuperscript{49} Antonios E. Platsas (n.2) 7.
Members with no room for reservation. This is also another form of convergence from within.

As Asif Qureshi and Andreas Zeigler showed, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provided the platform for legal convergence among all WTO members in three different ways: first, for a WTO country to fulfill its undertaken obligations under the TRIPS, all its national legislation has to be brought into effect; secondly each WTO member is required to provide the same level of protection to nationals of other WTO member countries as it would provide its own nationals in relation to intellectual property rights and thirdly, a WTO member is to provide the most-favoured-nation treatment to all other WTO members in relation to the same matter.

The TRIPS Agreement was reached under the WTO as a boundary between the international trade law and the coverage of intellectual property rights. The TRIPS Agreement is so extensive covering such aspects of intellectual property law such as copyright, trademarks, geographical indications, industrial designs, patents, undisclosed information matters and anti-competitive licences in contractual licences. The TRIPS Agreement under the WTO framework, for it to operate in any domestic laws, necessarily require extensive legal amendments, thereby changing the
nature of international economic law.\textsuperscript{60} The WTO also contain a highly developed system for the implementation of the TRIPS Agreement.\textsuperscript{61}

The WTO is seen as a compelling example of how legal economic systems promote legal internationalism and convergence of different and differing legal systems.\textsuperscript{62} Its multilateral nature, the investment chapter therein, extensive jurisprudence and sophisticated dispute settlement mechanism that has its in-built appeal system have made the WTO to serve as a beacon of hope for the convergence of otherwise divergent legal regimes. The International Monetary Fund is another important sector of international economic law that promotes internationalism and convergence on quite a large scale.

As will be explained in the next sub-topic, the development of regional economic blocks has had a profound impact on the legal convergence progressively seen in the entire trade law sphere.

\textbf{c. The European Community/European Union}

The European Union is an international organisation whose principal business is the bringing together of some legal areas of the Union – convergence of legal systems. As an international economic organisation, the EU is “rooted in the rule of law under the auspices of the European Court of Justice”.\textsuperscript{63} It is evident that all the member States of the Union must have satisfied all the relevant requirements before accession and the most important was aligning their domestic laws and regulations in all respective

\textsuperscript{60} Antonios E. Platsas (n.2) 7.  
\textsuperscript{61} Asif H. Qureshi & Andreas R. Zeigler (n.51) 339.  
\textsuperscript{62} Antonios E. Platsas (n.2) 8.  
\textsuperscript{63} Ole Spiermann, (n.13) 785, 787.
areas, with that of the Union. It is noted, however, that any member State can negotiate an opt-out following a laid down procedure, a good example can be seen in how the United Kingdom and the Republic of Denmark negotiated an opt-out from the single currency of the Union.

The EU originally started as an economic law experiment before transforming into a successful political economic union, which shows convergent economic law has triumphed. The economic integration of the countries that today make the European Union effectively commenced with the 1989 liberation of capital flow throughout all member States. The monetary union achieved in 1992 finally paved the way for the single currency that materialized in 1999.

It would have sufficed to exemplify the unity and convergence of international law or specifically international economic law within the EU by reference to the EC Directives, especially EC Directive 93/13/EEC and EC Directive 99/44/EC. However, it seems there is a more compelling argument for convergence of international economic law within the EU than what the EC Directives covered. Furthermore, the ongoing negotiation between the EU and the US on the Trans-Atlantic Trade and Investment Partnership TTIP, though still in its fluid form, is a firm testament to the

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64 Presently, the EU comprises of 28 Member States (As this moment the U.K is discussing its exit as a fallout of the Brexit) and each of these must have satisfied all the legal requirements covered in thirty-five legal chapters before accession. For all the chapters, see http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#3, accessed 20 March 2017.
65 Antonios E. Platsas (n.2) 4.
66 See Tony Cleaver, Understanding the World Economy (3d ed. 2007) 111.
67 It is noted that the EC Directives have been the subject of attack by some academics as, contrary to our perspective, producing divergence rather than convergence, for example, EC Directive 93/13/EEC.
convergence-taking place not only within the EU but also in international economic law generally. 68

Many other regional economic arrangements are encouraging convergence of economic laws just like the European Union has done, though to a lesser extent than the older, more developed harmonisation coming from the EU. Good examples can be seen in the North American Free Trade Agreement (NAFTA), the Economic Community of West African States (ECOWAS), the Association of South East Asian States (ASEAN), the African Union (AU) and the Commonwealth of Independent States. The success of the EU’s convergence of its economic law regimes and its overall integration led these other regional blocks to aspire to converge their economic laws. 69

Having seen the development and application of the doctrine of legal convergence in varying fields of international law and its efficacy in the convergence of two systems both within and without, the question now will be how can sustainable development be applied as an interpretive tool with the aim of bringing the regimes of trade and investment together. The Vienna Convention popularly referred to, as the Canon of treaty interpretation, will be used to make the case that the Convention has enough in its provisions that will allow for its application in the convergence of the two legal regimes.

68 The TTIP/TTP represent examples of convergence developing in the area, though they are also seen as reactionary regimes developed by these countries currently facing a lot of debate due to varying factors facing these seeming partners. 
69 Tony Clever, (n.66) 121.
2.5 The Vienna Convention on the Law of Treaties – A Deconstruction

Any discussion involving the understanding and application of the VCLT ought to logically start from its text and a comprehensive discussion of the ordinary meaning of the wordings of that text. These will be done with a view to seeing whether the VCLT can provide the much-needed answer to interpretation of non-discrimination standards in investment treaties. Even before the start of the discussion of the text of the VCLT and a review of the meaning of the words used in its formulation, it is tempting to go back in time and locate the root of this canon of treaty interpretation. The excruciating argument developing over the suitability of the use of the VCLT by investment tribunals in the interpretation of the standards of treatment made it a compelling reason to reach far back into history to posit its relevance and possible effectiveness as an interpretive tool. The Convention itself refrain from emphatically siding with any of the ideological arguments on the interpretation of treaties, though it is resolute in its anchoring on the objective of the treaty rather than on the intention of the parties.  

Historically, the works of two foremost intellectuals have always served as good reference points in this regard. Both Hugo Grotius and Emmerich de Vettel’s seminal works serve as important roots to the provisions of Article 31(3) (c) VCLT and formed the foundation on which existing debate on the rules applicable to Article 31(3) (c) are based. Hugo Grotius made reference to the choice of the law of nations as a rule of interpretation when he stated that:

71 Panos Merkouris, Article 31(3) (c) VCLT and the Principle of Systemic Integration, Normative Shadows in Plato’s Case, (Brill Nijhoff 2015) 16.
72 Hugo Grotius (Clement Barksdale tr. and annot.), De jure belli ac pacis (The Illustrious Hugo Grotius of the Law of Warre and Peace with Annotations. III Parts and Memorials of the Author’s Life
I shall not, however, admit the rule…that the contracts of kings and peoples ought to be interpreted according to Roman law so far as possible, unless it is apparent that among certain peoples the body of civil law has been received as the law of nations in respect to the matters which concern the law of nations.

Emmerich de Vattel, on the other hand, while providing an antidote to any speech that is given in an unclear and ambiguous manner, stated in his famous treatise *The Law of Nations* that:

> We ought to interpret his obscure or vague expressions, in such a manner, that they may agree with those terms that are clear and without ambiguity, which he has used elsewhere, either in the same treaty, or in some other of the like kind.

The above is simply a summary of the historical reach of the VCLT. The relevance of the Vienna rules to the interpretative approach suggested in chapter six makes it necessary to assemble the entire elements of Article 31 of the Vienna Convention on the general rule of interpretation here. This is to be followed by some detailed discussions of the most fundamental aspects. The elements are reproduced here:

**Article 31 – General Rule of Interpretation**

1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3) There shall be taken into account, together with the context:

a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) Any relevant rules of international law applicable in relations between the parties.

Article 31(3) (c), which is a customary international law provision\textsuperscript{74}, now codifies what is referred to as the \emph{principle of systemic integration}.

A good first step is a deconstruction of the entire elements constituting Article 31VCLT before narrowing down on Article 31(3)(c), which is the main article that will be the focus of application under the analysis in chapter six.

Even though this is a deconstruction of the elements constituting Article 31 only, it is unarguable that in the face of any dispute requiring engaging the rules, it is the entire Vienna rules that are applied in the interpretation of the treaty relevant to the dispute not portions of it.\textsuperscript{75} The content of Article 31 is referred to in the singular, ‘general


rule’ in order to guard against applying particular rules of treaty interpretation separate from each other. Having established the above caveat, attention is now turned to the constituent elements of the Article 31(1) in our attempt to unravel the real meaning of terms before proceeding to Article 31 (3) (c) which is the main article that will be applied in this framework and in the synthesis coming up in chapter six. As such, the elements in 31 (1), ‘a treaty’, ‘good faith’, ‘ordinary meaning of terms’, ‘context’ and ‘object and purpose’, will be briefly discussed here.

1. *A ‘Treaty’* – In interpreting the term ‘treaty’, recourse must be had to its ‘special’ meaning as adduced to by the provisions of the Vienna Convention itself in its definition provision. Article 2 VCLT states:

   ‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation…

The constituent parts of the definition are international agreements, between States and governed by international law. The need to give a special meaning to the term ‘treaty’, if the parties so intend, is giving heed to the requirements of the provisions of Article 31(4). An important point to be made here is that though it is generally agreed that Articles 31-33 are customary international law and the definition of treaties covered by the VCLT are also within the customary law definition of a treaty, the customary law definition is more expansive than that assumed under the

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76 Richard Gardiner, 142.
Thus the meaning of treaty under customary law will necessarily involve agreements regulated by international law and involve states and international organisations. As such, Gardiner argued that where a tribunal is convinced that an instrument qualifies as a treaty, nothing stops it from applying the customary rules of treaty interpretation laid down under the Vienna rules. Of course the qualification becomes necessary to show that not all instruments that nation-states agreed possess the attributes of treaties.

In considering the general rule, the context, interpretation, position, and effect of the treaty relative to its terms become important issues to dissect. To do these, the general rule started by pointing to a distinction between the treaty and its terms as a way of showing the way in which the word ‘treaty’ is generally used there. From the general rule, it is discernable that in the interpretation of any treaty, the exercise necessarily begins with the ordinary meaning of the terms of the treaty in question, such meaning being controlled by the context in which the terms appeared, and the object and purpose of the treaty usually help to clarify the technique of treaty interpretation. However, reference to the ‘terms of the treaty’ itself creates doubt as to what terms are in contention here. Is the reference to the terms of the treaty directed at what the parties to the treaty have agreed or to the content of the treaty itself? A reading of the context of the treaty will point to the latter. From the context, the terms refer to the provisions of the treaty itself not the agreement reached by the parties. This is a

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77 Richard Gardiner, (n.75) 143.
78 Richard Gardiner, (n.75) 143.
79 Richard Gardiner, (n.75) 144.
80 This formed part of the ILC’s debate on ‘whether interpretation should be by reference to the text itself or to the intention of the parties’, see Mr. de Luna [1964] Yearbook of the ILC, vol. 1, 276, para. 16.
81 Richard Gardiner, (n.75) 144.
point to come back to in the analysis in chapter five because of its implication on the interpretation of one treaty relative to the others.

It is clear that the ILC’s work on the interpretation of treaties points to the fact that though it is the treaty text that evidence the agreement of the parties, the whole of the treaty must be read and due regard given to its object and purpose, it is not enough to simply undertake an inquiry into the ordinary meaning of the words in controversy. However, in the interpretation of treaty, though outstanding problems remain when dealing with the interpretation of the provisions of the treaty in question, but the most difficult issue has been the effect of lack of silence on a treaty. The importance of absent terms or silence cannot be over-emphasised, as it is a constant in the search of the ordinary meaning of a term in treaty interpretation. What assumption will be made where a treaty has not clearly provided for terms governing a particular matter will necessarily depend on the nature of the treaty itself and the effect of the constituent elements of the Vienna rules on that particular treaty. Another room for assumption is where the treaty in question has a select list of items covered by the treaty, does it necessarily means anything not covered or that cannot come within the contemplation of the list is out? Can the principle in *ejusdem generis* be of any significance here? Due its flexibility, it maybe possible that the *ejusdem generis* principle may allow for the accommodation of such items that were left out of the list.

As difficult as the above assumptions seem, a more complicated issue seems to be where the treaty in question has given permission for a particular thing but leaves it

82 Importantly see ILC 2016 Report, Ch. VI, A/71/10, on subsequent agreements and subsequent practice in relation to the interpretation of treaties wherein the report considers both evolutive and systemic methods of interpretation of treaties, available online at legal.un.org/ilc/reports/2016, see also Richard Gardiner, (n.75) 145.
uncertain if an arbitrator has the discretion to conclude that other matters similar to
the ones permitted will be subject to future treaty or are simply not covered by the
treaty in question and as such the parties are free to progress as they desire. Gardiner
concluded here that everything would have to go back to the nature of the treaty
itself. 83

Having seen how the term treaty is constructed in Article 31(1), it is now important to
look at how good faith is constructed under the same sub-section and relative to the
treaty. The term good faith is generally seen as a limiting factor indicating the extent
of the application of terms into treaty. 84

2. ‘Good Faith’ – The principle of good faith is, without doubt, fundamental to both
contractual agreements and treaties. This can be seen in the way courts and
tribunals made direct reference to it in their decisions and awards. The views
expressed in various judicial decisions and awards varied depending on the legal
system under which they are expressed. 85 Modern interpretation rules are
basically an expansion of the idea that all agreements must be interpreted in good
faith. 86 Nonetheless, it has not been easy to identify any specific role or
application of the principle of good faith, a problem that may be associated with
its subjective nature. Furthermore, despite its appearance as a moral principle, its
application has generated a lot of inconsistent views; eliciting doubt about the

83 Richard Gardiner, (n.75) 145-146.
84 Richard Gardiner, (n.75) 147,
85 See generally R Zimmerman and S Whittaker, Good Faith in European Contract Law (CUP,
Cambridge 2000).
86 Hersch Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the
Interpretation of Treaties’, (1949) XXVI BYBIL 48 at 56.
very essence of the concept and the uncertainty of its application. Further to this subjective nature is also the difficulty in justifying whether an arbitral tribunal has reached its interpretation of a treaty in bad faith. Arbitral awards and judgments, no doubt, have also referred to good faith in validating references to discovering the intention of the parties.

The principle of good faith, as expressed at the beginning of the rules, differs from other elements of the Vienna rules because it applies to the entire treaty rather than to individual words or phrases as contained within the particular treaty under consideration. So “…the content of the concept of good faith is more of a contextual nature than the concept itself [is] understood in the abstract sense”. Despite the fact that determining the precise content of the principle of good faith remains elusive, it does contain the principle of ‘effectiveness’ a principle that is readily applicable to particular terms as they appear in a treaty. This principle of effectiveness is depicted in the Latin maxim _ut res magis valeat quam pereat_, which support an interpretation that fulfills the aims of the treaty being interpreted through advancing the objects and purpose of the treaty.

Alluring to its role as a general rule of treaty interpretation, the ILC, in its commentary of the draft articles, posits that the entire maxim is encapsulated in the provisions of article 31(1). The ILC state thus:

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89 The _Ut res_ rule, another part of the principle of effectiveness is that it favours a treaty interpretation that will fulfill the aims of the treaty under consideration.
When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.  

In the *Taxes on Alcoholic Beverages* case, the Appellate Body of the WTO clearly recognised the application of the *ut res* as an element of the general rule of treaty interpretation wherein it states:

> A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness (*ut res magis valeat quam pereat*).  

The position regarding the application of the principle of effectiveness has not only been reiterated in several other decisions of the Appellate Body of the WTO asking treaty interpreters to ensure that all the terms of a treaty are given meaning and effect as required, but that the principle is also one that is or can be extended to other related treaties. 

The position, relevance and overall value of the application of the principle of good faith in treaty interpretation remain problematic or at best cagey, this despite the doctrine being accepted as an integral part of virtually all legal systems. Just like the way equity operates to counter the hardship of the common law, the principle of good

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90 See the Commentary on draft articles, [1966] *Yearbook of the ILC*, vol II, 219, para. 6.  
faith has developed to ameliorate any undesirable situations created by the strict application of the letter and spirit of the law. However, there would not have been any problem if this has been the only way the principle is viewed, but its obscure character has opened it up to criticism from various sources, least being the fact that its existence in the law is to help in finding a biased interpretation to intricate issues.  

The intrinsic subjectivity of the principle of good faith has been used to attack its significance. However, other scholars like Sornarajah argued that the principle is so widely used in law that its subjective nature is not enough ground to use and destroy its application or significance and its continuous use is a testimony to that position. As a principle that suggests normative standard, good faith can light the path in the conflict-ridden field of international investment law. As stated in chapter one under the statement of the problem, international investment arbitration is at a critical point in its development. The field is in a crisis ranging from inconsistent awards relating to the same dispute, inconsistent interpretation of investment protection standards or treaty clauses.

Various theses or theories have been advanced for these legitimacy crises in investment arbitration. Two theories that have bearing on the analysis in chapter five of this thesis are centred on the arbitrators and the role they play especially in investment treaty arbitration. The first criticism has been arbitrators’ seeming negation of the intention of the parties via expansionary interpretations aimed at advancing political or economic goals they did not agree on. The second criticism

95 M. Sornarajah.
96 M. Sornarajah.
has to do with the selection of the arbitrators from a narrow pool of professionals\textsuperscript{98} who apply their expertise and swing the law in favour of investment protection and big business rather than the overall interest of the states’ development or otherwise.\textsuperscript{99}

Further to the role arbitrators’ play, could the principle of good faith then serve as a rallying point to correct inconsistency in awards? This point will be dwelled on in the analysis in chapter six. Following the general rule on treaty interpretation, the next element worth assembling here is the Ordinary Meaning to be given to the terms of the treaty.

3. ‘\textit{Ordinary Meaning}’ – ‘the ordinary meaning to be given to the terms of the treaty’, necessarily mean that the element – \textit{ordinary meaning} – must not be read in isolation when applying the general rule. In other words, the ordinary meaning must be directly linked with the context and read with the other elements of the Vienna rules. As a starting point, anyone looking at the wordings of a treaty will first attempt to give the words the usual or at least one of the usual meanings attributed to them. It is noted, however, as Gardiner opined, with the accompanying caution that “the word ‘meaning’ itself, has at least sixteen different meanings”.\textsuperscript{100}


\textsuperscript{100} Richard Gardiner (n 75), quoting G Schwarzenberger, ‘Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties’ (1968) 9 Va J Int’ L 1 at 13 in (n 74) 161.
Looking at the content of the general rule under Art.31, it can be deduced that the ordinary meaning referred to is definitely that of the ‘terms’. It is the terms of the treaty being interpreted whose ordinary meaning the interpreter seeks to understand and apply. How does the interpreter know what are the terms and sift them out from the treaty is an issue that has been debated and different prepositions advanced. As such, the first port of call in what makes up the terms in the language of the treaty is to look at not only the wordings but also the content of the treaty as a representation of the agreement of the parties.101

The written agreement of the parties needs to be understood by the interpreter if justice is to be done in sifting out the terms from such agreement. To do this then, consideration must necessarily be given to the definition of the individual words that made up the terms. These words need to be understood and analysed before any meaningful attempt can be made in determining the real content of the parties’ agreement (treaty). In other words, the aggregate result in the Vienna Convention to the allusion to ‘terms’ in their context is that the word is concerned with the ordinary meaning of words and phrases rather than bargains or packages of stipulations contained therein.102

Now, to what extent does getting the ‘ordinary meaning’ of a term important in treaty interpretation? This question is relevant considering the minimal significance tribunals have attached to this exercise when interpreting treaties. This seems so

101 See Article 2(1) VCLT (1969)
102 Richard Gardiner (n 75) 164.
because the meaning of the word ordinary itself may necessarily include lots of other synonyms to choose from in order to satisfy whatever is the requirement.103

Generally, and as a starting point, domestic courts, maybe following the rules in statutory interpretation, applied the literal rule and use dictionaries in order to get the ordinary, grammatical meaning of a particular word. Is this applicable or relevant to the tribunals interpreting sometimes-complex treaties? Irrespective of the interpretive body, the use of synonyms is not a pointer to the presence of a single ‘ordinary meaning’ of the word; rather it is even a pointer to the contrary. Both domestic courts and international tribunals have made use of both ordinary English Dictionary and specialist or technical dictionaries to ascertain the meaning of certain words, though this usually leaves many interpretive questions wide open to other extrapolations.104

The WTO cautioned that no matter the type of dictionary in use, dictionaries, alone, are far inadequate to answer the intricate questions of treaty interpretation.105

In summary, to get to the meaning of a treaty term using the ‘ordinary meaning’ is not an easy task that is achievable by simply looking up the meaning of the words constituting the entire ‘terms’. It is also noted that other relevant aspects of the ‘terms’ of the treaty that will play a role in interpretation and as such should be looked at include the literal meaning of ‘single terms’, to whom does the reference refer, and the effect of general treaty language in interpretation since international law did not necessarily prescribe any linguistic style for treaties.106

103 Synonyms like ‘normal’, ‘elementary’, ‘regular’, ‘primary’ ‘customary’ Etc, all prop up.


105 United States – Measures, paras 54, 164-165.

106 Richard Gardiner (n 75) 174.
The last point here is that even though the ordinary meaning of the ‘terms’ of a treaty is necessarily the first step to a meaningful interpretation, it is pertinent to understand that this only becomes crucial if such ordinary meaning is established by an inquiry into the context and object and purpose of the particular treaty under consideration.107

4. **Context** – The context in which the ‘terms’ of the treaty occur under the Vienna rules signify that it will perform the following roles:108

i) It will act as a qualifier of the ordinary meaning of the terms used in the treaty being interpreted, assisting the interpreter not only in choosing the ordinary meaning to be attached to the ‘terms’ but also in altering ‘any over-literal approach to interpretation’.109

ii) It identifies, in the Vienna rules, relevant materials to be considered as shaping the context.

The second role aptly explains context and its presence by reference to the entire text of the treaty from the beginning to the end, from preamble to annexes, if any, importantly though, this is not in any way a repeal of the relevance of the first role, reading the words in context, meaning reading them in their primary domain.110 So the essentially requirement under context is first to analyse words, as stand alone or as part of a phrase, this to be followed by the application of the broader, more extensive definition. This process allow the interpreter, a tribunal in the context of investment law, to employ several factors, proximate and sometimes even far removed. The proximate may include the wordings present or used in relative provisions, in titles, in

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107 Richard Gardiner (n 75) 166.
108 Richard Gardiner (n 75) 177.
109 Richard Gardiner.
110 Richard Gardiner.
punctuations to such unlikely elements as contrasting “with other provisions on similar matters or using similar wordings, extending to the function of the context as a bridge to the further element in the first paragraph of the general rule, that is ‘object and purpose’”. It is the context in which the terms are used that leads us to understand the object and purpose for which the treaty was created.

5. Object and Purpose – Article 31(1) of the Vienna Convention ends with the teleological elements of the general rule of treaty interpretation. The main object and purpose of the Vienna rules is to explain the ordinary meaning rather than give comprehensive criteria for treaty interpretation.111 Here, the interpreter’s attention is drawn to the central question relative to the ‘object and purpose’ of the treaty, the way to identify and apply them. The fundamental objective of treaty interpretation is to put forward a result or argument that clearly further the aims of the treaty and this is only possible by ascertaining the object and purpose of the treaty, noting however, that the interpreter is not allowed to use the common purpose of a treaty to supersede its text, as Gardiner puts it:112

…object and purpose are modifiers of the ordinary meaning of a term which is being interpreted in the sense that the ordinary meaning is to be identified in their light.

Despite all these extensive, well-defined processes of treaty interpretation, ‘the nature, role and application of the concept of ‘object and purpose’ in the treaty law (treaty interpretation) remain a mystery.’113 The use of the phrase ordinary did not in any way makes it easy to differentiate between the terms ‘object’ and ‘purpose’, and this may

111 Richard Gardiner (n 75) 190.
112 Richard Gardiner.
explain why under the rules the terms are treated as compound words in their application.

The position may be different in practice. It can be discerned from the judgment of the ICJ that there are times whereby the object and purpose of a treaty may not be considered as a consolidated idea. In the Oil Platforms case, the ICJ has at some places referred to ‘objects’ and ‘purposes’ together while at others, the reference was to ‘object’ separately, and to ‘objective’, ‘spirit’, and the ‘whole of these provisions is aimed at’.

On the other hand, the World Trade Organisation (WTO) realised that it would be practically impossible for anyone to hold that just because Article 31(1) points the interpreter to a singular object and purpose, it means that such an object and purpose will be easily identifiable in every case of treaty interpretation. The Appellate Body of the WTO stated:

...most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the WTO Agreement...The Panel in effect took a one sided view of the object and purpose of the WTO Agreement when it fashioned a new test not found in the text of the Agreement.

Agreed, the preamble is always a good starting point for every treaty interpretation, however, some caution needs to be exercised here as some preambles do contain certain drafting errors and the word ‘preamble’ itself may call for its own

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115 Oil Platforms, paras 27, 28, 31, 52 and 36 respectively.
interpretation. As such, while applying the preamble in reference to the object and purpose of a treaty, regards should be made to Article 31(2) and what is obtained in practice. From the provisions of Article 31(2) and evidence from practice, an interpreter is necessarily required to read the whole treaty before any attempt at interpretation. In the US Shrimp’s case, the Appellate Body of the WTO did refer to both the preamble of the treaty in question and did a comprehensive analysis of the substantive provisions of the treaty.\textsuperscript{117}

Further to the application of the context in which the ‘terms’ appear, Article 31(3) made reference to other important elements to be considered when interpreting a treaty. The provisions of sub-paragraph (c) referring to ‘any relevant rules of international law applicable in relations between the parties’ is the most fundamental to this framework of analysis as it codifies the principle of systemic integration.\textsuperscript{118}

It is only through a reference to and a proper understanding of these elements and their link to each other that an understanding of the aim and applicability of the provisions of Article 31(3) (c) of the Vienna Convention can be reached.\textsuperscript{119} These elements need to be discussed in turn. The discussion will take the form of an examination of these elements by application of the above system of using their ordinary meaning and also how they apply in context. This analysis may serve as a way of seeking for an informed meaning of these terms. The elements are ‘rules’, ‘relevant’, ‘applicable’ and ‘parties’.

\textsuperscript{117} US Shrimp, paras. 12, 17.
\textsuperscript{118} Article 31(3)(c), (n 74).
\textsuperscript{119} Panos Merkouris, (n 71) 18.
‘rules’ – Using the rules of the application of ordinary meaning first, we seek the meaning of terms from the dictionary, and since this is a field of law, we look at both English Dictionary and Law Dictionary. The *Oxford English Dictionary Online* define rule as a:

2.a “rule…A general principle, regulation, or maxim governing individual conduct…

5.a. A regulation framed or adopted by an organisation, institution, or other body for governing its conduct and that of its members”.

*Blacks Law Dictionary* defines rule as “…1. Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation”.

Applying the above definitions and importantly looking at the context of the Convention, ‘rules’ referred to by Article 31(3)(c) is a reference to the rules of international law and not to other extensive principles, which may not qualify as rules. However, it is noted that the reference is extensive enough to be inclusive of even other treaties in as much as they are applicable. This is not to say there are no dissenting voices as to the extent of the application of the term ‘rules’. Some writers have stretched the rules so widely as to cover the writing of publicists, some others

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123 Campbell McLachlan.

124 See Richard Gardiner (n 75) 260.
have argued that ‘rules’ could not cover international agreements\textsuperscript{125} while others even argued that general principles of law\textsuperscript{126} could not be covered by ‘relevant rules’.

Therefore, applying the rules of interpretation we started with, using the ‘ordinary meaning’ of the term ‘rules’ will seem to lead us to the conclusion that the reference is to all rules regardless of where they emanate from.

By way of application, it suffice it to say that the WTO Panel in the EC-Biotech\textsuperscript{127} case has had occasion to corroborate the initial conclusion as to what the term ‘rules’ stands for. The Panel identifies ‘rules of international law’ to cover “(i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognised general principles of law”.\textsuperscript{128} Many other tribunals have also acknowledged this likelihood, including the argument as to whether treaties are within the contemplation of the term ‘rules’ of Article 31(3)(c) since they came up at a much later stage of the VCLT debate.\textsuperscript{129}

\textsuperscript{125} For example Georg Schwarzenberger’s argument that ‘rules of international law’ could not cover international agreements because such are incorporated under Article 31(3)(a) – see Georg Schwarzenberger, Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Convention on the Law of Treaties, Virg.J. Int’l. 9 (1968-9) 1, 14.

\textsuperscript{126} Ian Sinclair, The Vienna Convention on the Law of Treaties (Manchester: MUP, 1984) 139. Sinclair’s position remains outrageous as no support avails it either jurisprudentially or doctrinally.


\textsuperscript{128} EC-Biotech, though the same tribunal observed recognizing ‘general principles’ as a ‘rule’ is not as simple as it appears though it indeed held that such principles do fell within the contemplation of Article 31(3)(c).

\textsuperscript{129} See for example on General Principles of Law, the ECHR decision in Golder v. the United Kingdom Judgment of 21 February 1975, Application No. 4451/70, para. 35, Mamutkulov and Askarov v. Turkey, ECHR, Grand Chamber, Judgment of 4 February 2005, Application Nos. 468 27/99 and 46951/99, para. 111, on whether treaties are within the contemplation of Article 31(3)(c) VCLT, Mamutkulov and Askarov v. Turkey, para. 111-28 and on Customary International Law, see Sempra Energy International v. Argentine Republic, ICSID, Decision of 29 June 2010, on the Argentine Republic’s Application for Annulment of the Award, see ICSID Case No.ARB/02/16, para. 138.
(ii) ‘Relevance’ – coming from the word relevant, by way of definition, means:

“relevant… 1. …Of a claim, charge, defence, etc.: legally sufficient, adequate, or pertinent.

2. … a. Bearing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing”.  

So, is the term ‘relevant rules’ easily understood from the above definitions? Far from it, the definitions did, however, share something in common, they point to a connection between one thing and another. Some commentators are of the view that the term relevant in the paragraph is in reference to ‘relevant’ rules “touching on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation.”  

Such intervention still did not seem to solve the problem as the extent of the similarity of the ‘subject matter’ of the treaty in focus and the rule mentioned in Article 31(3)(c) is still ambiguous especially as no doctrinal reference exist. So Panos Merkouris consequently argued that “the ‘same subject-matter’ understanding of the term ‘relevant’ seems to be only one of the possible ways to identify relevance.” The importance of ‘relevant rules’ can only be appreciated if they are applied, so the next thing in our assembly of elements is to look at ‘applicable rules’.

(iii) Applicable rules – there is a peculiar and fundamental problem in the analysis of the term ‘applicable’. This problem is with regards to the

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130 Oxford English Dictionary Online, (n120).
131 Richard Gardiner (n 75) 260.
132 Panos Merkouris (n 71) 21.
133 Panos Merkouris, 22.
meaning and analysis both definitional and doctrinal. No critical doctrinal scrutiny of the term seems to exist while its definition connects with another term that comes before it, ‘relevant’. ‘Applicable’, as an adjective, means:

1. “Applicable’ adj. Capable of being applied or put to use…” 134
2. “Apply’, vb. To put to use with a particular subject matter”. 135

Following from the above problematic analysis of the ordinary meaning of the term ‘applicable’, it will seem that it keeps out all non-binding rules away from the realm of the application of Article 31(3)(c). 136 Applicable rules will be between the parties, the last term in the paragraph being assembled here.

(iv) Parties – From the perspective of the extent of the applicability of the provisions of Article 31(3)(c), it seems that it is the term ‘parties’ that has generated the most intense debate and scrutiny. 137 Just like in the other terms, first look is at the available dictionary definitions.

“Party n. …6.a. Any of the groups of people constituting a side in a formal proceeding, such as the litigants in a legal action, those who enter into a contract,

134 Oxford English Dictionary Online, (n120).
135 Black’s Law Dictionary, (n121) 116. While applying this particular definition of the use of the term as a verb, Merkouris pointed out that the term seem to be connected with another term that came before it, ‘relevant’ and concluded that this would then seem to be a ‘tautological self-reference’. Panos Merkouris.
137 See generally Campbell McLachlan (n70), Richard Gardiner (n75), Panos Merkouris (n71) 22.
etc”. 138 “Party. … 1. One who takes part in a transaction… 2. One by or against whom a lawsuit is brought”. 139

The evident controversy as to the reference to ‘parties’ in the provisions of Article 31(3)(c) does not seem to be resolved by resort to the above definitions. The two definitions simply recognised party as either a party to an agreement or a party to a legal transaction, in this context party to a treaty or to a legal dispute. 140 A reading of paragraph (C) will show that it is not manifestly stated, in the determination of the relevance and applicability, whom are the parties referred to, are they parties to the treaty or parties in the dispute. 141 From the above positions, it is easily seen that recourse to the ordinary meaning of the term ‘parties’ will proffer no help in discovering its intended meaning. 142

In order to avoid the uncertainty, as to which party is referenced in the treaty being interpreted, may be recourse has to be had to the context of Article 31(3)(c). This becomes necessary because from a reading of the actual context of Article 31(3)(c), meaning the provisions of Article 31 itself, it would be seen that the term ‘party’ was used quiet pliably in different ways. Some of the ways in which the term has been used can be seen by a contextual reference to the provisions of Article 2(1)(g) of the VCLT that defines the term ‘party’ as “a State, which has consented to be bound by the treaty and for which the treaty is in force”. This reference to party will definitely not be only to party to the treaty in interpretation. This is so because, though the

138 Oxford English Dictionary Online, (n 120).
139 Black’s Law Dictionary, (n121) 1231-2.
140 Panos Merkouris (n71) 23.
141 Campbell MacLachlan (n70) 291.
provision of the Article will go in tandem with that of Article 31(3)(a), it cannot be said when the provision is contrasted with the flexible provisions of Article 31(2)(a) and (b)’s reference to the term ‘party’. Furthermore, in Article 66(a) VCLT, it was clear that ‘parties’ mean ‘parties to the dispute’. Therefore, subject to Article 2(1)(g), a State can only be regarded as a party if it is bound upon its signature.¹⁴³

Thus the provisions of Article 31(3)(c) is so fluid that even applying the provisions in the context of the VCLT only yielded entirely conflicting outcomes.¹⁴⁴ McLachlan succinctly rendered these outcomes in four divergent ways:

(i) that all parties should be the same in both the treaty under interpretation and the treaty relied upon,

(ii) that all parties to the dispute should be the same parties to the other treaty,

(iii) that if a treaty is not in force between all members of the treaty being interpreted, then it can only be considered if the rule contained in it is a rule of customary international law and, finally,

(iv) that, as an intermediate ground, there is no need for a complete identity of treaty parties in as much as the treaty relied upon is shown to indicate the common intentions or understanding of all the parties.¹⁴⁵

¹⁴³ Panos Merkouris (n71) 23.
¹⁴⁵ Campbell McLachlan, (n70) 314-15.
The relative flaw in all the above interpretations not withstanding\textsuperscript{146}, the last seems to have curried the favour of some renowned commentators in the field.\textsuperscript{147} From all the above, it is clear that applying Article 31 textual and contextual interpretation of 31(3)(c) has not resolved contradictory outcomes of the meaning of the term ‘parties’.\textsuperscript{148}

From the above brief inquiry into the perspectives of the meaning of the various aspects of Article 31(3)(c), it is important to sum-up that the terrain covering this all-important article is far from clearly expressed. Of course, from the above analysis, it seems only the term ‘rules’ has been settled with any measure of closure. However, it is not correct to say that the evident controversy surrounding the applicable meaning of the constituent terms of this article has made it completely inapplicable, certainly not. Though it remains to be seen if Post-VCLT jurisprudence will settle those indeterminate parts of Article 31(3)(c), some valid arguments pointing to both the pre-VCLT and Post-VCLT jurisprudence as possible answers to the reach of this article exist.\textsuperscript{149} Though this is not a critical discourse about the VCLT, it still calls for a look at some of the conclusions coming from these arguments. This will enable us complete the discussion on the suitability of applying the provisions of Article 31(3)(c) and the principle of systemic integration investment tribunals in the interpretation of treaties or treaty standards, for example the principle of non-

\textsuperscript{146} See generally Isabelle van Damme, \textit{Treaty Interpretation by the WTO Appellate Body} (Oxford: OUP, 2009), 372, on the drawbacks of these interpretations.
\textsuperscript{148} Panos Merkouris (n71) 24.
\textsuperscript{149} Generally, see Panos Merkouris, and specifically Panos Merkouris (n71) 51-101.
discrimination we have been using as example and then its further application by the concept of sustainable development.

Following the above analysis of the constituent elements of Article 31(3)(c), the failure of getting to the real meaning of the terms therein, a formidable argument exist to show one critical element that seems to bind the terms together and determine their meanings. The *proximity criterion* is regarded as a single criterion that can give meaning to the terms ‘relevance’, ‘applicability’ and ‘parties’ and has been applied by courts and tribunals to probe whether the norm in question is relevant for the purposes of Article 31(3)(c).\textsuperscript{150} Merkouris aptly summed up that this is achieved by the combined application of the four different expressions of this criterion\textsuperscript{151}:

(i) terminological/linguistic proximity;
(ii) subject-matter proximity;
(iii) shared parties (‘actor’) proximity; and
(iv) temporal proximity.

International jurisprudence has shown that the consolidated and stable application of these four expressions of the *proximity criterion* is the right approach to Article 31(3)(c). It is to this international jurisprudence we will turn to as a synthesis of all the above positions and the cases in which they were applied is undertaken in chapter five.

\textsuperscript{150} Panos Merkouris (n71) 100.
\textsuperscript{151} Panos Merkouris.
2.6 Conclusion

In this chapter, an attempt was made to trace the development of the doctrine of legal convergence and the Vienna Convention on the Law of Treaties (VCLT), their theoretical foundations and application in some areas of international law and other international institutions. In the following chapters, the thesis will pursue a conscientious, interdisciplinary interpretive approach that will harmonise theoretical and jurisprudential insights from law, economics, environment, sociology and psychology in the analysis of the intricate doctrinal sphere of international trade and international investment law. Chapters three and four will lead the pack. Chapter three, devoted to investment law, will show how various investment tribunals have interpreted, inconsistently, both investment treaties and investment protection standards, leading to uncertainty, incoherence, shallow and muddled arbitral reasoning in awards. Decisions of both the Panels and Appellate Board of the WTO will be the focus of chapter four to see how they interpret and apply the multilateral treaty. The main idea here is to explore the gap that needs to be filled-in for a workable harmonisation/convergence of international trade and investment law through a more coherent interpretation of the non-discrimination standards. Just the way legal convergence occurs within a regime and between legal systems, it can also occur between or among legal regimes, and the VCLT can serve as an effective, verifiable tool in achieving this. As will be shown in this thesis, parties, both States and foreign investors/traders, will be better off with a well sophisticated system that will accommodate investment protection and trade liberalization mainly through the uniform, harmonised interpretation of treaties and of the standards of treatment like the non-discrimination standard.
Chapter Three

Non-Discrimination in International Investment Law

3.0 Introduction

The aim of this chapter is to point to the persistent inconsistency in the interpretation of the non-discrimination principle enshrined in national treatment [NT], most favoured nation [MFN] and even such absolute standard of fair and equitable treatment [FET]. The issues would be treated from the wider area of international law, i.e. international economic law, providing wide ranging perspectives, differences in concepts, justifiability of the answers to some of the issues in their respective contexts of international trade law and international investment law. In this chapter, the need to show the inconsistencies in the interpretation of these obligations by arbitral tribunals becomes necessary in order to identify the problem and resultant effect of the variations. The chapter will first examine the origin of the principle of non-discrimination as an element, its content and application.

The principle of non-discrimination stands at the centre of the protection of foreign investment and the multilateral trading system. It is said to be a fundamental pillar of the WTO. Historically, the principle belongs to the larger body of customary international law.¹ Though economic development has to do with the promotion and protection of foreign investment, however, international investment agreements (IIAs), mainly the bilateral investment treaties (BITs) and the free trade agreements (FTAs) are more concerned with the protection of foreign investors and their

investments. The non-discrimination principle, especially as contained in modern IIAs, established that contracting parties to a treaty shall not treat domestic market actors more favourably than foreign market actors (referred to as national treatment NT) or differentiate between foreign market actors from different origins (known as most-favoured-nation obligation, MFN).

The non-discrimination principle is one that is relevant, and as such found, in all the fields of international economic law. It is found in the protection of investment and intellectual property rights, human rights and in the fields of trade in goods and services. The obligation not to discriminate is applicable both De jure and De facto. It is significant to note that despite the fact that the principle of non-discrimination is common to both trade and investment, the principle has no generally established meaning under international economic law. This, however, does not negate the fact that the economic basis for the claims of non-discrimination is quite similar in both international trade and international investment.

The principle of non-discrimination, essentially on the basis of nationality of the investor, is included in modern IIAs and more generally in international investment law (in ‘national treatment, most-favoured-nation’ and in such absolute standards like the principle of ‘fair and equitable treatment’ standard). The three standards exist

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2 Today, the investment regime has over 3200 agreements comprising of 2860 BITs and 340 ‘other’ international investment agreements. See UNCTAD, International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal, IIA Issues Note, no.4, June 2013.
3 This is the direct and most obvious type of discrimination and is rarely used because it is identifiable. In this type, States, through regulations, usually impose or frame discriminatory measures whereby some countries drive certain advantages whereas others were denied.
4 This is the most vicious type of discrimination. Here, States do not use the provisions of law or regulations but rather the effect of law or regulations produce discrimination. This type of discrimination is especially very complex to identify especially in trade regulations.
either as stand apart provisions\(^6\) or formulated in a single article.\(^7\) These standards would be the focus of this chapter.

The content of the principle of non-discrimination will be examined from the perspective of investment disputes. The general and undefined features of these investment standards, their contextual meaning, application and significance can only be explained by arbitration, which for a long time was the only acceptable form for the settlement of investment disputes,\(^8\) however, the inclusion of local remedies rules in some modern BITs is effectively changing the trend.\(^9\) Arbitral tribunals saddled with the responsibility of interpreting and applying these standards have not been consistent in their interpretations, hence the lack of certainty in arbitral decision and investors legitimate expectations. The inconsistency in interpretation is so deeply rooted and extensive to the extent that some arbitral tribunals have delivered so many different and conflicting interpretations of the same standard and even in the same treaty or other IIAs.\(^10\)

Using the elements of the non-discrimination standards, this chapter will evaluate how investment tribunals have interpreted national treatment, most-favoured-nation and fair and equitable treatment standards. Detailed discussion will be for the national treatment provision for obvious reasons. The national treatment provision is among the most critical obligations present in all investment agreements. In doing this, the

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\(^6\) The Netherlands-Cambodia BIT, 2006, is a peculiar example. The three provisions are contained in a single article but separated into different paragraphs.

\(^7\) European BITs usually put National Treatment and Most-Favoured-Nation in the same article while fair and equitable treatment is separately framed.

\(^8\) This is under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States signed on 18 March 1965 and popularly called the Washington or ICSID Convention (hereinafter ‘the ICSID Convention’).

\(^9\) See Indian Model BIT for example.

discussion will be centred on the inconsistencies of the arbitral decisions interpretation of these standards and the implication of such. The position of this thesis is that the inconsistencies in the interpretation of these standards is a pointer to the compelling need for coherence in the interpretation of these investment protection standards with a view to assisting investors legitimate expectations of certainty and clarity in investment law and the harmonization of trade and investment law provisions using the non-discrimination principle.

Chapter four will build on the discussion in chapter three by looking at the same standards from the perspective of international trade and the WTO, with the notable exception of the fair and equitable treatment (FET) standard that has no mirror reflection in the trade regime. The aim is to show a more settled jurisprudence in the interpretation and application of the standards by the WTO Panels and Appeal Boards, especially the way the AB consistently reprimanded the Panels where they failed to apply the Vienna rules in their interpretation. This will be with a view to weaving the argument towards the need for a more coherent, consistent and harmonised interpretation of standards under international investment law generally, and particularly the lessons that could be learnt from the trade regime in this regard. Suffice it to say that the WTO jurisprudence is not bereft of its own shortcomings, out of which the most fundamental will be highlighted.

3.1 National Treatment Obligation – An Overview

Even though it is trite that non-discrimination is the prevailing rule under public international law, generally there is no requirement to treat aliens favourably. Ian Brownlie states that:
There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens. It must be observed by all hands that certain sources of inequality are admissible.¹¹

Brownlie further argued that ‘it is not thought that the national treatment principle provides a reliable general formula’.¹²

However, despite its inexactness in customary international law provisions, the national treatment principle has come to be accepted as a standard provision relative to BITs, other IIAs and contemporary international investment law generally.¹³ It is noteworthy here to see that the standard has been omitted from the IIAs completed by the APEC countries, the Chinese BITs and the recent Indian Model BIT.¹⁴ According to UNCTAD

‘The national treatment standard is perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically (and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the establishment of an investment’.¹⁵

National treatment is the obligation by a host state to treat foreign investors and their investment no less favourably than national investors or their investments.¹⁶ In their common phrasing in BITs, the national treatment clause usually comprise of contracting States’ obligation to accord treatment ‘no less favourable’ than that which

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¹² Brownlie, 536.
the host State accords to its own investors ‘in like circumstances’. Article 2 of the 
Japan-Korea BIT 2002 provides for national treatment thus:

‘Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to 
their investments treatment no ‘less favourable’ than the treatment it accords ‘in like circumstances’ to 
its own investors and their investments with respect to the establishment, acquisition, expansion, 
operation, management, maintenance, use, enjoyment, and sale or other disposal of investments’.

Article 3 of the US-Rwanda BIT 2008 also provides:

‘1. Each Party shall accord to investors of the other party treatment no less favourable than that it 
accords, in like circumstances, to its own investors with respect to the establishment, acquisition, 
management, conduct, operation, and sale or other disposition of investments in its territory.’

Generally, the national treatment clause is relatively homogenous in most BITs. The 
central import of the national treatment clause is the prohibition of differential 
treatment of foreign investors when compared to treatment given to domestic 
investors. However, despite the homogeneity of the clause, the usage of certain terms 
in the clause reveals noticeable differences, for example the use of the term ‘in like 
situations’ rather than ‘in like circumstances’, ‘similar’ rather than ‘like’, ‘no less 
favourable’ or ‘as favourable as’.

Apart from the national treatment obligation, many IIAs also contain other non-
discrimination provisions that are couched in different wordings from those used in

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17 US-Rwanda BIT, signed on the 19 February 2008, available in 
18 For example see the language employed in most EU States concluded BITs.  
19 For example see Art 3 US 2004 and 2012 Model BITs.  
20 Dolzer and Schreuer (n.13).
BITs like the Japan-Korea BIT and US-Rwanda BIT above.\textsuperscript{21} Art II (3)(b) of the US-Estonia BIT\textsuperscript{22} provides:

‘Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment.’

\subsection*{3.2 Scope of Applicability in IIAs}

It is important to appreciate the scope of the applicability of the national treatment obligation within the investment law context. When does the obligation commence? Is the host state under obligation to provide the treatment pre or post-establishment of the investment? A survey of existing BITs revealed that the majority only requires protection post-entry of investments, though the United States is one country highly in favour of the pre-entry national treatment provisions.\textsuperscript{23}

On the other hand, countries within the European Union enter into BITs that have post-entry national treatment protection included.\textsuperscript{24}

A good framing of the post-entry national treatment provisions can be found in the provisions of Article 10 (7) of the Energy Charter Treaty:

‘Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the

\textsuperscript{21} A good example is Art II (3)(b) the US-Estonia BIT that provides for additional non-discrimination requirement. These IIAs also contain
\textsuperscript{22} US-Estonia BIT signed on 19 April 1994, available at <http://www.unctad.org/iia>
\textsuperscript{23} See NAFTA Chapter 11 for example.
\textsuperscript{24} European Countries mostly conclude treaties with only post-entry national treatment protection, for example see Art 2(1) of the German Model Treaty 2005. See also the \textit{Fraport v. Philippines}, Award of 16 August 2007, para 335.
Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.  

On the other hand however, as stated above, the US, Japan and Canada, apart from the post-entry, do provide for national treatment protection to right of access to a national market, the pre-entry national treatment. Article 4 of the 2004 Canadian Foreign Investment Protection Agreement provides for pre-establishment national treatment;

1. Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

Article 3 of the 2004 US Model Treaty and the NAFTA both contain pre-establishment protection. NAFTA Art 1102 provides;

‘Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.’

26 Also known as the Canadian FIPAs.
27 NAFTA, Art. 1102, para 2. See also Art.10.3, Chapter 10 of CAFTA (Central America Free Trade Agreement) http://www.caftalaw.net/cafta-text accessed 20 April 2015.
From the perspective of public international law, it is imperative to recall that states have the sovereign right to permit foreign nationals to establish in their territory or not. Historically, it is instructive to note that for the IIAs with pre-entry national treatment, certain strategic service sectors have always been protected against foreign competition so as to develop and safeguard domestic industries and national interests in those sectors. The states here, despite their liberalizing IIAs, conclude treaties with a detailed, negative list of exemptions from the national treatment provision. They generally consider these areas to be too sensitive for foreign businesses to partake.

The NAFTA and ASEAN member states are prominent in the use of the negative list of exceptions though the list gets shorter as these states develop their critical sectors. It is usually referred to as the ‘negative listing’ method because it provides a list of sectors in which the provision will not apply. Apart from the well known exemptions of the area of natural resources, the negative list of exemptions from national treatment cover areas such as natural resources, national security, energy, public service, aviation and cultural heritage. In the USA-Mongolia BIT mentioned above, the US specified sectors excluded from the national treatment as air transportation, communication services, ocean and coastal shipping, power production, banking and energy. Mongolia’s list of exemptions includes banking and land ownership. There is also the ‘positive listing’ method whereby state parties to the treaty create a list of sectors in which the provision will apply. An example of positive listing can be seen in the provisions of the World Trade Organization’s (WTO) General Agreement on

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28 For an in-depth analysis of this position, especially making a case for the developing states, see Sornarajah 2004, pp. 97-114.
30 For an in-depth discussion on this, see Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (CUP 2010) 337.
Trade in Services (GATS) where member states are required to undertake the obligation of granting market access and national treatment in designated areas such as ‘education’ or ‘environmental services’. The negative list method seems to be the most preferred because it aligns with the general aim of treaties, which is the extensive liberalization of investments and with it, the expansion of the national treatment provision.

3.3 National Treatment – An Inquiry into Interpretive Discrepancies

As stated above, arbitral tribunals are saddled with the onerous responsibility of resolving investor-state disputes generally. In the cause of the resolution of such disputes, these tribunals are often called upon to interpret the national treatment provision contained in the relevant BITs. The lack of a binding precedent in the investment arbitration jurisprudence, the variations in the way national treatment is couched in different BITs and the simplistic methodology involved in the drafting of the standard has significantly affected its interpretation.

It is trite the provisions of Article 31 of the Vienna Convention on the Law of Treaties remain the guide for treaty interpretation. The rules contained therein give international adjudicators enough discretion in interpreting provisions of public international law. Though some commentators have argued that these rules are not

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32 See Art. XVI AND Art. XVII.
33 The method was the type proposed in the negotiations of the MAI, see the Draft Text on the Multilateral Agreement on Investment (MAI), OECD DAFFE/MAI (98) 7/REV1, 1998.
34 These tribunals include those set up under the ICSID, NAFTA and other ad hoc tribunals.
36 Chapter two, above, where the foundational basis of the VCLT, its scope and applicability was discussed at length. In chapter five, the thesis will draw upon chapter two to show how the VCLT can assist in the harmonisation of the interpretation of the non-discrimination standards in both trade and investment law.
suitable in the interpretation of the provisions of national treatment, in chapter five, this thesis will argue otherwise.  

Majority of tribunals opined that, in a determination of the question whether a State has violated the national treatment standard is to determine whether the claimant is in ‘like circumstances’ or in a ‘similar situation’ to the domestic investor that has been purportedly given preference. There is a clear division within the investment community as to the import of “like circumstances”. Diametrically opposite views exist as to whether “like circumstances” exist as the applicable element of the non-discrimination principles or as an exception to substantiate differential treatment on policy grounds. Furthermore, though the key elements of ‘likeness’ and ‘less favourable treatment’ remain the focus in the interpretation of national treatment by arbitral tribunals, these tribunals still find it difficult to extract the purpose and nature of the standard within the investment context. The near total absence of the travaux préparatoires of some relevant treaties and the dearth of well-reasoned, readily available awards has made this all the more challenging.

Outside the NAFTA, the GATT/WTO, only a trickle of awards analyzing the national treatment standard is available. The fact that existing investment tribunals ventured

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40 This is with the notable exception of NAFTA. See the NAFTA negotiating texts available at http://www.naftalaw.org/commission.htm, accessed on 24 April 2015.
into WTO jurisprudence for guidance reinforced the argument in this thesis that the investment regime lacks the required coherence and consistency in the interpretation and application of these relative standards.\textsuperscript{42} The reasoning followed by these tribunals remains inconsistent and even contradictory. Furthermore, given that what really differentiates these BITs is simply semantics that did not in any significant way affect the content of the protection offered by the BITs has not been helpful.

In the determination of national treatment, arbitral tribunals have undertaken an inquiry into whether there exists a differentiation in the treatment accorded to the foreign investor and/or investment.\textsuperscript{43} Secondly, it has to be shown whether the foreign and/or domestic investor and/or investment operate in a common, competitive relationship.\textsuperscript{44} A look at the real battleground in the interpretation of national treatment, likeness, is necessary here.

Many arbitral tribunals have interpreted the national treatment provision on the basis of likeness, making like circumstances essential to the interpretation of national treatment. However, an interesting observation here is that the interpretations of the meaning and operation of the likeness standard by these tribunals varied significantly even within the same provision. Many investment treaties have it as a mandatory provision while investment tribunals have invoked it in many arbitral awards, even if they did reference it as in like circumstances. For example the NAFTA tribunals employ the extensive meaning of ‘like circumstances’ in Article 1102 to reach the

\textsuperscript{42} Leila Choukroune, (n.41) 200.
\textsuperscript{43} For example \textit{Marvin Roy Feldman Karpa (CEMSA) v. Mexico}, ICSID Case No. ARB (AF) 99/1, Award of 16 December 2002.
\textsuperscript{44} \textit{Pope & Talbot Inc. v. Government of Canada}, Award on the Merits, 10 April 2001, para 78.
conclusion that the competitive relationship should involve investors and investment in the ‘same business or economic sector’.\textsuperscript{45} NAFTA Article 1102 states:

‘Each Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’.

In deciding whether ‘in-like circumstances’ should be included in the Draft Multilateral Agreement on Investment (MAI), the OECD maintained that the national treatment and the most-favoured-nation treatment are comparative terms.\textsuperscript{46}

For arbitral tribunals, though the provisions of Article 10 of the ECT does not include any clear comparator requirement, the tribunal in \textit{Nykomb v Latvia} argued that the universal test in a discrimination evaluation is to analyse like with like despite the fact that Article 10 of the Energy Charter Treaty ECT that the tribunal invoked evidence no clear comparator requirement.\textsuperscript{47}

Though the IIAs have no particular interpretive methodology as a result of the fact that most national treatment provision, due to its position as a relative right, lack any detailed elaboration. However, following the NAFTA jurisprudence, some scholars fundamentally agreed that non-discrimination has certain legal elements that need to be evaluated on the facts, more so when the national treatment provision is being

\textsuperscript{45} Federico Ortino (n.10), 355
analysed. In the analysis of national treatment, some of these elements engaged the attention of the arbitral tribunals in their interpretation of this relative standard that mirror key strains in the WTO jurisprudence. Arguably, majority of scholar put these elements as:

(i) Comparability of the investors
(ii) ‘Less favourable treatment’
(iii) Justifications

Though the main aim of this segment of the discussion is to show the incoherence and inconsistency in the interpretation of the non-discrimination obligation using these relative standards, this will be done through the application of the above elements.

3.3.1 Likeness Put to the Test

It is the view of some tribunals that in the analysis of the national treatment provision, the facts encompassing the standard should be reviewed taking cognizance of its ‘overall legal context’. Based on this, these tribunals have argued that the policy objectives of the disputed measure become relevant in the assessment of like circumstances. In S.D. Myers Inc. v. Canada, the tribunal remarked that the OECD practice indicates that any assessment of ‘like situations’ needs to take cognizance of policy objectives in deciding whether businesses are in like circumstances. While adhering to this rule, the tribunal then held that:

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50 Jurgen Kurtz, 95, Sanders (n 41), Sornarajah (n 30), Ortino (n10), Dolzer & Schreuer (n 13).
51 See for example S.D. Myers v. Canada, para. 245, Pope & Talbot v. Canada, para. 76.
‘The interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest’.  

The *S.D. Myers* tribunal, having recognised that the general principles emerging from a reading of the provisions in NAFTA should be taken into account in the interpretation of ‘like circumstances’, further argued:

‘The concept of ‘like circumstances’ invites an examination of whether a non-national investor complaining of less favourable treatment is in the same ‘sector’ as the national investor. The tribunal takes the view that the word ‘sector’ has a wide connotation that includes the concepts of ‘economic sector’ and ‘business sector’.

From the above, the *SD Myers* tribunal seemed to have also followed the trade law interpretation by linking likeness to competition. The use of competition as a condition of likeness is a reasoning that was also applied by the tribunal in *Pope & Talbot* tribunal. The tribunal further noted that both the foreign and domestic investors in the particular instance were engaged in providing the same ‘polychlorinated biphenyl (PCB) waste remediation service, further stated that the foreign investor:

54 *S.D. Myers v. Canada*, para. 250.
55 *SD Myers, Inc. v Canada*, (n 43), at para 250.
56 Though it is noted that there were other tribunals that did not tow this competition line, just as also did some WTO AB decisions. See *Occidental* and *Methanex*.
57 *Pope & Talbot* (n. 42). The decision will be analysed below.
‘Was in a position to attract customers that might otherwise have gone to the domestic operators because it could offer more favourable prices and because it had extensive experience and credibility’.  

The SD Myers provides the first considerable insight into the national treatment obligation claim based on an investor-State investment dispute. In SD Myers, the tribunal, while applying likeness in the interpretation of the non-discrimination principle based on national treatment claim, evidently relied on the measure’s adverse effect only on the foreign investor without an inquiry into the intent of the measure.  

The conclusion reached by the tribunal in SD Myers was that from the business viewpoint, SDMI and Myers Canada were in ‘like circumstances’ with the Canadian operators because they have the same group of customers.  

Apart from the OECD practice stated above, the tribunal also made references to WTO Law. The reference to the WTO is an important point this thesis will come back to in the subsequent chapters to show how the interpretation of the non-discrimination principle under the more sophisticated WTO can serve as a learning point that may help in the convergence of the principle under international economic law.  

Interestingly, in the US-Ecuador BIT, the tribunal, in another perspective of the reading of likeness as a criterion, departed from the application of competitive

58 SD Myers, Inc. v Canada, (n 43), at para 251.  
60 S. D. Myers v. Canada, para. 250.  
61 Some authors have criticized this approach of the tribunal’s reference to WTO Law as being controversial and unconvincing. See Leila (n 41).  
62 S.D. Myers v. Canada (n.49) para. 248.  
63 Occidental Exploration and Production Co v Ecuador, LCIA Case No UN3467, Award, 1 July 2004 (US-Ecuador BIT).
relationship as the basis of analysis of the national treatment standard. It agreed with the claimant and refused a ‘narrow’ interpretation of the term ‘in like situations’.

In the *Occidental* case, the investor’s claim was that Ecuador had breached the non-discrimination obligation in the form of a breach of national treatment, as it accorded it less favourable treatment by denying it value-added tax (VAT) refund while other domestic companies, operating in different sectors, were entitled to the refund. Here, it is clear that the issue involved the application of conventional standard in assessing ‘likeness’ between non-competing products. The claimant was an oil exploration and production company while the domestic companies were in the export of other goods including seafood and flowers. In arriving at its decision by rejecting the ‘narrow’ interpretation of likeness applied by the tribunal in *SD Myers*, it went into an expansive interpretation of the national treatment standard and noted:

‘The Tribunal is of the view that in the context of this particular claim the Claimant is right and its arguments are convincing. In fact, ‘in like situations’ cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken’.

So the arbitral tribunal in *Occidental* did not follow the economic sector approach to determine whether the breach of non-discrimination is based on nationality of the foreign investor. Going by the above, the tribunal clearly rejected Ecuador’s contention that *Occidental* should be likened only to domestic investments in the same business sector.

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64 Nicolas Diebold, (n37) 836.
65 *Occidental*, (n 61), para 173.
It is instructive to note that Petroecuador, which was the domestic competitor of Occidental, was also found not to be entitled to the VAT refund and as such was also denied that favourable treatment. In the Occidental case, in the process of withdrawing from the competition-based approach, the London Court of International Arbitration (LCIA) also made reference to WTO Law. It did that by drawing a clear distinction between the WTO ‘like products’ and the prevalent BIT reference to ‘like situations’. Though the Occidental tribunal rejected all other claims, it found violations of both the national treatment and fair and equitable treatment standards.

Another interesting arbitral award that considered likeness in the analysis of non-discrimination in the context of the national treatment provision is Methanex Corp v. US. The Methanex tribunal, just like the tribunal in SD Myers, refused to tow the competition-based line but at the same time was radically different from the position taken by the Occidental tribunal. Methanex case was a NAFTA dispute that involved a ban on the use or sale of MBTE gasoline additive based on environmental protection grounds. The dispute was on the legality of such a ban by California.

First, answering the question whether Methanex was “in like circumstances” with the domestic ethanol producers in question, the tribunal had no problem in agreeing that the role of NAFTA Article 1102 is basically to end discrimination based on nationality. Secondly, in limiting the class of domestic investors that were in ‘like circumstances’ with the foreign investor, the tribunal took a very narrow, and

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66 See Chapter Four infra for a more concise discussion of the interpretation of non-discrimination principle under national treatment standard from the perspective of the WTO.

67 The interpretation of the FET is discussed in 3.5 below.

68 Methanex Corp v. US, UNCITRAL, Final Award on jurisdiction and merits, 3 August 2005, Part IV, Chapter B (Article 1102 NAFTA).
controversial, view on the meaning of likeness by seeing it as something akin to, ‘identical’, “that is like [the foreign investment] in all relevant respects, but for nationality of ownership”. \(^{69}\) Methanex’s argument was that as producers of methanol, they were in like circumstances with the producers of ethanol since both produce the ingredient used in manufacturing reformulated gasoline and as such, were in direct competition. \(^{70}\) So any differential treatment between the same investments could be judged to be as a result of the investment’s nationality. \(^{71}\) The tribunal further argued that employing the competitive relationship approach canvassed by the investor would lead to an expansive interpretation that would be beyond the scope of the provisions on national treatment in NAFTA Article 1102. \(^{72}\) The tribunal observed thus:

> ‘Given the object of Article 1102 and the flexibility which the provision provides in its adoption of ‘like circumstances’, it would be as perverse to ignore identical comparators if they were available and to use comparators that were less ‘like’, as it would be perverse to refuse to find and to apply less ‘like’ comparators when no identical comparators existed. The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it’. \(^{73}\)

Interestingly, unlike the SD Myers and Occidental tribunals, the Methanex tribunal avoided relying on the WTO jurisprudence in its interpretation by firmly demarcating between ‘like goods’, as completely a trade concern, and ‘like circumstances’ which is an investment provision attribute. This argument, however, is rather faulty since the WTO is more than just a trade in goods treaty. The national treatment for example is

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\(^{69}\) Methanex, para.14.  
\(^{71}\) Methanex, para. 14.  
\(^{72}\) Methanex, Pt IV, Ch. B (Article 1102 NAFTA).  
\(^{73}\) Methanex v US, (n 50), at para 17, Pt. IV, Ch. B, 8
applicable to all parts of the WTO including intellectual property and the General Agreement on Trade in Services.\footnote{See relevant parts of the WTO/ (GATS).

\footnote{Pope & Talbot Inc. v The Government of Canada, UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001, at para 78, (hereinafter Pope & Talbot).}

\footnote{Pope & Talbot v. Canada, para. 75.}

\footnote{Pope & Talbot v. Canada, para. 79.} }

In the case of \textit{Pope & Talbot Inc. v The Government of Canada}, the tribunal declared that the first step in any analysis of the national treatment standard should be by comparison of investments within the same economic sector, and that not only the economic factor but also the policy objectives of the member States should be considered.\footnote{Pope & Talbot v. Canada, para. 75.} The \textit{Pope & Talbot} tribunal addressed ‘in like circumstances’ from the position of the comparators among the softwood lumber exporters.\footnote{Pope & Talbot v. Canada, para. 75.} In that case, the softwood lumber producers in the covered areas were considered not to be in ‘like circumstances’ with the producers in the covered areas. The \textit{Pope & Talbot} tribunal further recognised that a breach of NAFTA Article 1102 is notionally confirmed ‘once a difference in treatment between a domestic and a foreign-owned investment is discerned’.\footnote{Pope & Talbot v. Canada, para. 79.} Perhaps no NAFTA tribunal has argued the national treatment standard the way the tribunal in \textit{Pope & Talbot} did. Even though the tribunal rejected the Article 1102 national treatment claim but rather found a breach of Article 1105 minimum standard of treatment, a more interesting part of the award was the tribunal’s analysis of the meaning of Article 1102 in comparison to the interpretation of the same standard under the WTO jurisprudence. The tribunal clearly accepted the proposition of the claimant.
The tribunal in *United Parcel Service of America v Government of Canada* considered the operators of courier and postal services not to be in ‘like circumstances’ because of the difference in their delivery methods.\(^7\)

The tribunal in *Feldman v. Mexico*\(^9\) also narrowed down likeness by interpreting ‘in like circumstances’ to mean operating in the same business, the exporting of cigarettes.\(^8\) On the other hand, the tribunal in *Champion Trading Co*\(^8\), also adopting the narrow interpretation of ‘in like situations’, decided to look beyond the factual situation of the domestic and foreign cotton traders operating in the same sector. In the dispute, certain domestic companies received payments from the Egyptian Government while the foreign investor was denied despite both being in the same cotton trading. The tribunal argued that though both were operating in the same economic sector, they were clearly distinguishable as the domestic trades were buying their cotton from government designated centres at fixed prices while the foreign traders were not.\(^2\)

The last case in the review of investment tribunals’ interpretation of the principle of non-discrimination based on likeness is the interesting case of *Bayindir v. Pakistan*.\(^3\) The case of *Bayindir v. Pakistan* was chosen as the last to be reviewed here for its many interesting perspectives. Though it was from an ICSID case law, the *Bayindir*

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\(^7\) *United Parcel Service of America Inc. v Canada*, UNCITRAL/NAFTA, Award on the Merits, 24 May 2007, (hereinafter *UPS v Canada*).

\(^9\) *Marvin Roy Feldman Karpa (CEMSA) v. Mexico*, ICSID Case No. ARB (AF)/99/1, Award (16 December 2002) (Gantz, Kerameus, Covarrubias Bravo) [hereinafter *Feldman v. Mexico*].

\(^8\) *Feldman v. Mexico*, Award, 16 December 2002, para 171.

\(^8\) *Champion Trading Company and Ameritrade Internationa,l Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award (27 October 2006) (Aynes, Briner, Fortier).

\(^2\) *Champion Trading Co. v. Egypt*, para 154.

\(^3\) *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (Kaufmann-Kohler, Berman, Bockstiegel) [hereinafter *Bayindir v. Pakistan*].
tribunal affirmed the NAFTA jurisprudence three-step examination when assessing whether there was a breach of the national treatment obligation. The tribunal held that:

The tribunal will first examine whether Bayindir’s investment was in a ‘similar situation.’ If so, it will then assess whether Bayindir’s investment was accorded less favourable treatment than PMC-JV and whether the difference in treatment was justified.84

In the assessment of likeness in order to confirm the violation of the national treatment obligation, the first thing has been for the tribunal to determine a comparator that is in “like situation” or “like circumstances” with the claimant. In this regard, the Bayindir tribunal argued that being in the same “business sector” is not enough for two companies to be ‘in like situations’. It stated that:

The claimant is right that the project and business sectors are the same. This may be relevant in a trade law context. Under a freestanding test, however, such as the one applied here, that degree of identity does not suffice to displace the differences between the two contractual relationships.85

Having stated that, the tribunal concluded:

The two contractual relationships are too different for Bayindir and the local contractors to be deemed in ‘similar situations’. Consequently, the first requirement for a breach of the national treatment clause embodied in Article II (2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements.86

84 Bayindir v. Pakistan, para 399.
85 Bayindir v. Pakistan, (n.81) para 402.
86 Bayindir v. Pakistan, (n. 81) para 411.
This decision is significant in its different reasoning on the concept of business sector. The approach adopted by the tribunal was similar to that in the earlier case of *Champion Trading v. Egypt*.87

From the above brief survey of investment awards, it is observed that the various tribunals understood likeness differently and applied it inconsistently and incoherently. As such, the standard with which to contrast the activities of domestic investors with their foreign counterparts remains debatable.88

Even though this thesis is not advocating for a congenial marriage between the jurisprudential approaches of the systems of trade and investment, it is, however, going to pinpoint the superior interpretative methodology of the trade law jurisprudence. This is with a view to learning something from the more sophisticated WTO jurisprudence due to the congenital defect of the system under investment law. In chapter five, these inconsistencies and lack of coherence would be synthesized by way of cross-reference to chapters three and four.89

3.4 Treatment between Comparators and the Effect of Intent

Having established the position of the foreign investor when compared to the domestic investor, the tribunals, usually following the three-steps test advocated by NAFTA, then move to establish whether the foreign investor has been given treatment commensurate with that of the domestic investor. Just as in the case of ‘likeness’, the phrasing of the national treatment standard differs as far as the required treatment is concerned. The wording most commonly used generally considers treatment of

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87 *Champion Trading Co. v. Egypt*, (n. 79).
88 Dolzer & Schreuer, (n 13), 200.
89 Sub-head 3.8 below will also analyse some of these inconsistencies.
foreign investors and/or investments that is ‘no less favourable’ than is granted to domestic investors in the host country. Furthermore, arbitral tribunals have continuously differed about the relevant procedure to be followed in establishing whether a foreign investor has suffered ‘less favourable’ treatment. The tribunals disagreed as to whether the measure’s adverse effect on the foreign investor is enough to confirm less favourable treatment or whether discriminatory intent is also relevant in such a determination of national treatment.

In assessing the requirement of intent of the host government to give preferential treatment to its nationals, the tribunal in *SD Myers v Canada* settles on the effect rather than the intent. The NAFTA tribunal in *Myers* stated:

> ‘Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of intent to favour nationals over non-nationals would not give rise to a breach of Article 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word ‘treatment’ suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11’.

In *Siemens v Argentina*, the tribunal was even clearer when it stated that:

> ‘The tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment’.

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90 Federico Ortino, (n10).
91 *SD Myers v Canada*, (n 43).
92 *SD Myers v Canada*, (n 43) para 254.
93 *Siemens v Argentina*, Award, 6 February 2007.
94 *Siemens v Argentina*, para 321.
The tribunals in both *Feldman v Mexico*\(^95\) and *Corn Products v Mexico*\(^96\) seem to share *Siemens v Argentina’s* position that it is the impact of the measure that is important not the intention of the host state.

However, in contrast to the various tribunals that considered the probable impact rather than the intent of a measure in a finding of discrimination, are tribunals that seem to require the presence of intent. The tribunals in *Methanex v The United States Government*\(^97\) and that of *Genin v Estonia*\(^98\) both recognised that intention is paramount in any attempt to establish the presence of discrimination.

The *Methanex* tribunal explicitly demanded that in order to initiate a violation of the national treatment standard, the Canadian investor ‘must demonstrate … that California intended to favour domestic investors by discriminating against foreign investors’\(^99\).

In *Genin*, the tribunal, while rejecting the non-discrimination claim against Estonia, stated:

‘there is no indication that the Bank of Estonia specifically targeted EIB in a discriminatory way, or treated it less favourably than banks owned by Estonian nationals. Moreover, Claimants have failed to prove that the withdrawal of EIB’s license was done with the intention to harm the Bank or any of the Claimants in this arbitration, or to treat them in a discriminatory way’\(^100\).

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\(^95\) *Feldman v Mexico*, (n 56), at para 181.
\(^96\) *Corn Products v Mexico*, Decision on Responsibility, 15 January 2008.
\(^97\) *Methanex v US*, (n 50), at para 12.
\(^99\) *Methanex v US*, (n 50), at para 12.
\(^100\) *Genin v Estonia*, (n 68), at para 369.
The perspective taken by the tribunal in *Occidental* seems different. Even though the tribunal accepted that the foreign investors were treated less favourably than the national companies, that had ‘not been done with the intent of discriminating against foreign-owned companies’ and as such held that ‘the result of the policy enacted…in fact has been a less favourable treatment to the foreign investor’.  

3.5 Interpreting Non-Discrimination as Most Favoured Nation Obligation

The Most-Favoured-Nation (MFN) treatment clause in modern investment treaties is traceable to the twelfth century features of the friendship, commerce and navigation treaties. It is a substantive standard that is part of international economic treaties. It has been included in the very first BIT between Germany and Pakistan. The MFN clause is part of the principle of equality and protection against discrimination that is provided by the host state. It requires the host state not to discriminate both *de jure* or *de facto*. The main purpose of the MFN is to ensure that parties to the relevant treaty treat each other in a manner at least as favourable as they treat third parties. The International Law Commission final Draft Articles define the MFN treatment:

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than the

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101 *Occidental*, (n 48) para177.
104 1959.
106 UNCTAD, (n 72), at 10
treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.\textsuperscript{107}

The MFN treatment and NT are for the prevention of discrimination on the basis of nationality. As such, for a violation of MFN treatment to occur, the difference in treatment must be as a result of the nationality of the foreign investor.

As a non-discrimination guarantee just like other investment standards, the MFN has varying wordings and appears in different context depending on the object and purpose of the treaty containing the clause.\textsuperscript{108} The bilateral nature of investment treaties is another important reason for the differences in wordings. Though it is linked to the principle of equality of States, however the obligation only exists when it is created by a treaty clause.\textsuperscript{109} Some treaties provide for a narrow MFN clause while other treaties couched it in general terms. Article 3 (1) and (2) of the 1998 German Model Treaty combine the MFN and NT obligations:

“(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.”

\textsuperscript{109} OECD Working Papers on International Investment, 2.
Furthermore, just like in the national treatment standard, some MFN clauses include the ‘like circumstances’ terminology. Article 1103 of NAFTA Chapter Eleven, which is a clear reflection of the United States BIT Program, provides:

“1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of another Party or of a non-Party with respect to the establishment, acquisition expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Party shall accord investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”

The German Model contains a general MFN provision that is not limited to the part containing the clause. Majority of the MFN clauses in BITs contain generalized promises of MFN treatment applicable to all parts covered by the BIT. The legal basis for the MFN treatment clause remains the ‘base treaty’ that contains the MFN clause. Article 7 of the Draft Articles on MFN states:

“Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.”

The provision on the MFN treatment, as a relative and substantive protection standard just like the NT standard, definitely requires a comparator. Furthermore, it requires a

111 UNCTAD, (n 72) 22.
finding of more favourable treatment given to investors of a named nationality instead of the investors covered by the ‘base treaty’.\textsuperscript{112} Evidently, there should be a comparison followed by an objective assessment of less favourable treatment in order to make a finding on the violation of MFN treatment.\textsuperscript{113}

The International Law Commission (ILC) expected the interpretation of the MFN clause necessarily follows the rules of the VCLT.\textsuperscript{114} This will require an inquiry into the ordinary meaning of the clause in the context and purpose of the particular treaty incorporating the MFN.\textsuperscript{115} The ILC’s work therefore provided an analysis on how the MFN clause is governed by the \textit{ejusdem generis} principle that was used by several arbitral tribunals and judicial bodies in their interpretation of the standard.\textsuperscript{116} The principle is to the effect that an MFN clause can attract the more favourable treatment present in such other relevant treaties only based on the same ‘subject matter’, the same ‘category of matter’, or the same ‘class of matter’.\textsuperscript{117}

It is interesting that despite being a non-discrimination standard, the MFN treatment obligation does not in any way require that foreign investors must be treated equally regardless of their specific condition or circumstance.\textsuperscript{118} Rather, differential treatment could be justified if the comparators are shown to be in different objective situations. As stated earlier, the treaties use varying wordings that include ‘like situations’, ‘like
circumstances’ or other similar wordings.\textsuperscript{119} The tribunal in \textit{Parkerings v Lithuania}\textsuperscript{120} opined that a comparison was imperative with another investor who was in like circumstances while the tribunal in \textit{Bayindir v Pakistan}\textsuperscript{121} provided that the comparison between the relevant foreign investors must be tested at the level of the contractual terms and circumstances.

The MFN treatment clause can be subjected to certain exceptions.\textsuperscript{122} The EU Model BIT seems to recognise these exceptions, and posit that the EU investment treaty practice ‘may significantly add to a discernible trend towards an approximation (or ‘re-integration’) of international investment law to (with) international trade law’, … leading to ‘a further move towards the de-fragmentation of international economic law’.\textsuperscript{123} Thus these exceptions could be said to be as a result of the wordings of the clause or can be exceptions that are expressly stated. In either case, these exceptions play significant role in the interpretation of the standard as a substantive treatment obligation and also serve as restrictive devices for the negotiating States against unplanned negative effect or application.\textsuperscript{124}

The Majority of treaty practice is concentrated in the areas of substantive application of the MFN treatment clause to the area of investment liberalization. In the \textit{ADF v

\textsuperscript{119} See for example NAFTA (1992), US Model BIT (2004).
\textsuperscript{120} \textit{Parkerings-Compagniet AS v Republic of Lithuania}, ICISID Case No. ARB/05/8, Award, 11 September 2007.
\textsuperscript{121} \textit{Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan}, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.
\textsuperscript{122} UNCTAD (n 72) 46.
\textsuperscript{124} David D. Caron and Esme Sharlow, \textit{Most Favoured Nation Treatment – Substantive Protection}, (n 75).
USA\textsuperscript{125}, the claimant invoked the MFN treatment clause in NAFTA in order to benefit from a broader fair and equitable treatment provision contained in third party BITs by the United States with Albania and Estonia. The tribunal rejected the investor’s claim and found for the respondent that its acts were excluded under Article 1108 NAFTA and as such the claimant could not rely on the MFN clause. The claimant’s aim was simply to get round the limiting interpretation given to the fair and equitable treatment clause under Article 1105 of NAFTA. That is why Roland Klager viewed the FET to be a ‘black box’ full of surprises’.\textsuperscript{126} The vague nature, unpredictable and inconsistent interpretation of the standard poses lots of issues in its application, making it ‘a prominent cause of action for investor-State claims’.\textsuperscript{127}

In \textit{CME v Czech Republic}\textsuperscript{128}, the tribunal used the award to provide a clarification of the meaning of words used in the ‘base treaty’ by invoking provisions in third party treaties. In the \textit{MTD v Chile}\textsuperscript{129}, the tribunal allowed the claimant to use an MFN clause to import protection provisions that were otherwise absent in the basic treaty. The claimant invoked the MFN clause in the Chile-Malaysia BIT to put forward its argument that the more favourable substantive provisions that were contained in other third treaties should apply to benefit it.

\textsuperscript{125} \textit{ADF Group Inc. v United States of America}, ICSID Case No. ARB (AF)/00/1, Award of 9 January 2003. The \textit{ADF v USA} remains the only case in which an investment tribunal has interpreted and applied an exception to reject an MFN claim.


\textsuperscript{127} Roland Klager.

\textsuperscript{128} \textit{CME v Czech Republic B.V. v. The Czech Republic}, UNCITRAL, Final Award, 14 March 2003.

\textsuperscript{129} \textit{MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile}, ICSID Case No. ARB/01/7, Award, 25 May 2004. Though there was an annulment, it did not overturn the decision of the original tribunal on this issue.
The MFN treatment as a standard, a standard borrowed from the trade regime where it is a natural fit, is now applicable in the field of investment and trade and essentially provides for equal competitive opportunities with regard to those matters the specific MFN clause applies. The standard, together with the NT, is widely regarded as an important standard of treatment for both investors and their investments. The MFN clauses are commonly found with varying meanings and application in many investment treaties. Each MFN clause can only be effectively applied through a careful, in-depth analysis of the relevant text in accordance with the general rules of interpretation of the Vienna Convention. 130

3.6 The Fair and Equitable Treatment Standard

Perhaps no investment protection standard has generated such intense interest and academic discourse in the last decade than the fair and equitable treatment standard. 131 The FET has been a sleeping beauty, woken up from its deep slumber lately to rescue estranged foreign investors. Todd Weiler traced the origin of the standard to the ‘applicable law’ of the mixed claims commissions of the mid-19th to the mid-20th

130 OECD (n 78) 16, see also Chapter Two above for a more in-depth discussion of the application of the VCLT.
Centuries\textsuperscript{132} while Vasciannie traced it to the OECD Convention of 1967.\textsuperscript{133} Paparinskis traced the use of the phrase ‘fair and equitable’ in the field of foreign investment protection to the 1948 Havana Charter of the International Trade Organisation (ITO).\textsuperscript{134}

The standard is now present in most bilateral investment treaties and remains one of the most litigated provisions in IIAs.\textsuperscript{135} Article II (2) of the Argentina-USA BIT states: ‘Investment shall at all times be accorded fair and equitable treatment…’ It is also present in many multilateral treaties such as the Energy Charter Treaty (ECT) of 1994 and the North American Free Trade Agreement (NAFTA) of 1992. The Energy Charter Treaty has an extensive provision on the FET requirement. Article 10 (1) of the ECT provides:

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make investments in its area. Such conditions shall include commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.\textsuperscript{136}

The standard, quite unlike the NT and the MFN, is an absolute, non-contingent one and as such does not require the State’s existing treatment of investors or other circumstances created by the State.\textsuperscript{137} The contingent character of the standard has made investors completely rely on it, ‘as a divine gift from host States’ and on the

\textsuperscript{132} Todd Weiler, (n 98) 184.
\textsuperscript{133} S Vasciannie (n 98) 104. Dolzer traced the concept to the treaties of friendship, commerce and navigation (FCN).
\textsuperscript{134} Jonathan Bonnitcha, (n 98) 143.
\textsuperscript{135} Dolzer and Schreuer, (n98) 131.
\textsuperscript{136} See the ECT 1994, ILM 381, 389 (1995).
\textsuperscript{137} Katia-Yannaca-Small, \textit{Fair and Equitable Treatment Standard: Recent Developments}, in August Reinisch, (n 100) 111.
other hand it is criticized by the host States ‘because of the unbalanced relationship it creates between the foreign investor and host State’. 138

Despite being the most invoked provision in investment disputes today and also despite the fact that considerable effort has been expanded in an in-depth examination of the FET, the standard is still not fully clarified. 139 Furthermore, just as in other investment treaty standard clauses, there is no universally agreed wording of the FET standard. Significant variations from treaty to treaty abound, hence the importance of recourse to Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and reference to its context and history. 140 The meaning of the terms ‘fair’ and ‘equitable’ has not been easy either. 141

In bilateral Investment treaty practice, the FET standard is applied as a gap-filling measure where other more specific standards have not provided coverage. 142 There are quite a number of positions linking the FET standard to non-discrimination. One argument opined that the FET assumed position as an international investment law standard due to its success as equality and non-discrimination standard in other commercial contexts. 143 Arbitrariness and discrimination, it is argued, effectively fall under the FET standard despite the concepts being clearly delineated under specific rules in international investment law. 144 So generally, any discriminatory treatment is

138 Ioana Tudor, (n 100) 3.
139 Katia Yannaca-Small.
141 Krista Schefer, (n 98) 327.
142 Sempra v Argentina, (n 108) para 297.
143 Todd Weiler, (n 98) 190.
enough to establish a violation of the FET because discriminatory treatment is not fair or equitable.\textsuperscript{145}

The tribunal in \textit{CMS v Argentina} also connected the arbitrariness and discrimination protection standard to the FET standard where it observed, ‘….any measure that might involve arbitrariness or discrimination is in itself contrary to the fair and equitable treatment’.\textsuperscript{146} This was also the position of the tribunal in \textit{Waste Management v Mexico}.\textsuperscript{147} All these have gone to show clear manifestations of non-discrimination in the FET standard.

It seems an anomaly that the starting point for an analysis of the FET as a standard of treatment for foreigners has nothing to do with investment. The reference to the expectation of international investment law on host States to treat investors based on the fair and equitable principle always goes back to the \textit{Neer} case.\textsuperscript{148} The \textit{Neer} arbitration involve a claim presented by the United States to the US-Mexico Claims Commission on behalf of the family of Paul Neer, who was killed in Mexico in uncertain circumstances. In what is the most authoritative pronouncement on the issue, the tribunal stated:

‘… the propriety of governmental acts should be put to the test of international standards….the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of

\textsuperscript{145} Ioana Tudor, (n 98) 28-29.

\textsuperscript{146} CMS Gas Transmission Company v The Argentine Republic, ICSID Case No. ARB/01/8, Award of 12 May 2005.

\textsuperscript{147} Waste Management Inc. v United Mexican States, ICSID Case No. ARB (AF)/003/, Award of April 2004.

international standards that every reasonable and impartial man would readily recognize its insufficiency'.

In the latest pronouncement on the IMS by the ICJ in the *Kulbhushan Jadhav case* between India and Pakistan, the State of India remains disinclined to signing Protocol II additional to the Geneva Conventions that deals with the rights of protected persons in situations of internal armed conflicts. However, it was argued that India this does not take away the fact that India remains bound by common Article 3 of the Geneva Conventions I-III, which is ‘a customary norm of international law which prescribes a minimum standard of treatment for civilians caught in an internal conflict’.

The Claims Commission in *Neer* clearly emphasized on the need to defer to the host State and concluded that the facts of the case did not reveal a lack of diligence to the extent that will render Mexico liable. In effect, Mexican authorities’ failure to bring to book the perpetrators of Neer’s murder ‘did not per se violate the international minimum standard on the treatment of aliens’. The Commission dismissed the claim.

Why is *Neer* important? The decision prepared the ground for the advent of the international minimum standard in international law and set the tone for a discussion of the standard treatment of aliens. Ongoing argument has centred on the position of FET standard in relation to the international minimum standard. In effect, does the FET reflect the international minimum standard within customary international law or does it represents an autonomous standard? Recently, the ICJ has course to make a pronouncement on it in the *Case Concerning Ahmadou Sadio Diallo (Republic of

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149 Neer v Mexico, 15 October 1926, 4 UNR1A 60.
152 Ioana Tudor, (n 98) 63.
arguing how the standard attained customary international law standard. Many commentators have expressed divergent views. Stephen Schwebel, arguing that the FET Standard has attained the status of customary international law due to its presence in almost two thousand bilateral investment treaties, stated:

The phenomenon of how and when provisions of treaties binding only on parties may seep into general international law and thus binding the international community as a whole is subtle and elusive. It is nevertheless a process known to international law. It is a process of which some 2,200 bilateral investment treaties are the contemporary exemplar.154

Alberto Alvarez Jiménez, in his analysis of the ICJ’s Ahmoudou Sadio Diallo case,155 argued that despite the evidence of certain favourable factors within the domain of both international law and international investment law together with the uniqueness of the Diallo case and novel approach by some States to offer foreign investors lower, not higher, level of protection, the FET does not meet the sill of the ICJ’s awaken strict approach to customary international law.156 Alvarez’s conclusion was that what the Diallo case would achieve was to afford the ICJ an opportunity to define the contours and content of the minimum standard of treatment of aliens and would be highly unlikely from this for the FET to receive the court’s recognition as customary international law.157

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155 Alberto Alvarez Jiménez, *Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice*, available at dialnet.unirioja.es/descarga/articulo/4897681.pdf, (last accessed on the 29th August 2017). NB: the author was clear that his opinion was not to preempt the court as he gave the opinion before judgment was handed down in the case, rather before the case has even been pleaded before the ICJ.
156 Alberto Alvarez Jiménez, 7
In an empirical study of the application and interpretation of the FET standard in bilateral investment treaties, Ioana Tudor argued against the two contending perspectives. Accepting either of the dual positions, the traditional view that simply considers the standard to be part of the customary IMS or the modern view, which recognised the FET as an independent standard that has attained a customary character, she opined, simply add to the confusion concerning the standard. She suggested an alternative approach, which is to the effect that the FET should be analysed, based on its customary character, as an independent standard and not as part of the IMS. So the FET standard not only has a status of its own but has also developed a customary character.

The traditional approach to the position of the FET as part of customary IMS has found blessing in the NAFTA context while the modern view remain the perspective taken in many arbitral awards.

The North American Free Trade Agreement, NAFTA, remains the first multilateral treaty that offered both individuals and corporate bodies an avenue to ventilate their grievances before an international tribunal. Article 1105 covering minimum standard of treatment is the most controversial and disputed content of NAFTA Chapter 11.

Article 1105 (1) of NAFTA provides:

158 Ioana Tudor, (n 98) 3. Her study involved 365 BITs in which only 19 failed to mention FET. She observed that the FET was mentioned in both the Preamble and body of the treaties.
159 Ioana Tudor, (n 98) 56.
160 See also F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 (1999) The British Yearbook of International Law, 241.
161 (n 98) 68, See also PSEG Global Inc And Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID, ARB/02/5, Award rendered on 19 January 2007, 238.
162 See NAFTA Article 1105(1) and also see Pope & Talbot for the BIT position separating the FET from IMS.
163 See Patrick Dumberry, (n 98) 1, North American Free Trade Agreement, (NAFTA) 32, ILM, 605 (1993). NAFTA is also the first investment agreement between two developed States, United States and Canada.
164 Patrick Dumberry, 2-3.
Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The above statement, put together with NAFTA parties’ statement on the implementation of NAFTA, clearly set the FET to be among the requirements of international law. The clarification interpretation given to Article 1105 (1) by the NAFTA Free Trade Commission (FTC) has not gone unchallenged; in fact, to some it does more than interpret but completely amend the meaning of the provision and as such even the agreement.165

FTC’s interpretation of Article 1105(1) NAFTA states that:

Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that, which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).166

In the Mondev case, the claimant’s argument was to the effect that the respondent canvassed a changed of the meaning of the NAFTA provision that was fundamental to the case and that such a significant change is a clear violation of the principle of good

165 See Mondev International Ltd v United States of America ICSID, ARB (AF)/99/2, Final Award rendered on 11 October 2002, Methanex v USA, (n 50) at para 264, see also Pope & Talbot Inc. v Government of Canada, UNCITRAL, Award on Damages rendered on 31 May 2002.
166 FTC Notes of Interpretation of Certain Chapter 11 Provisions, Part B.
faith. The tribunal in *Pope & Talbot* in its decision on damages took the same position. The tribunal, on ‘whether the FTC’s action can properly be qualified as an “interpretation”, decided that the action might have amounted more to an amendment than an interpretation.  

However, the decision in *Pope & Talbot* is significant in another respect; that is its conclusion on the relation between the FET and the IMS. In its conclusion that there is a clear difference, and as such separation between the FET and the IMS, it settled that the extent of the treatment in normal standards in operation in the NAFTA countries enough to satisfy the requirement of Article 1105. The tribunal further confirmed the dramatic character of the FET and opined that the standard must be interpreted based on the relevant circumstances of the case. Several arbitral awards that came after *Pope & Talbot*, agreed with the tribunal’s decision concerning the evolutionary character of the FET.

Considering all the arguments and arbitral interpretations on the relationship between the FET and the IMS, Tudor argued that the two are incompatible, for the IMS aimed at the physical protection of foreigners and their property while foreign investment law was cut for the particular protection of investors.

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167 *Mondev v USA*, (n 124) at para 102.
168 *Pope & Talbot*, (n 124) paras 47 to 58.
169 See Ioana Tudor’s in-depth discussion of this position and a further analysis of the FET-IMS discussion.
170 *Pope & Talbot*, (n 124) see paras 47-59.
171 Ioana Tudor, (n 98) 60.
172 (n 98) 65, generally see 65-85, see also the *Jadhav Case* (India v. Pakistan) (n.150).
In his seminal discussion of the FET and IMS from the perspective of NAFTA Article 1105 also, Patrick Dumberry used two approaches, autonomous and equalizing.\(^{173}\)

Under the independent approach, the FET is given its ordinary meaning in the relevant treaty and the proponents of this approach argued that the FET has finally crystallised into a principle of customary international law of its own.\(^{174}\) On the other hand, the equalizing approach understood the FET as a reflection of the minimum standard of treatment under customary international law.

While Dumberry’s conclusion posit that the entire argument concerning the meaning, interpretation and position of the FET will not be answered using theories but a recourse to the particular FET clause to how it was drafted,\(^{175}\) Klager found the entire controversy to be clearly misleading because the division between IMS and the FET is without proof.\(^{176}\) Paparinskis conclusion on this is that customary law may necessarily be used in the interpretation though one rejects the traditional view that the fair and equitable treatment allude to the customary minimum standard.\(^{177}\)

The FET has been referred to severally as a ‘catch-all’ provision for investor protection because of its extensive coverage and wide presence in investment treaties.\(^{178}\) As an overarching clause, it also covers all other standards and is sometimes applied by investment arbitrators to refuse assistance to foreign investors asking for compensation for any loss ascribed to the host State’s behavior.\(^{179}\)

\(^{173}\) Patrick Dumberry, (n 98) 37.
\(^{174}\) See Ahmadou Sadio Diallo (n.153).
\(^{175}\) (n 98) see 37-46.
\(^{176}\) Roland Klager, (n 98) 88.
\(^{177}\) Martin Paparinskis, (n 98) 166.
\(^{178}\) Krista Schefer, (n 98) 327.
\(^{179}\) Ioana Tudor, (n 98) 68.
3.7 Interaction Among Investment Treaty Standards

The interaction among investment treaty standards is not one that is very clearly demarcated, at least as regards some of the standards. The national treatment standard, though generally accepted as a standalone, independent standard, is connected to other treaty standards and especially to the FET.\textsuperscript{180} Discrimination based on nationality or against a foreign investor will clearly serve as a breach of the FET. The MFN standard is undeniably used to ensure non-discrimination and its relative interaction with other standards has been accepted.\textsuperscript{181} Certain investment treaty tribunals regard the FET standard to be a far-reaching, all encompassing standard that cover all the other standards.\textsuperscript{182} The FET remains a recurring denominator in all the standards.

‘Considering the place of the fair and equitable standard at the very beginning of Art.II (2), one can consider this to be a more general standard which finds its specific application in \textit{inter alia} the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual towards the investor’.\textsuperscript{183}

The position of this thesis is that the standards will be progressively used to show their commonality at least in the prevention of discrimination. Arbitral decisions and commentaries will be used in the subsequent chapters to show some in-depth relationship between the standards.

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\textsuperscript{180} Christoph Schreuer, \textit{Interrelationship of Standards}, in August Reinisch, (n 100) 6.

\textsuperscript{181} \textit{ADF v USA}, para 193.

\textsuperscript{182} \textit{Nobel Ventures Inc v Romania}, Award of 12 October 2005.

\textsuperscript{183} \textit{Nobel Ventures}, para 182.
3.8 Tension in Arbitrating Non-Discrimination in Treaty Standards

Considerable evidence abounds from arbitral practice with regard to the extent of inconsistency in the interpretation of key elements of the national treatment standard. The tribunals have varying positions as to the nature of the relationship (the likeness), between the domestic and foreign investors, which is necessary in the determination of discrimination.184

On the issue of ‘likeness’, while the majority view focus on the domestic and foreign investors carrying on business in the same economic sector even if not in competition with each other, the tribunal in *Occidental* took a much wider interpretation of likeness comparing a foreign oil exporter with a domestic flower exporter. The *Methanex* tribunal’s reading was stricter by restricting the comparison to identical investors only.

The tribunals have also significantly differed in their interpretation of the national treatment standard with regard to the relevance of discriminatory intent. While the tribunals in *Pope & Talbot, Myers, Feldman and Occidental* evidently rely on the measure’s adverse effect on the foreign investors, other tribunals like the *Methanex* and *Genin* have accepted the relevance of discriminatory intent in order to establish a finding of national treatment claim. Various other tribunals have used varying approaches in such issues as the relationship between the measure and the host state’s policy objectives in order to reach a finding of difference in treatment.185

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184 Federico Ortino, (n 9), 364.
185 Federico Ortino.
3.9 Conclusion

This brief analysis has clearly shown the tension in the interpretation of standards of treatment by arbitral tribunals. The inconsistency and incoherence noticed has been responsible for the many crises bedeviling the investment regime, which necessitate the need to look outside the investment jurisprudence for help – could the WTO provide such help? Chapter four is devoted to the WTO’s Panels and Appellate Boards’ interpretation of these relative standards of treatment with so as to see if they provide any better interpretation that the investment jurisprudence can learn from. This does not mean transposing the trade regime into the investment regime. As we will see, the WTO has its own inherent problems, suffice it to say it is far better than the investment regime in a lot of respects and as such some lessons will be learnt as part of the journey towards developing a more coherent interpretation of the non-discrimination principle for international economic law.
Chapter Four

Non-Discrimination Under The GATT/WTO

4.0 Introduction

This chapter, just like chapter three that precedes it, is specifically aimed at reviewing the interpretation approach taken by the trade regime. It will look at how the trade regime interprets and applies the principle of non-discrimination. This is with a view to drawing the salient differences between the interpretation of the principle under investment law and the World Trade Organisation - WTO. The discourse here is necessary in order to tease out the relative development in the jurisprudence of the WTO and give an analytical account of how the Panels and the Appellate Body have interpreted the non-discrimination principle using the standards of treatment – Most-Favoured-Nation (MFN) and National Treatment (NT). Of course, the trade jurisprudence is ripe with its interpretation and analysis using sustainable development approach, the cases that invoked this concept using the VCLT are analysed in the next chapter.

Any discussion of the principle of non-discrimination under the WTO will necessarily entails a look at the development of the World Trade Organisation (WTO) and the General Agreement on Tariffs and Trade (GATT) before it.

The initial idea was to place the GATT under the International Trade Organisation (ITO), which unfortunately could not see the light of the day.\(^1\) However, in 1947, and

\(^1\) GATT Art XXIX covers the relationship between the GATT and the ITO. The US vehemently rejected the idea of the ITO fearing it will affect its domestic sovereignty.
as a prelude to the ITO, some 23 major international trading countries came together to bring about a temporary agreement, the GATT that will become the standard institutional foundation upon which today’s world trade regime rests.\(^2\)

The GATT system continued to regulate international trade between nations from 1948 until the creation of the WTO. The GATT covers such areas as the trade in goods, trade liberalization, the sponsorship of the eight rounds of trade negotiations and dispute settlement mechanism for the use of the contracting parties. However, despite these evident achievements, the GATT was bedeviled by numerous shortcomings or failures, which include, among others, refusal of some parties, especially the developing countries, to undertake any obligation, failure of the GATT system to have a recognised structure for it to work under, neglect of some critical sectors of trade, ineffective dispute settlement mechanism and many others.\(^3\)

As a result of the above clear shortcomings in the operation of the GATT, the eighth round of the GATT trade negotiation that has popularly come to be known as the Uruguay Round was held with a view to tackling these problems.\(^4\) The effort eventually led to the creation of the WTO.

The Agreement Establishing the World Trade Organisation (hereinafter the WTO Agreement) mainly deals with organizational and structural issues while the

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The substantive obligations covered by the WTO members pertaining to international trade are contained in the different agreements added to the WTO Agreement.\(^5\)

The World Trade Organisation is now the single institutional framework that encompassed the GATT and all its related agreements, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) that form a binding contract between the parties.\(^6\)

Quite unlike the GATT, the WTO is evidently an international organisation created by a multilateral treaty having independent legal personality with rights and privileges to enter into relations with other organisations.\(^7\) The WTO, despite being mainly a multilateral treaty that is devoted to liberalization of trade, is also effectively employed in the management and regulation of trade.\(^8\)

Article III of the WTO clearly spelt out the five main functions of the trade body that situate it at the centre of the multilateral trading system.\(^9\) The preamble to the WTO Agreement states the fundamental principles of the WTO to include trade liberalization, promotion of fairness in trade relations, transparency, and non-discrimination and special treatment of developing countries. Among all the fundamental principles of the WTO, this thesis will be mainly concerned with the principle of non-discrimination only.


\(^6\) WTO Agreement, Art. II (1).

\(^7\) WTO Agreement Art. VIII.

\(^8\) WTO Agreement (n 6).

\(^9\) William Davey, (n 3) 24.
4.1 The Principle of Non-Discrimination Under the WTO

The era of the Great Depression of the 1930s saw many countries employing discrimination between and against other countries as a form of protectionist trade policies. However, there seems to be a putative trend in the US approach under the Trump administration; ‘buy American, hire American’ for trade and services! If this is implemented, experts predict, there is likely going to be a trade war. Inarguably, discrimination distorts trade and the market by favouring certain goods and services that may clearly be sub-standard and overall more expensive.

Non-Discrimination is a fundamental pillar and feature of the multilateral trading system of the WTO. The non-discrimination principle is in effect designed to ensure that WTO Members do not discriminate on ‘like products’ based on their origin, that is ‘like products’ must be treated equally irrespective of their origin. The rules embodying the non-discrimination principle are at the very hearts of the main WTO agreements of the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the many other agreements of the WTO.

11 Other dimensions are the evident re-negotiation of NAFTA on the one hand and the impact of Brexit on the other.
12 Peter Van Den Bossche (n10).
14 GATT (n4)
15 General Agreement on Trade in Services, April 15, 1994, WTO Agreement [hereinafter GATS].
16 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15 1994, WTO Agreement, [hereinafter TRIPS].
17 For example, NT obligations can also be found in Article 2.1 of the Agreement on Technical Barriers to Trade [hereinafter the TBT Agreement], and also in Article 2 of the Agreement on Trade-Related Measures (TRIMS), in the same vein, MFN obligations can be found in Article 2.1 of the TBT Agreement, Article 9.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [hereinafter the Antidumping Agreement] and Article 19.3 of the Agreement
Discrimination is defined as either “the effect of a law or established practice that confers privileges on a certain class because of race, age, sex, nationality, religion, or disability” or “differential treatment; especially, a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”. The WTO Appellate Body, while considering the definition of discrimination, stated that: “The ordinary meanings of ‘discriminate’ converge in one important respect: they both suggest that distinguishing among similarly situated beneficiaries is discriminatory”. Under the WTO, discrimination is majorly divided into two, De jure and De facto discrimination. De jure discrimination, said to be the obvious and rarely used form, is where the State, through deliberate policy and or regulation, formulate discriminatory measures that will see to some countries driving certain advantages over others. On the other hand, De facto discrimination, which is said to be the most vicious and complex type of discrimination in international trade law, does not usually emanate from direct regulation but is manifested in the effect produced by such regulations or laws. Other, less applicable types of discrimination include natural origin, which is similar to de facto discrimination and origin-based discrimination that is based solely on the origin of the product.

The notion of non-discrimination is highly intricate and quite flexible, its definition and analysis therefore depends on the context in which it is applied. It may be as a result of its intricate nature that the Panel in Canada-Patent Protection of Pharmaceutical Products warned, “‘Discrimination’ is a term to be avoided whenever

more precise standards are available, and when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.”

It is instructive that even though the non-discrimination provisions contained in all the WTO agreements are stated in clear terms, this alone has not sufficiently addressed the problem of defining the concept. However, despite the seeming difficulties in arriving at a definition of such a concept, the Appellate Body has interpreted the sweeping term ‘non-discrimination’ as a stipulation not to treat ‘similarly situated’ countries differently. It opined that discrimination would only happen when ‘similarly situated’ countries are offered different treatments. So from the Appellate Body’s interpretation, the fundamental issue in making a finding of discrimination will be to ascertain the grounds for comparing ‘similarity’ between WTO Members, something entirely lacking in the investment regime. This interpretation is seen as a great development in the overall jurisprudence of the WTO as it brings about a guide in defining the non-discrimination obligation.

The difficulty in dealing with the non-discrimination standard under the WTO is a result of the fact that reaching a finding on the first element, the comparator clause, as to whether two situations are quite alike so as to be treated the same is one that is not easy to arrive at. It then becomes imperative to ascertain the elements common to the two situations that should be examined in order to make a finding as to whether they are the ‘identical’ or are ‘similar’. Now a follow up question to the above will seem to be how can supplementary guidelines be established in order to map out the

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22 William Davey, (n 3) 58.
25 William Davey (n 3).
elements that will be relevant and serve as a basis in determining similarity of situations? The second element concerns a comparison between the treatments of the relevant market actors to see whether one is treated less favourably than the other. There seems to be not much in-depth discussion in available literature and case law on the interaction between the two elements. Each of the elements, however, has been subject to different interpretations under different standards.

May be guidance can be sought from the WTO Agreements with regards to criteria relevant in the determination of similarity of situations and similarity of treatment. The notion of “similarly situated” is said to underscore all the non-discrimination obligations of the WTO. The various agreements contain different criteria that are applicable to the determination of “similarly situated” and “similarity of treatment”.

So simply put, the notion, as contained in the provisions of the various WTO agreements, prohibit arbitrary or unjustifiable discrimination and entail equal treatment of the WTO Members that are “similarly situated” based on their existing conditions.26

Generally, the WTO tribunals, in making a finding about discrimination, also pass through the route of making a complete resolution of the likeness or similarity between products, services or nationality of the Members. Both the NT and the MFN clauses in the GATT and GATS use the notion of “like products”27, “like services”28 and “like service suppliers”29 in justifying the classification of similarly situated

26 Both NT & MFN Clauses consider the WTO Members to be “similarly situated”.
28 GATS Arts. II:1 and XVII:1 (n 15).
29 GATS.
Members. The jurisprudence of the WTO is replete with many decisions where the concept of “like products” has been interpreted. Suffice it to say, the AB has cautioned that the concept is not to be construed uniformly for all cases; rather each case has its peculiarity and ought to be judged as such by the experts interpreting the applicable treaty.

For a clear understanding of the interpretation and application of the principle of non-discrimination under the NT and MFN, it is imperative to have at least a cursory look into the general concept of interpretation under the WTO jurisprudence.

4.2 Interpretation of the Principle of Non-Discrimination under the WTO

The general provisions covering non-discrimination standard in the WTO agreements, unlike what is obtained in the NT and the MFN, simply employ the name ‘discrimination’ without any specific guidelines to assist in defining the obligation. This makes the term ‘non-discrimination’ to be vague at best.

Considering the treaty-based nature of all the WTO obligations, the question is, how do the panels and the AB interpret the provisions of this multilateral instrument? As a multilateral treaty, the panels and AB created under the WTO are guided by the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties as required by the WTO Dispute Settlement Understanding which direct all WTO tribunals to apply ‘customary rules of interpretation’ in resolving the provisions of WTO agreements.

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30 Julia Ya Qin (n 20) 217.
Article 31 of the Vienna Convention states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.” The general import of the provisions of Article 31 of the Vienna Convention is that a treaty interpreter is required to interpret following the enumerated stages covered by the article, good faith, ordinary meaning, object and purpose of the treaty. Though the ‘object’ and ‘purpose’ can be inferred to refer to the complete treaty, this has not prevented the AB to question these in a particular WTO provision. In order to ascertain the object and purpose of a particular provision in a treaty, the ordinary meaning of the provision becomes imperative since the object and purpose of most treaties are broadly expressed in the preamble, making it difficult to apply such in a purposeful way. In some instances, it is clear that some WTO agreements contain multiple objectives that may not be directly connected to a specific provision in the agreement though where a WTO tribunal identify the object and purpose of a particular provision, these must be in conformity with at least one of the broader objects and purposes of the relevant WTO agreement. Despite the seeming problem of the way these WTO tribunals do this, it is still way ahead of investment tribunals take on this as exemplified in chapter three above.

33 Article 31 VCLT (n31). See Chapter two for an in-depth analysis of the application of the Vienna Rules.
34 For example the Appellate Body Report, US-Gasoline, (n 32) 17-18, 22, where the body examined the object and purpose of Article III:4 and the Appellate Body Report, Argentina-Safeguard Measures on Imports of Footwear, WT/DS121/AB/R (Dec. 14, 1999) 91, where it examined the object and purpose of Article XIX.
35 Julia Ya Qin (n20) 236.
36 Julia Ya Qin (n20) 236.
Thus, it can be safely concluded that the rules for the determination of similarity, those rules that will be used to determine ‘likeness’ and ‘less favourable treatment’, must follow the fundamental purposes of the WTO Agreement. Thus the definition of ‘non-discrimination’ can be explored within the setting of the WTO using the ‘similarly situated’ pattern.

4.3 Investigating the Pattern of the ‘Similarly-Situated’ within the WTO

The idea of the ‘similarly situated’ is central to the two fundamental standards of treatment applying the non-discrimination principle under the WTO, the NT and MFN obligations. The notion of ‘like products’ is used to reach a conclusion as to whether two or more WTO members are ‘similarly situated’ and as such should receive similar treatment. It follows that, under the GATT provisions of the NT and MFN, the non-discrimination provisions requires the treatment of ‘like products’ of WTO members to be alike irrespective of their national origins. The jurisprudence of the WTO seem to be mainly concerned with ‘likeness’ in the concept of ‘like products’ obligations unlike the other corresponding concepts of ‘like services’ and ‘like service suppliers’.37

The notion of ‘like products’, as explored in a number of GATT and WTO decisions, has come to define the extent of the application of GATT MFN and NT obligations.38 The term has appeared in the text of a number of WTO agreements and as such has always been mandatorily interpreted by the various WTO tribunals anytime a Member’s measure has to do with a classification of products. This will necessarily


entails asking question about whether two products are ‘like’ and a follow up question as to whether the products are similarly situated. It then means that the constitution of ‘like products’ can essentially be viewed using the ‘similarly situated’ concept. In asking the question about ‘similarly situated’ here, recourse must be had to the purpose of the comparison between the products and the policy objectives sought to be achieved.\(^{39}\) So to know whether two products are really like or are similarly situated, recourse must be had to the relevant provision demanding their comparison.

In the *Japan-Alcoholic Beverages Case*, the Appellate Body provided a general interpretation of like products by establishing that the definition of likeness itself will depend on the context of the WTO provision within which it appears and is being interpreted. The AB, in the said *Japan Alcoholic Beverages*, referred to the concept of ‘likeness’ as an accordion by stating “The concept of ‘likeness’ is a relative one that evokes the image of an accordion”.\(^{40}\) The concept might either stretches or narrow down depending on which of the WTO Agreements is under consideration.

In making an inquiry into the concept of ‘like products’ under Article III, GATT/WTO tribunals have developed certain criteria that must be adhered to:

1. What are the products’ property, nature and quality?
2. Do the products have the same end users?
3. How do consumers in a given market perceive a given product (consumers tastes and habits)?

\(^{39}\) Julia Ya Qin (n20) 240.
\(^{40}\) *Japan-Alcohol.*
4. What are the tariff classifications of the products?41

With the above in mind, the definition of ‘like products’ may necessarily vary within the context of the WTO. For example if two WTO provisions that contain the concept of likeness vary in the purpose they set out to achieve, then the criteria that will help to determine likeness, which must definitely promote the purpose, will also differ, affecting the definition of likeness under such provisions. So the criteria do not apply at the same level and there is no obligation on a Member to prove them cumulatively.42 Comparing the provisions of GATT Article 1.1 MFN and GATT Article 111 NT, it can be seen that though the two clauses share identical purposes of non-discrimination and ensure equality in competitive market conditions, their policy goals are quite different.43 While Article III focuses on removing protection of domestic production through internal measures, Article I’s main aim is permitting protection of domestic production through tariffs, thereby having as its goal, a tidy administration of protection.44 These kinds of variances in policy objectives between the provisions in the two standards, MFN and NT, clearly allow for a narrower definition of ‘like products’ in Article 1.1 than in Article III.45

Since GATT Article III simply prohibits any importing Member from using internal tax or other internal regulations to disadvantage imported products in favour of ‘like domestic products’, then the main point is whether the products importing Member

42 Makane Mbengue (n13).
44 Robert Hudec (n 43) 108.
45 Robert Hudec (n 43) 112
has treated the imported products any ‘less favourably’ than the corresponding/competing domestic products. The contending arguments will swing between ‘like products’ and treatment ‘not less favourable’. In resolving such disputes, the GATT/WTO tribunals have always resorted to applying the above criteria.\textsuperscript{46} Recently, the tribunals seem to also consider substitutability of the products, arguing that any determination of likeness is majorly a determination of “the nature and extent of a competitive relationship” between the imported and the domestic products under consideration.\textsuperscript{47}

In defining ‘like products’, the main controversy seems to be in relation to the “aim-and-effects” test. The aim-and-effects approach was first developed in the GATT Panel Report in the *US-Malt Beverages*,\textsuperscript{48} prescribing that, the determination of ‘like product’ under Article III should entail a look at the basic policy objective of the Article as set out in Article III.1. Article III.1 states internal taxes and other regulatory measures:

“should not be applied to imported or domestic products so as to afford protection to domestic production”.\textsuperscript{49}

In applying this approach, it will seem that any domestic tax or internal regulation that purportedly treats an imported product ‘less favourably’ than a corresponding

\textsuperscript{46} Report of the Working Party (n40)  
\textsuperscript{47} EC-Asbestos (n 38).  
\textsuperscript{49} GATT Art. III.1
domestic product may not likely be seen as a violation of the provisions of Article III, satisfying that the measure has a clear non-protectionist regulatory purpose.\textsuperscript{50}

However, it seems to be the majority view of many WTO tribunals’ commentators that the Appellate Body of the WTO had debunked the aim-and-effects approach in defining like products especially in the Japan-Alcohol\textsuperscript{51} and EC-Bananas\textsuperscript{52} cases.\textsuperscript{53} In the two cases cited, the AB has, critics argued, been excessively formalistic and incoherent in the treatment of fundamental issues rooted in the WTO policing of domestic regulatory policy.\textsuperscript{54} The AB seemed to have acceded to the critics in that its position was altered in subsequent cases for example in the EC-Asbestos where Canada challenged the French’s ban of asbestos products as a clear violation of Article III.4. In its well considered decision, the AB clearly explained that the term ‘like product’ referred to in Article III.4 must be interpreted with a view to giving meaning and appropriate scope to the enabling principle set out in the provisions of Article III.1.\textsuperscript{55}

In an interesting twist also, the AB further consolidated its noted shift in position by concluding that any determination of ‘likeness’ under the provisions of Article III.4, is basically a finding about “the nature and extent of a competitive relationship between and among products”.\textsuperscript{56} So the position of the AB is now clearly defined, for ‘like products’ in Article III.4, the body has accepted market ‘effects’ as the main element

\textsuperscript{50} See US-Malt Beverages (n48).
\textsuperscript{51} Japan-Alcohol (n39), see Robert Hudec (n43)
\textsuperscript{52} EC-Bananas (n37)
\textsuperscript{53} There seems to be a minority opinion to the effect that the AB has not really discredited the aim-and-effects approach if read correctly. See Donald Reagan ‘Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade: A Tribute to Bob Hudec’, 37 J. World Trade 737 (2003)
\textsuperscript{54} Julia Ya Qin (n20) 245, see also Robert Hudec (n43) 375
\textsuperscript{55} Appellate Body Report, EC-Asbestos (n 38) 98.
\textsuperscript{56} Appellate Body Report, EC-Asbestos (n38) 99
in defining likeness but refused to acknowledge the importance of regulatory ‘aim’ in the determination of likeness.\textsuperscript{57} However, for ‘like products’ in Article III.2, first sentence, the AB refused to acknowledge both the market effect and the regulatory aim of any challenged measure by a Member as relevant to its definition.\textsuperscript{58}

Generally, flowing from the above GATT/WTO tribunals’ discussions, the similarly situated analysis can be applied using the aim-and-effects approach. Applying the similarly situated analysis here, it can be reasoned that the determination of likeness between imported and domestic products would not be successful without an informed reference to the purposes of the Article III provisions that require their comparison. The expansive and main purpose of Article III is to avoid protectionism whenever a Member is applying internal tax and regulatory measures.\textsuperscript{59} It then follows that, in the determination of likeness under Article III, it is only those elements that are helpful in verifying the protectionist nature of a measure that should be applied.

It is instructive to note that, applying the similarly situated evaluation to the interpretation of like products has pointedly revealed a significant amount of inconsistency in the AB’s interpretation of the provisions of GATT Article III. It has, on the other hand, established the advantageous position of the aim-and-effects principle. The aim-and-effects principle is one that has a clear policy guideline and ensures certainty in the application of the provisions of Article III. The principle

\textsuperscript{57} Appellate Body Report, \textit{EC-Asbestos} (n38) 99
\textsuperscript{58} It is worthy of note however that the tribunal may find a violation of Article III.2, second sentence, without making a corresponding finding in Article III.2, first sentence, see Appellate Body Report, \textit{Korea-Taxes on Alcoholic Beverages}, WT/DS75, 84/AB/R (adopted Feb. 17, 1999) 118.
\textsuperscript{59} Appellate Body Report, \textit{Japan-Alcohol} (n.39) 16.
further acknowledge that the most important elements in the determination of likeness are clearly those that are valuable in identifying protectionism, stopping which is the basic function of Article III.

4.4 Interpretation of Non-Discrimination under the Most-Favoured-Nation Obligation

The Most-Favoured-Nation, MFN, is one of the foundational principles of the WTO law and is a key element of the three principal WTO agreements comprising of the GATT 1994, the GATS and TRIPS. The MFN found in the foregoing agreements is only amendable by the unanimous agreement of the Members.60 The principle is mainly found under the provisions of Article 1 of the GATT. This sub-topic will trace the origin, rationale, interpretation and application of the rule within the GATT/WTO practice.

Looking beyond Article 1 of the GATT, the WTO is replete with many other non-discrimination obligations. The application of Article 1(1) can be far reaching, examining issues such as the content and scope of the MFN, its relative advantages, the nature of its touted unconditional application and most importantly the import of ‘like products’ in the application of non-discrimination, which is what this part will dwell on more.

As examined in the introductory part of this chapter, the notion of like products is one that has been very problematic in the GATT/WTO jurisprudence. It has appeared in a number of provisions either as a stand alone or in relation to some other competitive

60 WTO Agreement, Art. X (2)
products. This has definitely mean having different meanings of the term in the various provisions, which in turn leads to various interpretations by the WTO Panels and the Appellate Body. Article III can serve as a good example. It can be observed that the meaning of ‘like products’ in paragraph 2, which relates to internal taxes, is viewed as being different from its meaning in paragraph 4, which deals with internal regulations. It has been opined that the difference in Article III occurs because while Article 4 relates only to like products, the provisions of paragraph 2 relate to both like and directly competitive or substitutable products. If like products is used as a parameter, it would be assumed that, since Article I is identical to Article III (4) in that it also applies to like products, then the definition of like products in Article I would be proximate to the definition of like products contained in Article III (4). It has been argued that the scope of the definition of ‘like products’ under Article I (1) ought to differ based on whether the challenged measure is a tariff or tariff related measure or whether it is an internal tax or regulation.

Though both the WTO Panels and the Appellate Body have not found it worthy to give like products any prominence in the discussion of the provision of Article I, one particular type of case stands out. The case has to do with a claim of a member’s violation of the MFN clause by the member deliberately treating two like products differently for tariff purposes.

In the WTO Panel’s Report, *Spain-Unroasted Coffee*, Spain subjected coffee to a tariff though at that time coffee was not subject to a tariff. Originally, Spain had dealt

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61 See for example GATT Articles I & III (4) that refer to “like products” only while Article XIX refers to “like and directly competitive products”.
62 William Davey (n3) 78.
with unroasted, non-decaffeinated coffee under one tariff heading and subject to one tariff rate. The country later changed its policy and divided coffee into five different tariff headings, which were subject to two different tariff rates. The first rate of seven percent had coffee under three headings while the second rate was duty free and had coffee under the other two headings. So lower tax rates were applied to the “mild” coffees. As a result of this classification and varied tax rates, Brazil, an exporter of strong coffee to Spain, objected to the new tariff regimes. It challenged the regime as a violation of the provisions of Article I (1). The Panel argued that organoleptic differences resulting from geographical factors, cultivation methods, the processing of beans and the genetic factor were not enough to allow for a different tariff treatment. It further pointed out that coffee, in its end-use, was universally regarded as a well-defined and single product intended for drinking and then noted that no other contracting party applied its tariff regime in respect of unroasted, non-decaffeinated coffee subject to different tariff rates. The Panel then concluded that unroasted, non-decaffeinated coffee beans should be considered ‘like products’ within the meaning of Article I.1.

Davey argued against the findings of the panel by positing that in today’s ubiquitous coffee shops, to conclude that coffee is a single product is odd at best because coffee is often not sold as a blend and can vary significantly depending on its origin and how it is distributed. Hence, it will seem there is then the need for a better interpretative approach, sustainable development?

64 Panel Report, Spain-Unroasted Coffee, Para. 4.6
65 Panel Report, Spain-Unroasted Coffee, Para. 4.7-4.8
66 Panel Report, Spain-Unroasted Coffee, Para. 4.9
67 William Davey (n3) 80
The viewpoint of the *Coffee* Panel can be distinguished with that of the *SPF Lumber* Panel.⁶⁸ In the *SPL Lumber*, Canada was dismayed that the Japanese tariff bindings in GATT allowed higher tariffs on dimension lumber from certain species than from such other species. Canada then challenged the tariff treatment of dimension lumber by Japan.⁶⁹ From the tariff structure in the challenged measure, it seems Canadian-origin dimension lumber was likely to be subjected to higher tariffs than the United States-origin dimension lumber. According to Canadian legal claim, all dimension lumber was inherently one like product and could not be treated differently for tariff reasons.

Looking at the two cases, one realistic difference between them emerges. It is evident that Spain had not bound its tariff for coffee, while Japan, on the other hand, had, in earlier tariff negotiations, negotiated and bound those differential rates for the lumber under consideration. The panel’s position was to the effect that for Canada to establish likeness in the two products, it has to begin from the Japanese tariff classification. Since it is acknowledged that the concept of dimension lumber was neither in the Japanese tariff regime nor in any internationally accepted customs classification, as such, the panel, in its well-considered opinion, refused to consider Canada’s reliance on the concept as its justification for certifying likeness of products under the provisions of Article I (1).⁷⁰ The panel’s view was that “tariff differentiations are basically a legitimate means of trade policy”.⁷¹

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⁶⁸ Panel Report, *Japan-SPF Lumber*
⁶⁹ Panel Report, *SPL Lumber*, para.5.11
⁷⁰ Panel Report, *SPL Lumber*, para.5.14
⁷¹ Panel Report, *SPL Lumber*, para.5.10
Principally, the SPF Lumber panel accepted that the GATT rules allow the use of tariffs to give differing levels of protection to domestic producers. This, however, is contingent upon the condition that the relevant contracting parties respect the negotiated tariff bindings. Though the Coffee and Lumber cases appear to be in conflict with each other, some academic commentators seem to prefer one, the Lumber case approach, arguing that the case recognised the right of WTO Members to determine the sectors they wish to protect.\footnote{William Davey (n3) 84, Robert Hudec (n43) 114-116} This position has support from the fact that the WTO is really not a free trade consensus but an agreement that acknowledge the likelihood of its members electing to preserve higher rates of protection in peculiar sectors. There are, however, commentators that prefer the Coffee case approach.\footnote{P. Van den Bossche, The Law and Policy of the World Trade Organisation: Text, Cases and Materials, 2nd ed., Cambridge, Cambridge University Press, 2008, pp. 329-330.}

Another important part of the MFN that is worthy of even a brief look at is the issue of unconditionality. It is the requirement of Article I (1) that the advantage at issue is to be given to other WTO Members “unconditionally”. The panel in the early GATT case, Belgium-Family Allowance\footnote{Panel Report, Belgium-Family Allowance} has interpreted the term ‘unconditionally’ as used in Article I (1). In the case, Belgium, through its law, foist an internal charge on foreign goods that were purchased by public bodies when those goods originate in a country whose system of family allowances did not meet certain peculiar needs. The panel stated\footnote{Panel Report, Belgium-Family Allowance, para. 3}:

> Belgium has granted exemption from the levy under consideration to products purchased by public bodies when they originate in (six countries). If the General Agreement were
definitively in force ..., it is clear that that exemption would have to be granted to all other contracting parties (including Denmark and Norway). The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect”.

The *Belgium-Family Allowances* case has been referred to for the thesis pointing to the impossibility of distinguishing between products on the condition of the factors under which they were made.76

A more modern case that has considered a broad view of the meaning/interpretation of the word “unconditionally” is the *EC-Tariff Preferences*. The WTO Panel that ruled on the case held77:

> “7.56 … The European Communities’ position is that ‘unconditionally’ in Article I: 1 means that any advantage granted may not be subject to conditions requiring compensation. The Drug Arrangements are not conditional, according to the European Communities, because the beneficiaries are not required to provide any compensation to the European Communities.

> 7.59 In the Panel’s view, moreover, the term ‘unconditionally’ in Article I: 1 has a broader meaning than simply that of not requiring compensation. While the panel acknowledges the European Communities’ argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of ‘unconditionally’ under Article I (1). Rather, the Panel sees no reason not to give the term its ordinary meaning under Article I (1), that is, ‘not limited by or subject to any conditions’.

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76 William Davey (n3) 88
77 Panel Report, *EEC-Beef*, para. 4.3
7.60 Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded ‘unconditionally’ to the like products originating in all other WTO Members, as required by Article I (1).”

Though the case did go on appeal, the AB did not find it worthy to discuss the conclusion reached by the panel. Though two previous WTO panels have also reached conflicting decisions on the meaning of unconditionality, the Tariff Preferences panel did not also made any reference to their conclusions. In the two different cases, certain favoured entities had an exclusive right to import products at a lower tariff rate than would ordinarily be appropriate. The question then was should the tariff advantage given to a particular product that comes from some country also be given to a corresponding like product that comes from a WTO Member? Two WTO panels in Indonesia-Autos78 and Canada-Autos79 evidently approached the question differently.

In the Indonesia-Autos, a Korean company that had a special relationship with an Indonesian company had its automobile exports accepted into Indonesia as duty free exports, while all other automobile imports were subject to a high tariff. The panel stated that80:

“In the GATT/WTO, the rights of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I (1), which provides that the tax and customs duty benefits accorded to products of one Member (here on the Korean products) be accorded to imported like products from other Members ‘immediately and unconditionally’ “.

78 Panel Report, Indonesia-Autos
79 Panel Report, Canada-Autos
The panel, after an exhaustive review and the above stated position, concluded that the *Indonesia-Autos* was an explicit violation of the MFN clause. The *Canada-Autos* case stand in contrast with the *Indonesian case*. In the *Canada-Autos*, one Swedish and several other US companies had the right to import automobiles duty free into Canada. Here, the WTO panel concluded that the MFN clause would be violated only if the deal certainly led to discrimination on the basis of origin.\(^81\) By way of interpretation, this will mean that if the companies under consideration imported automobiles from many different countries, then a charge against origin-based discrimination would not stand. To all intents and purposes, it is evident that though the panel did recognised that the General Motors could import automobiles duty-free from all parts of the world into Canada, the bulk would seem to be from the US, and as such a clear violation of Article 1 could be established. The *Indonesia Autos* could have reached the same conclusion if it had carried out similar investigation.\(^82\) There is no gainsaying the fact that the MFN remains the fundamental GATT tariff principle.

The *Canada-Autos* was the only case that was appealed between the two cases reviewed above. Even then, it seems the Appellate Body did not find it worthy to discuss the divergence in approaches between the two Panel reports.\(^83\) Many commentators seem to side with the *Indonesia Autos* panel.\(^84\) Davey argued that importing a product at a favourable tariff rate definitely means all like products coming from other WTO Members would definitely receive the same tariff treatment since “the emphasis in Article I is on equal treatment of like products,

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\(^81\) Panel Report, *Indonesia-Autos*, paras. 10.18-10.50
\(^82\) William Davey, (n3) 91
\(^83\) William Davey, (n3) 91
\(^84\) William Davey, (n3) 91, Robert Hudec (n43)
unconditionally”. If equal tariff treatment makes it conditional on the identity of the importer, then the aim of both the above approaches and the provisions of the Article will be defeated.

This sub-head will not go into a discussion of other GATT MFN obligations such as the provisions of Articles XIII and XVII, GATS Article II, TRIPS Article 4 and the TBT and SPS Agreements. Suffice it to say there seems to be little controversy in the way the various panels have interpreted the provisions of Article I. This may be as a result of the fact that there seems to be little or no resistance to the general principle that discriminating between countries in trade policies issues is wrong.

4.5 Interpretation of Non-Discrimination under the National Treatment Obligation

The National Treatment (NT) obligation basically requires that foreign goods should be treated in the same way with domestic goods. The import of this under the WTO Agreement is that WTO Members will come to an agreement on the level of protection to be given to domestic goods during tariff negotiations and ensure that no further protection will be provided secondarily. Tariff negotiations will come to naught without the NT rule as discriminatory measures could come into play against foreign goods after they must have cleared customs.

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85 William Davey, (n3) 92
86 William Davey, (n3) 92, this position, however, is not unmindful of the exceptions to Article I, for example exceptions for certain preferential agreements and for developing countries exceptions.
87 Except of course if the discrimination is pursuant to agreed exceptions in preferential trade plans for developing countries and other regional groupings.
The NT clause is basically contained in GATT Article III. Applying the interpretative expression of the language of Article 31 VCLT, the purpose of Article III of the GATT is clearly stated:

“Members recognised that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production”.

Though the language used in the above paragraph is non-mandatory, it is important to note how the non-mandatory principle contained therein has been incorporated in two of the three mandatory substantive paragraphs of Article III. The significance of the paragraph is in the way the Appellate Body held that the said paragraph informs all of the provisions of Article III and should be used whenever the paragraph is to be interpreted.\(^88\)

It is discernible from the content of Article III that the import of the Article is to stop WTO Members from neutralizing the outcome of tariff measures by taking definite steps that discriminate against imported goods. Surprisingly, however, it seems all the GATT panels and the WTO Appellate Body sees Article III as a provision governing fair competition between imported and domestic products. The GATT panel in the *Italian Agricultural Machinery* case in 1958 stated\(^89\):

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\(^88\) See Panel Report, *Italian Agricultural Machinery*.

\(^89\) Panel Report, *Italian Agricultural Machinery*, para.11-12
11. The intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.

12. Accordingly, Article III (4) covers …any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market”.

The GATT panel in the US –Section 337 case also took the same position by stating that Article III (4) required “effective equality of opportunities for imported products”\textsuperscript{90}, this is in respect of the measure that can be situated within its realm. The WTO Appellate Body seems to have towed the line of the two cases in its own interpretations of Article III.\textsuperscript{91}

Article III is central to the GATT system with Article III (2) and III (4) phrased similarly in some instances, this leading to occasional interpretive overlap. The alcoholic beverages cases are seen as the leading authorities in testing the interpretation and application of Article III. In these cases, the classic argument of an exporting country was that the way in which such beverages are taxed support domestic products. This would definitely not be from \textit{de jure} but from \textit{de facto} differentiation that disapproves imported products. For a violation of the WTO rules to occur will depend on whether the products involved, though strictly identifiable, are seen as adequately similar that the relevant WTO rules require them to be taxed alike. Article III (2), first sentence essentially raised two fundamental questions – whether there is a differentiation in the way two products are taxed and, secondly, what constitutes like products. It is the second question that is of interest here.

\textsuperscript{90} Panel-Report, \textit{US-Section 337}, para.5.11
\textsuperscript{91} Appellate Body Report, \textit{Japan-Alcoholic Beverages II}. 
In *Japan-Alcoholic Beverages II*, the claim was about a Japanese-origin beverage-called shochu, which was taxed at a lower rate than certain other alcoholic beverages-example vodka, whisky, gin and various other liqueurs, considered being of more interest to the complainants. Though there were said to be Japanese producers of the beverages of interest to the complainants, the shochu was mainly a domestic product. The argument canvassed by the Japanese government was that the tax difference indicated that shochu was a working class drink, an inexpensive type of alcoholic beverage, different from the higher priced beverages of interest to the complainant in the case. Though mainly correct, it seems, however, that some classes of shochu were up for sale as substitutes to, for example, vodka.

Both the United States and Japan, in the case of *Japan-Alcoholic Beverages II*, argued for the WTO Panel to take a completely dissimilar approach in defining like products. Their central argument was that the panel should just use the aims and effect test in the Japanese measure and decide whether it was a protectionist measure or not; if not, then the products ought not to be taken as ‘like products’; and if yes, then they ought to be taken as ‘like products’. 92 Certainly, nothing in the language of Article III (2) supports this position. However, help can be sought from the provisions of Article III (1) referred to by Article III (2) since the provisions of Article III (1) surely point out that the purpose of Article III in general is to prevent protectionist measures. 93 Japan argued that the tax differentiation was done for social reasons and was not protectionist while the United States argument was that administering such a test would result in the inference that the Japanese tax system breached Article III (2).

92 Panel Report, *Japan-Alcoholic Beverages II*, paras. 4.24-4.35
93 William Davey, (n3) 162
It was interesting that the WTO Panel rejected both arguments. The Panel’s own position was that nothing in the language of Article III (2) or in the term ‘like products’ informed the kind of examination both the United States and Japan suggested. It viewed the endeavor to use the aims and effects test to define ‘like products’ as essentially changing the GATT rules. The position under the traditional approach was that whenever a measure was discovered to be in violation, then the respondent must be ready to show that an exception was applicable. The US/Japanese approach was somewhat different; here the complainant need to demonstrate the inadmissibility of an exception in its attempt to establish the presence of protectionist aim or effect in defining ‘like products’ in the case in point. The panel conclusion was that though there was some little precedence for the US/Japan approach, superior reasoning tilt towards the traditional approach.

In applying the traditional test, the WTO panel necessarily shadows the earlier GATT panel that decided on Japanese alcohol taxes and concluded that only vodka could be deemed a ‘like product’ to shochu. This followed the fact that though there was no physical and end user difference in the products, at least for the purposes of the Japanese tax law, it was impossible to filter shochu through white birch charcoal, which vodka was at the time. The only like products the panel found then were shochu and vodka.

Panel Report, Japan–Alcoholic Beverages II, paras. 6.20-6.21
Panel Report, Japan–Alcoholic Beverages I, para. 5.7
Panel Report, Japan-alcoholic Beverages II, para. 6.23
The Appellate Body looked at the framework of Article III (2) and upholds the panel’s conclusion by observing:  

“No one approach to exercising judgment will be appropriate for all cases. The criteria in Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is ‘like’. The concept of ‘likeness’ is a relative one that evokes the image of an accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied…We believe that, in Article III: 2, first sentence of the GATT 1994, the accordion of ‘likeness’ is meant to be narrowly squeezed.”

It can be deducted from the conclusion of the Appellate Body that, except if origin-based discrimination is involved, only a few products will qualify for ‘like products’ under GATT Article III (2) first sentence. It seems the Appellate Body did not consider the aims and effects test in its review of the panel’s report. It however ratified the panel’s choice of the traditional approach.

In the Thailand-Cigarettes (Philippines) case, the United States and the European Union complained against a Philippines measure, which levied lower taxes on certain distilled spirits produced from sugar cane molasses than on spirits produced from other sources of ethyl alcohol. The panel highlighted that the final products in issue were basically the same. Its interpretation used physical characteristics of the finished products, their end uses, competitiveness, tariff classifications, consumer perceptions and the treatment of the domestic and imported spirits relevant for differing regulatory purposes. As the imported products were subject to taxation

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97 Appellate Body Report, Japan-Alcoholic Beverages II, 21  
98 Appellate Body Report, Japan-Alcoholic Beverages II, 19-23  
99 Panel Report, Philippines-Distilled Spirits, paras. 7.30-7.85  
100 Panel Report, Philippines-Distilled Spirits, paras. 7.30-7.85
beyond that fixed on like domestic products, then a breach of Article III (2) first sentence was established.

Certain other tribunals have found both domestic and imported products to be like products for the purposes of Article III (2) first sentence. The products in the above cases could be differentiated based on their physical characteristics and the fact that some of them involved de jure discrimination based on origin. This may seem a better position looking at the content of Article III (2), second sentence.

The Appellate Body in the Japan-Alcoholic Beverages II, ruled that the second sentence of Article III (2) contain three elements, competitive or substitutable products, dissimilar taxation and protection. Here there is the need for a little further insight into how other tribunals have looked at the definition of like products before concluding the sub-head though no in-depth analysis will be provided and not all aspects of Article III (2), second sentence will be entertained.

It has not been easy for any WTO tribunal to determine whether two products are in competition to the extent that they can be regarded as “directly competitive or substitutable” so as to satisfy the requirements of Article III (2) second sentence. In the Japan-Alcoholic Beverages II, the panel discovered that shochu and some other distilled spirits of concern to the complaining parties were directly competitive or substitutable products. It seems the panel based its reasoning on the economic substitutability of the products.\(^{101}\) In the Korea-Alcoholic Beverages, the Appellate Body distinctly recognised that “an approach that focused solely on the quantitative

\(^{101}\) William Davey, (n3) 177
overlap of competition would, in essence, make cross-price elasticity the decisive criterion in determining whether products are ‘directly competitive or substitutable’.”

We share the Panel’s reluctance to rely unduly on quantitative analyses of the competitive relationship.”

In the Chile-Alcoholic Beverages, the panel also reviewed the same factors, as had the panel in the Korean case. The panel in the Philippines-Distilled Spirits case concluded that the like products it found were also directly competitive or substitutable. From these cases, it is evident that most of the panels were prepared to discover the presence of directly competitive or substitutable products based on their similarities ranging from their physical characteristics to end-uses to marketing and even to product price elasticity.

As explained in the preceding paragraphs and also under the discussion of the MFN treatment, one thing is clear from the interpretation of Article III (2) by the various panels and Appellate Bodies – the narrow definition given to ‘like products’ therein. The aim of the various interpretations seems to be the restriction of the application of the provision, especially the second sentence, to only cases that involve origin-based, de jure, discrimination. If this stands, it can then be deduced that de facto discrimination can only be considered and interpreted under the provisions of Article III (2), second sentence. This is so because to succeed under this sentence, it has to be shown that the tax measure is put in place in order to afford protection and as such no ‘innocent’ tax measures that may violate Article III will be allowed.

To conclude this sub-heading, it is imperative to briefly look at the interpretation given to ‘like products’, which is the second element under Article III (4). GATT

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102 Appellate Body Report, Korea-Alcoholic Beverages, para. 134
103 Though it is evident that the Chile and Korea panels did not really rely on these factors.
1994 did not actually make the interpretation of (4) important like it does the provisions of Articles I and III (2). Evidently, before the coming of the WTO, the main GATT case that discussed the interpretation of like products was the *EEC-Animal Feed Proteins*. The panel was clear in its conclusion that different products applied protein to animal feed and as such not qualified to be considered like products irrespective of their common end-use due to the variations in their protein content, tariff classification and physical characteristics. Post 1990, a panel, the *US-Malt Beverages*, concluded that low alcohol beer and high alcohol beer were not like products. After an extensive review, it concluded:

“…In the view of the Panel, therefore, it is imperative that the like product determination in the context of Article III be made in such a way that it not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties”.

Apart from the fact that the panel used the standard criteria for defining likeness of products – end uses, physical characteristics and consumer perceptions in reaching its conclusion, it discussed the need for affording government enough regulatory space.

It seems the first WTO case that discussed the definition of like products in considerable detail was the *EC-Asbestos* case. The panel was faced with the questions as to the degree to which the term ‘like products’ should be interpreted in

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104 Panel Report, *EEC-Animal Feed Proteins*
105 Panel Report, *EEC-Animal Feed Proteins*, para. 4.2
107 Panel Report, *US-Malt Beverages*, para. 5.72
the same way in both Article III (2) and (4) and if so interpreted, what would be the implications of such interpretation. As seen above while discussing non-discrimination and the interpretation of like products, Article III (4) is mainly concerned with the treatment of like products, while Article III (2) only regulates the treatment of like products through its first sentence and directly competitive or substitutable products through its second sentence. This will necessarily mean that if the same definition of like products is to be applied to both Articles, it is clear that the extent of the applicability of the two paragraphs will be seen to be quite different. Since both Article III (2) and (4) seek to ensure that internal taxes or regulations are not used to give an unfair advantage to domestic products in line with the provisions of Article I, then interpreting them in a such a way to achieve different scope will be meaningless.\textsuperscript{110}

From the above, it can be discerned that quite unlike the provisions of Article III (2), the definition of ‘like products’ in light of Article III (4) must have an extensive reach than that of Article III (2). This seems to be the position reached by the Appellate Body in the EC-Asbestos case. Despite the heated controversy in earlier WTO decisions over how like products should be ascertained, it seems that the later cases since the EC-Asbestos have resolved this especially in light of Article III (4).\textsuperscript{111}

Even though the MFN clause appeared in many WTO agreements, only four did cover the NT obligation – TRIPS, GATS, TBT Agreement and the Plurilateral Government Procurement Agreement (PGPA).\textsuperscript{112} It is not the position of this chapter to give an exhaustive account of all of these areas, suffice it to say, the main idea is to give an

\textsuperscript{110} William Davey (n3) 198.
\textsuperscript{111} See for example Turkey-Rice
\textsuperscript{112} Though it is not contentious that the Plurilateral Agreement also covers the MFN.
account of the varying positions of various GATT/WTO Panels and Appellate Body in the interpretation of these principles using the non-discrimination obligation as a basis.

4.6 General Exceptions to the Non-Discrimination Obligations under WTO Law

Arguably, the general exceptions to the non-discrimination obligations are one of the most fundamental distinguishing features of the multilateral trade regime. The provision of general exceptions in the jurisprudence of the WTO, its content and application is clearly not mirrored in the jurisprudence of any bilateral investment treaty. In chapter six, when synthesizing the contents of all the chapters, an attempt will be made, if need be, to recommend the need for the application of exceptions in investment treaties as a learning curve from trade.

Looking at the MFN and NT standards discussed above, particular exceptions applicable there can be distinguished. MFN’s fundamental exceptions in Article XXIV – free trade areas and custom unions and Enabling Clause exception – for preferential treatment of developing countries, generally permit origin-based discrimination. The two applicable exceptions governing NT obligation are both covered under Article III – Government Procurement under Article III (8) (a) and Domestic Producer Subsidies – Article III (8) (a).

The non-discrimination obligation is impacted upon by the general exceptions incorporated in the GATT Article XX and GATS Article XIV, though the exceptions are more visible when the NT obligation is considered. GATT Article XX contains the most important individual exceptions. Its basic, elementary structure is made up of
the general introductory clause and the said chapeau, which was followed by the different specific exceptions.

The starting point when a measure has been challenged as discriminatory is to ask if the said measure can be justified under the said Article XX. The way this Article functions has generated considerable controversy. The controversy has led to the question as to whether Article XX should be viewed narrowly as an exception to the extensive obligations covered under Article I and III or should it be viewed as a system that gives Governments enough regulatory/policy space to advance their goals? The likelihood that interpreting Article XX narrowly to prevent a breach of Article III was said to have strongly influenced the definition of like products using the protective aim and effect test. Importantly, it seems the WTO Appellate Body did not buy into this position.113

Under the WTO, unlike under the earlier GATT cases, Governments have been given more discretion to adopt policy measures that help them achieve their set out goals. Various panels and the Appellate Body have espoused an inclusive interpretation to those specific exceptions in the areas of health, public morals and conservation. A generic interpretation of the cases showed that Governments would have the regulatory space to decide even where the facts rationalizing the decision are ill defined. The panels and WTO Appellate Body decisions also seem to approve that Governments can put in place the level of protection they plan for in specific regulatory/policy areas. From this brief discussion, it can be concluded that Article XX has a very expansive interpretation allowing Governments wide discretionary

113 See the US-Shrimp case
power in the areas covered without any constrain from the WTO’s non-discrimination rules.

4.7 Navigating the Tension between Non-Discrimination and Special and Differential Treatment

From the onset of the GATT negotiations, developing States have agitated that they should be given special and differential treatment.114 The agitation became necessary then due to the position of the developing countries that the so-called exceptions contained in the GATT were only effectively accessed by the developed, industrialised countries. This demand gained currency due to the persistence of the developing countries and a corresponding acceptance of such need by the developed countries.

The above concern and agitation led to the conclusion of an important agreement, the Generalised System of Preferences (GSP) between the OECD countries and the developing countries. The main aim of the system was for developed countries to give tariff preferences to developing countries. Generally speaking, giving tariff preferences would be inconsistent with the provisions of GATT Article I; hence the need to agree on a system that will allow such preferences and this was allowed by the GATT.115 The Enabling Clause, adopted via a ministerial agreement, replaced this waiver allowing tariff preferences during the Tokyo Round of 1979. Apart from the

114 J. Jackson, World Trade and the Law of GATT, 628-640
developed world adopting the GSP, the WTO has embraced the waiver allowing these
developing countries to accord preferences to the least developed countries.\(^{116}\)

The most contentious issue regarding the GSP has been its relationship with the non-
discrimination obligation. Are the GSP schemes subject to the non-discrimination
requirements? This question becomes important because of the interest it generates as
the main focus in the *EC-Tariff Preferences* case brought by India against the
European Union’s GSP scheme.\(^{117}\) India claimed before the GATT Panel that the EU
drug arrangements breached GATT Article I and that the EU could not justify its act
by depending on the Enabling Clause since the said arrangements did not meet the
Enabling Clause’s non-discrimination requirements. So the main issue the panel
contented with was whether a GSP scheme under the Enabling Clause could
discriminate between the Clause’s beneficiaries. So the main issue raised by the panel
is the meaning of the term “non-discrimination” in footnote 3 of the Enabling Clause.
It is interesting that the panel did found in favour of India that the term “non-
discriminatory” referred to in footnote 3 to paragraph 2 (a) of the Enabling Clause
called for undifferentiated tariff preferences under the GSP schemes to be made
available to all developing countries without any differentiation.\(^{118}\)

\(^{116}\) See ‘Preferential Tariff Treatment for Least-Developed Countries’, General Council Decision of 15
June 1999, WTO Doc. WT/L/304 (17 June 1999), extended until 2019, WTO Doc.WT/L/759 (29 May
2009).

\(^{117}\) Panel and Appellate Body Reports, *EC-Tariff Preferences*.

\(^{118}\) Panel Report, *EC-Tariff Preferences*, para. 7.161. The General Agreement on Tariffs and Trade,
Agreement on Tariffs and Trade 1994, April 15, 1994, WTO Agreement [hereinafter GATT]. General
effectively incorporated into the General Agreement on Tariffs and Trade 1994, April 15, 1994, WTO
55 U.N.T.S 194 (GATT 1947), effectively incorporated into the General Agreement on Tariffs and
Trade 1994, April 15, 1994, WTO Agreement [hereinafter GATT], is of course subject to the exception
for the implementation of self-evident limitations.
The detailed argument between the parties and in-depth discussion and analysis by both the panel and the Appellate Body is not what this thesis is about. Suffice it to say that the Appellate Body did explain that paragraph 2 (a) permits preferential treatment for developing countries “in accordance with the Generalised System of Preferences”. The Body first centred its attention on the introductory language of the Enabling Clause “Notwithstanding the provisions of Article I of the General Agreement” and concluded that this will necessarily operates as an exception.\textsuperscript{119} The European Union did countered this by arguing that since the Enabling Clause was the most fundamental execution of the special and differential treatment for developing countries that was among the main objectives of the WTO, it should not be designated as an exception to the primary rules.\textsuperscript{120} The characterisation of the Enabling Clause as an exception did not in any way lessen the application of the Clause.\textsuperscript{121}

The Appellate Body did not really resolve the meaning of the term “non-discriminatory” in the \textit{EC-Tariff Preferences}.\textsuperscript{122} However, after an exhaustive review of the argument from both sides and applying the context of paragraph 3 (c), the aim of the European Union’s drug arrangements (which was the EU’s appeal of the panel’s finding that the EU’s drug arrangements did not comply with the non-discrimination requirements of the Enabling Clause), the Appellate Body found that the EU measure failed to meet the requirements. It concluded that:\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{119} Appellate Body Report, \textit{EC-Tariff Preferences}, para. 90
\item \textsuperscript{120} William Davey (n3) 140.
\item \textsuperscript{121} The Appellate Body did point out to other important WTO objectives that were made out as exceptions.
\item \textsuperscript{122} William Davey (n3) 145
\item \textsuperscript{123} Appellate Body Report, \textit{EC-Tariff References}, para.187.
\end{itemize}
“The term ‘non-discriminatory’ in footnote 3 of the Enabling Clause requires that identical tariff
treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue
fails to meet this requirement for the following reasons…”

4.8 Conclusion

This chapter gave an analytical account of the non-discrimination principle under the
WTO both textually and from the Panel and Appellate Body decisions. In trying to
understand the relative coherence in the jurisprudence of the multilateral regime of the
WTO based on some of the decisions reviewed, the chapter analysed the elements of
the non-discrimination principle, its application and the exceptions. These exceptions,
which are clearly absent in the investment context, help in the definition of the
standards of treatment and the preference given to developing countries. This is not
oblivious of the criticism of the WTO exceptions as being contrary to the rule of law.
In investment law, it seems only a positivist interpretation (for example an investor
given FET) stuck and no any other leeway but to protect the right of the investor. It
remains to be seen whether, after the synthesis/analysis in chapter six, it is possible
for international law to have consistent/coherent standards, and these should be
uniform though not higher standards, for both trade and investment regimes. This will
be interesting in view of the new BITs agreed or under discussion, the newly signed
Trans-Pacific Partnership (TPP), the evident re-negotiation of NAFTA, Brexit and the
possible Trans-Atlantic Trade and Investment Partnership (TTIP).

Chapter five will be devoted to looking at the areas of convergence between trade and
investment by looking at the possibility of integrating the WTO exceptions, by way of
learning from the trade regime, into the international investment law’s principle of
non-discrimination. The chapter will draw principally from the possibility of
convergence of legal regimes by using the principle of legal convergence and the Vienna Convention as analytical tools. Other areas or justifications for convergence that the chapter will enumerate include the effect of lack of in-depth legal reasoning in arbitral awards, movement between actors, shared history between trade and investment and newly emerging treaties that are coalescing towards convergence.
Chapter Five

Conceptual Framework: Sustainable Development as a Convergence Factor for International Economic Law

5.0 Introduction

This chapter introduces sustainable development as a legal concept. International economic law is used in this chapter to mainly denote the fields of trade and investment. The main idea is to see whether the WTO and investment treaty tribunals can use it as an intellectual lens to interpret the non-discrimination standard in both regimes of international trade and international investment law with a view to having a uniform and harmonious interpretation in these contending fields of international economic law. The concept of sustainability was originally developed in the context of international environmental law. The term ‘sustainable development’ is broadly understood from the Brundtland Report to mean ‘development that meets the needs of the present without compromising the ability of the future generations to meet their own needs’. Pointing to the basis on which the concept of sustainable development rests – economic development, social wellbeing and social development, and environmental protection, provided much clearer definition. The International Law Commission (ILC), in its 2002 New Delhi Declaration, alluded to the broader terms covered by the concept of sustainable development. The New Delhi Declaration,

referring to the broader terms covered by sustainable development, provides that the concept:

involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on nature and human life as well as social and economic development depend, and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.⁴

The chapter will first trace the evolution of the concept under international law. Secondly, it will examine the legal nature and scope of the concept before providing a brief analysis as to how it is applied. Thirdly, an analysis of the application of the concept by international courts and tribunals will be undertaken. Flowing from the theme of the discussion, the central argument that will finally be focused on is that sustainable development can serve as a suitable interpretative tool that can aid international courts and tribunals to harmoniously analyse trade and investment agreements in a sustainable way for a possible future convergence of the regimes of international trade and investment.

5.1 Overview of the Concept of Sustainable Development

Historically, the concept of sustainable development is traced back to the forestry law in Central Europe. This earlier historical mention did not use the term ‘Sustainable Development’. The present concept is traceable to the 1972 United Nations Stockholm Declaration on the Human Environment.⁴ Though the declaration did not

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⁴ (n.2).
tackle the issue of ‘sustainable development’ directly, such can be inferred from the wording of Paragraph two in which State governments agreed that ‘the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world’. The Declaration contains 26 Principles, of which Principle 21 connotes the right of every State to sovereignty over its natural resources and a corresponding duty to ensure that activities within its jurisdiction do not cause damage to the environment of other States or areas outside its jurisdiction. The principle only relates to trans-boundary effects of States’ activities and not in any way to States’ management of their natural resources. Such management is addressed under other principles.

Principle 10 could also be seen as significant in that it establishes that price stability and positive returns for raw materials are issues of great importance to developing countries. Therefore, the declaration demanded that a State’s environmental policy should be geared towards enhancing, not diminishing, the development potential of developing countries. The Declaration that stemmed from the 1972 Conference led to the creation of the United Nations Environment Programme (UNEP).

However, sustainable development first became manifest in the 1980s, especially in the report of the International Union for Conservation of Nature and World

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5 Stockholm Declaration (n.2).
6 (n.2), Principle 21.
7 Stockholm Declaration (n.2).
9 (n2) 45.
10 It is now a subsidiary organ of the United Nations General Assembly – See UN doc. GA res. 2997 (XXVII), (15 December 1972).
Conservation Strategy.11 Sometime in 1982, the United Nations General Assembly (UNGA) adopted the World Charter for Nature.12 The Charter’s main concern is the conservation and better management of living natural resources.13 Though the early texts examined above clearly formulate the fundamental ingredients of the concept of sustainable development, it was the Brundtland Commission Report that first, not only defined, but also provided the political acceptance of the concept of sustainable development.14

In 1983 the UNGA established the World Commission on Environment and Development (WCED)15 with the following mandates16:

a) to propose long-term strategies to achieve sustainable development in the year 2000.

b) to recommend ways in which greater co-operation could be achieved between developing countries themselves and between developing countries and developed countries.

In 1992 the Rio Conference on Environment and Development was convened17 “to promote the further development of international environmental law, taking into

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12 UN Doc. A/RES/37/7, (28TH October 1982).
13 (n2) 46.
14 (n2) 47.
15 (n1), The Commission became known as the Brundtland Commission.
16 The mandate objective is to lead to “the achievement of common and mutually supportive objectives which take account of the interrelationship between people, resources, environment and development”, ibid, as quoted in (n2) 64.
account the Declaration of the UN Conference on the Human Environment (UNCHE), as well as the special needs and concerns of the developing Countries."¹⁸

The Rio Conference led to the conclusion of two multilateral treaties: the United Nations Framework Convention on Climate Change (UNFCCC)¹⁹ and the Convention on Biological Diversity (CBD)²⁰. Among the most important outcomes of the conference were the non-binding declarations, chief among them, the Rio Declaration on Environment and Development.²¹ It consists of 27 principles and Agenda 21, which is the programme of action for the twenty-first century. While Principle 27, which is the final principle, calls for “the further development of international law in the field of sustainable development”, Agenda 21 specifically calls for “a balanced and comprehensive development of international law in the field of sustainable development, giving special attention to the delicate balance between environmental and development concerns.”²² Pursuant to Agenda 21, UNGA requested ECOSOC to set up the UN Commission on Sustainable Development (UNCSD) with the mandate to monitor the progress made in the implementation of Agenda 21, discuss national reports on the implementation of the Agenda, assess the availability of funds, possibility of the transfer of environment-friendly technology to developing countries and finally make recommendations for new forms of co-operation aimed at

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¹⁸ 1992 Rio Declaration.
¹⁹ Popularly known as the Climate Change Convention, New York, 9th May 1992, entered into force on (21st March 1994).
²¹ (n17).
²² (n17), other principles include those of sovereignty over natural resources, precautionary principle, equity between generations etc.
Unlike the Stockholm Declaration, the Rio Declaration was basically concerned with the reduction of poverty and the provision of development needs.

Immediately after the Rio Conference, treaties such as the Anti-Desertification Convention, the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty and most importantly the Kyoto Protocol to the UN Framework Convention on Climate Change were all concluded. These conventions highlight environmental protection as a key in poverty eradication and sustainable development. While the Desertification Convention confirms the threat posed to trade, investment and socio-economic development by desertification, the NAFTA explicitly states, among others, that State Parties shall not relax their environmental and labour standards in order to attract foreign investment. It also provides that except in rare circumstances, normal regulatory measures to protect the environment shall not be deemed as expropriation. In the same vein, the Energy Charter Treaty allows member States to adopt or enforce any “measure necessary to protect human, animal or plant life or health”. It also enjoins them to strive to take precautionary measures to prevent or minimize environmental degradation, and to “take account of environmental considerations throughout the formulation and implementation of their

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29 NAFTA Art.1114 (2)
30 Art.1114 (1)
31 ECT Art.24
energy policies”\textsuperscript{32}. The Kyoto Protocol imposes not only duties on member States to cut emission but also enjoin them under the Clean Development Mechanism, to make funds available for investment in renewable energy and other projects that would reduce emissions in developing countries\textsuperscript{33}.

The concept of sustainable development reached its zenith at the Johannesburg World Summit on Sustainable Development (WSSD).\textsuperscript{34} UNGA charged the Summit with the responsibility “to reinvigorate the global commitment to sustainable development”.\textsuperscript{35} The main focus of the summit was reviewing the extent of compliance with already agreed policy and the integration between environmental, economic and socio-development policies.\textsuperscript{36} At the end of the summit, two policy documents were adopted. The first was a political document, the Johannesburg Declaration on Sustainable Development re-affirming our collective responsibility for a good living environment and the overall welfare of the inhabitants of this plane, now and in the future.\textsuperscript{37} The second was an international action programme, the Johannesburg Plan of Implementation as regards the reduction of poverty, changing unsustainable consumption patterns etc. and the implementation of an institutional framework for sustainable development.\textsuperscript{38}

\textsuperscript{32}Art.19
\textsuperscript{33}(n28), 676-679.
\textsuperscript{34}WSSD, UN doc. A/RES/55/199, (20th December 2000). The Summit took place between August-September 2002. Other important events that took place before the Johannesburg Summit include, among others, the Right to Development, the World Trade Organisation, and the Doha Ministerial Declaration of the WTO, the UN Millennium Development Goals etc.
\textsuperscript{35}WSSD, UN, Doc.
\textsuperscript{36}(n.2) 94. The Summit’s main focus from these perspectives was water and sanitation, energy, health care, agriculture and bio-diversity.
\textsuperscript{37}WSSD (n34) 1.
\textsuperscript{38}(n28).
The above overview sums-up the development of sustainable development from inception to the Johannesburg Declaration. The overview summarily provided a description of what the early development of the concept entailed and the different phases the concept has passed through. However, as Schrijver observed, even the Johannesburg Declaration on Sustainable Development did not, with any particularity, refer to the role of law in the promotion of the concept of sustainable development.\(^{39}\) This was a manifest shortcoming, which this chapter will address in the following sub-headings. The Declaration barely referred to the role of international law in sustainable development, briefly touching on the principles of international environmental law, human rights, the law of treaties, etc.

### 5.2 The Legal Basis of Sustainable Development

This will clearly develop the scope of writing an informed view of the existing conflict as to the legal nature and scope of sustainable development. A lot of arguments exist today as to whether sustainable development has acquired the legal status that is necessary for it to be applied in treaty obligations and interpretations. Its fluid nature and scope have informed these arguments. Commentators have talked to the extent of belaboring the issue. Arguments ranged from its status as a legal norm to its scope and applicability under treaty law.

However, integrating ‘sustainable development’ concerns into IIAs to the extent of its application, as an analytical/interpretative tool requires an in-depth look at its legal status. Different commentators have far reaching and varying opinions regarding its legal nature/status, with some asserting that it has attained a customary international

\(^{39}\) (n2) 96.
According to Virally, for any proposition to have legal breadth, it must be framed ‘with the intention to modify…elements of the existing legal order, or…that its implementation effectively achieves this result’. Applying Virally’s argument, it can then be concluded that sustainable development as a notion/proposition, is evidently legal in scope because the entire Rio Declaration is framed in the context of rights and obligations that are expressed in a rigid and binding manner. Not only in the Rio Declaration, sustainable development as a proposition is also formulated in several binding and non-binding documents/instruments with a view that the formulation will give rise to a legal outcome. However, it has been argued that mere legal span of such a proposition is far from being enough to qualify it as law. For it to have a legal status, such proposition must have been accepted as a binding one that can lead to a valid rule of law, which necessarily must come from one of Article 38(1) ICJ Statute’s acknowledged sources of international law namely conventions, customs and general principles of law. In answer to their permeating into the known sources of international law and even beyond into international treaties, sustainable development propositions are available in more than 300 conventions and 112 multilateral treaties, out of which 30 are intended for universal participation. Though there is still a loud

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42 Rio Declaration (n17), see also Barral, (n.40).

43 For example the notion is expressed in a lot of resolutions of international organisations, programmes of action, Declaration of States etc.

44 Virginie Barral, (n40) 383.

45 Virginie Barral, (n40) 384, full data from the survey reaching that conclusion set on file with the author.
cry out there by critics, this data is proof of the agreement among members of the international community on the relevance of sustainable development in the field of international law. A further contending argument by critics is the location of sustainable development within the body of the treaty itself, arguing that it mostly is confined to the preamble, which is a non-binding position within the treaty. This is, however, countered by the fact that at least 207 of the treaties that invoke sustainable development located it within the body/part of the treaty, making it an idea the parties to the treaty acknowledge as binding. So the notion of sustainable development is alluded to, as an objective that treaty/contracting parties ought to undertake to achieve, and the effective ways to follow in order to achieve the propositions contained therein.

Agreed, despite its penetration into treaty law, and unlike such non-binding soft law instruments like the Rio Declaration referred to above, the expression of the terms of sustainable development are quite pliable. They are sometimes set out in a language that is inexact and loose and as Barral pointed, ‘the provisions are often closer to setting out an incentive than purporting to be strictly constraining’. This softness in which the sustainable development provisions are cast in the treaty led to further criticism that its provisions are ineffective to produce well-founded rules of international law. However, as the new vision of sustainable development continues to take track, this is no more tenable as the new Morocco-Nigeria BIT shows by having obligatory provisions on sustainable development based on the modern evolutionary trend in international law. In addition, the criticism will also not succeed

46 Virginie Barral, (n40) 384, detailed empirical data are set on file with the author.
47 Virginie Barral.
48 For example see Baxter, International Law “In Her Infinite Variety”, 29 ICLQ (1980) 549, 554.
49 Preamble, Arts. 1(3), 24(1) Morocco-Nigeria BIT (December 2016).
on another front for, as Weil argued, ‘the unpredictable or unconstraining nature of certain provisions inserted in treaties has nothing to do with their legal character’. However, the way some treaty provisions traditionally set out motivation for an action whereby the treaty ask the parties to ‘strive to, or ‘promote’, are nothing but hortatory expressions rather than legally binding provisions/rules that are grounded standards of international law. As such, it is then evident from this analysis that reason of softness alone is way out insufficient to stop sustainable development provisions from attaining their valid status of being norms of international law.

However, it is trite under international law generally or treaty law in particular that the resultant effect of any treaty is, fundamentally, binding only between the parties to that treaty in question. So for us to find out whether sustainable development idea benefit from general normative reach, then it must be evidenced in customary international law.

5.3 Sustainable Development as Customary International Law

There is the need here to briefly explore how can international custom be identified. Any discussion or examination of customary international law necessarily goes back to the provisions of Article 38 (1) (b) of the Statute of the ICJ. The Court states under Article 38:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(b) International custom, as evidence of a general practice accepted as law

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51 For example the way many provisions of the Energy Charter Treaty are presented just as compromise formulae. See Cameron, Chapter One.
52 If anything, Barral argued, this would only increase the margin of appreciation of the contracting parties when they execute their treaty obligations.
The Court, in accepting custom as a formal source of international law that merits its application, must be evidenced by general practice that is accepted as law. From the definition, two fundamental elements depicting the presence of a custom can be gleaned, one objective or material element and the other one subjective or psychological element. The objective or material element is referred to as State practice while the subjective or psychological element is referred to as opinio juris sive necessitates (acceptance as law). Though customary international law has been described as ‘the generalization of the practice of States’, which is largely true, however the grounds for making such generalization necessarily require an assessment of ‘whether the practice is fit to be accepted, and is in truth generally accepted as law’.

There is the need to go back to some expert views from the past up to the ILC 2016 draft conclusions on identification of customary international law for a little insight into these elements that help in the identification of international custom. As to what constitute State practice, there has not been a unanimous agreement. For example some publicists argued that only physical acts could be considered as dependable sources of State practice as mere statements and even claims by these States are not constant. This position did not seem to have much support from the beginning as the counter narrative was the difficulty of making a distinction between the action of a State and its pronouncements. Today, the majority view favours the fact that State

54 See generally, James Crawford, Brownlie’s Principles of Public International Law (8th edn. OUP 2012) 23-28
55 Fisheries (UK v Norway), ICJ Reports 1951, 116, 191 (Per Judge Read).
56 James Crawford (n54) 23.
practice is regarded as any public act coming from a competent State organ or any act that can be ascribed to it.\textsuperscript{59}

*Opinio juris*, on the other hand, is not only an essential element of custom but it is the element that ‘precisely separates the wheat from the chaff’.\textsuperscript{60} The kind of requirements needed to establish *opinio juris*, just like in State practice, has been at best controversial.\textsuperscript{61} Why should States be compelled to legally follow a particular act? To some experts, the answer lays in consent, custom seen as similar to a treaty being an implicit, casual demonstration of States’ will\textsuperscript{62} while others see States as being bound by the custom because they function under the sense of a legal obligation to so act.\textsuperscript{63}

Assuming there is even some form of unanimity on the meaning of State practice and *opinio juris*, the question as to the proportion of the constituting elements will linger.\textsuperscript{64} One criticism seems to come from the traditional approach that hold that *opinio juris* must always go with a very comprehensive and practically uniform State practice.\textsuperscript{65}

\textsuperscript{59} See the International Law Association London Conference’ Final Report of the Committee on Formation of Customary (General) International Law, Statements Applicable to the Formation of General Customary International Law (2000) 14. The Permanent Court of International Justice PCIJ, in the Lotus Case (France v. Turkey), PCIJ, Series A, No.10, 28, held that omissions by States can also be held as State practice where the omission is clearly from a conscious duty to refrain from an act.


\textsuperscript{61} Tamás Hoffman.

\textsuperscript{62} Gregori Danilenko, ‘The Theory of Customary International Law, German Yearbook of International Law’ (1989) 31, 9 as quoted in Tamás Hoffman


\textsuperscript{64} Tamás Hoffman, 376.

\textsuperscript{65} Though this segment is not really an extensive discussion of the theories behind the development of *Opinio Juris* and State practice, it important to note here that two scholars disagreed with the traditional approach. Kelsen was of the view that State practice was the only element required in the formation of custom while Bin Cheng posited a similar single element theory holding *Opinio Juris* as the only evidence required because State practice does not possess any normative relevance in the establishment of custom.
As a response to the appearance of new areas of international law and the fragmentation manifest in the field, a modern approach to the development of custom under international law was revealed.\textsuperscript{66} Those in support of this modern approach refer to the ICJ’ judgment in the \textit{Nicaragua’s} case and concluded that a firm appearance of \textit{Opinio Juris} will be able to replace the unavailability of State practice and vive versa.\textsuperscript{67} Although it is not the place for this thesis to delve into the counter arguments against both the traditional and modern concepts as propounded by Koskenniemi, it will not be out of place to briefly state the criticism. Koskenniemi argued that international law is either apologetic or utopian, meaning that it only recounts what States really do and strive to rationalize these acts retroactively or it attempts to foist a capricious set of moral rules fully distinct from reality.\textsuperscript{68} Since international legal arguments generally shy away from either of these extremes, they definitely swing between Apology and Utopia, effectively leading to uncertainty of the content of legal norms.\textsuperscript{69}

It is impossible to conclude this segment of the discussion without reference to the 2016 ILC’s draft conclusions on identification of customary international law.\textsuperscript{70} The ILC posit that for the determination of ‘the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (\textit{Opinio Juris})’.\textsuperscript{71} The Commission pointed out that any assessment of the evidence for the presence of general practice that is accepted, as law, must take cognizance of the context and circumstances in which the evidence

\textsuperscript{66} The emergence of new branches of international like environmental law, natural resources law and human rights informed this development.


\textsuperscript{68} Martti Koskenniemi, \textit{From Apology to Utopia: The Structure of International Legal Argument} (Oxford 1989).

\textsuperscript{69} Tamás Hoffman (n 60) 377.

\textsuperscript{70} Chapter V, 2016 ILC Report on the work of the sixty-eight session.

\textsuperscript{71} ILC 2016, Conclusion 2.
occurred.\textsuperscript{72} According to the ILC, the constituent elements must also be established independent of each other.\textsuperscript{73} The requirement of general practice, being a constituent element of customary international law, posit that it is mainly the practice of States that play a part in the ‘formation, or expression, of the rules of customary international law’.\textsuperscript{74} The above briefly sum-up the development, distinction and general application of State practice and \textit{Opinio Juris}. In the following paragraphs, attempt will be made to show how sustainable development, as argued by some scholars and seen in some decisions, is achieving the status of customary international law.

Arguably, some commentators strongly assert that the notion of sustainable development has attained the status of customary international law evidenced by \textit{Opinio Juris} and State practice.\textsuperscript{75} However, Lowe’s argument on this front was to the effect that the creation of the concept of sustainable development varies significantly from the way customary international law comes into existence.\textsuperscript{76} He opined that ‘unlike rules of customary international law, the concept is not created by the traditional combination of ‘State practice + Opinio Juris’ or some variation thereon; it is essentially a judicial rule, created by judges and under their control. The judges are, of course, free to draw upon the practice of states (and indeed upon any other articulations of the concept): but they are not bound to do so, and they are not confined by it’. On the other hand, moreover, others maintained that no sufficient evidence exist to support this view, pointing out that the ICJ’s majority judgment’s

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\item \textsuperscript{72} ILC 2016 Conclusion 3.
\item \textsuperscript{73} ILC 2016
\item \textsuperscript{74} ILC 2016, Conclusion 4, Requirement of practice. In some instances, the practice of international organisations also aid the formation or expression of the rules of international customary law while the conducts of other actors may not.
\item \textsuperscript{75} P. Sands, (n40).
\item \textsuperscript{76} Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle and David Freestone (eds), \textit{International Law and Sustainable Development: Past Achievements and Future Challenges} (OUP 1999).
\end{itemize}
pronouncement on the *Gabčíkovo-Nagymaros Project*, though made reference to the notion’s legal status, failed to settle or subscribe to its customary international law status.\(^77\)

How do we get out a convincing answer to these contending arguments? Attention must be directed to judicial pronouncements in case law for support because that is where some legal certainty and guarantee are found.\(^78\) International lawyers seem to defer to judicial decisions because of the fact that judges’ pronouncements spread out past the parties to the case, especially on any pronouncement regarding customary international law, the existence of which is quite difficult to prove.\(^79\) In fact, it is this onerous responsibility they shoulder and the authority with which their pronouncements are held that makes international judges to be quite measured and reluctant, especially in acknowledging the existence of customary international law.\(^80\) Evidently, international judges seem to have carried this exercise to the recognition of sustainable development’s potentially customary nature, thereby ensuring that their decisions remain acceptable to States.\(^81\) A look at some judicial decisions and arbitral awards will reveal how judges and arbitrators navigated the murky waters of establishing and or recognizing the legal and customary nature of sustainable development.

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\(^78\) *Gabčíko-Nagymaros*, both the majority and Weeramantry’s dissenting views are important here for contrast.

\(^79\) Virginie Barral, (n40) 386.

\(^80\) Virginie Barral.

\(^81\) Virginie Barral.
5.4 Recognition of the Concept of Sustainable Development - Judicial Decisions/Arbitral Awards

Sustainable development as a concept has found judicial blessing by being invoked in the decisions of some important world judicial bodies. This assertion appears too simplistic due to the fierce objection by various academic commentaries as to its customary nature.\(^82\) As expressed above, while some see sufficient evidence of *Opinio Juris* and State practice to ground it as a customary rule even one that is theoretical and general, requiring tangible evidence from judicial decisions\(^83\), others completely steer away from the question by drawing attention to the fact that its applicability is found elsewhere than in its legal nature.\(^84\)

The International Court of Justice, in the *Gabčíkovo-Nagymaros*\(^85\) case, which remains the first point of judicial reference to the recognition of sustainable development independently of its inclusion in any treaty, made direct reference to it in its lengthy judgment:

“… Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This

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\(^{82}\) Generally see (n40).

\(^{83}\) Virginie Barral (n40) 385.

\(^{84}\) Virginie Barral, Fitzmaurice, (n55) 60 and Vaughan Lowe, (n54).

\(^{85}\) *Gabčíkovo-Nagymaros*. See also the separate opinion of Judge Weeramantry in the same case wherein he argued that sustainable development is not only a concept but also a principle of international law that has a normative value. Further see *Nuclear Tests Case (Australia v. France)* [1974], I.C.J, 253, 341-344 (Dec 20); *Kasikili/Sedudu Island (Botswana v. Namibia)* [1999], I.C.J. Rep 1045, 1087-1088 (9 Dec 13); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2007], I.C.J. Rep 135, 180.
need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development…”

The above majority decision of the ICJ not only invoked the concept but also established the need for States to always integrate their development needs with concern for the environment and as such indirectly gave its judicial blessing to the integration principle of sustainable development. It was this same paragraph that commentators used to attack the concept’s legal status. Varying arguments were made that though the court did touch on the notion, it seems to have deliberately ‘refrained from resolving this issue and did not acknowledge its customary international law status in the end.’

However, the separate opinion of Judge Weeramantry in the same case has been celebrated as giving the concept the necessary legal interpretation/backing it needed. He argued that the sustainable development principle is a necessary component of modern international law not only as a result of its objective necessity but also by reason of its broad and established recognition by the global community, not only developing countries. Alluding to its customary character, he was clear that the support of the international community ‘does not of course mean that each and every member of the community of nations has given its express and specific support to the principle – nor is this a requirement for the establishment of a principle of customary international law’. 

In relation to its application, Weeramantry addressed the contending problems of the scheme that led to the dispute between Slovakia and Hungary, arguing that an

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86 Gabčíkovo-Nagymaros, 140.
87 Katharina Berner, (n40) 183.
88 See Gabčíkovo-Nagymaros, separate opinion of Vice-President Christopher Gregory Weeramantry, (n55) 85.
89 Gabčíkovo-Nagymaros, 92.
90 Gabčíkovo-Nagymaros, Weeramantry.
international law principle was needed to resolve such competing concerns.\textsuperscript{91} He concluded that sustainable development is such a principle and is one that forms an integral part of international law. In fact, it was Weeramantry’s argument that to maintain that such a principle is absent in law is to hold that the current state of the law is one that allows placing two contending principles side by side without providing a corresponding principle that can reconcile them; he posited that sustainable development is a principle of reconciliation.\textsuperscript{92}

Furthermore, the ICJ, in the \textit{Pulp Mills}\textsuperscript{93} case, while recalling its findings in the \textit{Gabčikovo-Nagymaros} case\textsuperscript{94}, made important comments on the legal implications of sustainable development. This time around, the court moved a step further to establish that the object of Article 27 of the Statute of the River Uruguay\textsuperscript{95} was ‘consistent with the objective of sustainable development’, and though this did not confer a customary law status to sustainable development, it clearly moved it from being merely just a concept to an objective.

Maybe not surprisingly, it was at the Permanent Court of Arbitration at The Hague that the tribunal in the \textit{Iron Rhine} case made the brazen move to confer a customary status on sustainable development. The \textit{Iron Rhine Railway} tribunal (Belgium v. Netherlands)\textsuperscript{96} Award, while giving its opinion on the issue of balancing environmental and development concerns, argued that where development may cause harm, then there is a duty either to prevent completely or mitigate such harm and held

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\item\textsuperscript{91} Gabčikovo-Nagymaros, Weeramantry, 86.
\item\textsuperscript{92} Gabčikovo-Nagymaros, Weeramantry, 87.
\item\textsuperscript{94} \textit{Pulp Mills}, para.76.
\item\textsuperscript{95} The Statute of the River Uruguay was what Argentine claimed Uruguay has breached.
\end{itemize}
\end{footnotesize}
that integration is now an accepted principle of international law.\textsuperscript{97} With the invocation of paragraph 140 of the \textit{Gabčíkovo}-Nagymaros case, the tribunal pass on a forceful opinion that ‘sustainable development and integration of environmental measures in economic development projects are two facets of the same coin, which would suggest that, on this occasion, the arbitral tribunal did indeed accept the customary nature of sustainable development.\textsuperscript{98} The Tribunal further reviewed and linked its findings to the position of the 1972 Stockholm Conference on the Environment, the 1992 Rio Declaration on Environment and Development and recalled, citing with approval, the ICJ’s observation in the \textit{Gabčíkovo}-Nagymaros case on the need to always reconcile economic development objectives and environmental protection.\textsuperscript{99}

It seems that despite the fact that it is difficult for any single regime to innovate and adapt to the challenges posed by the broad application of sustainable development concerns, the WTO seem to be making giant strides. The fact that the Doha Round was stalled, this has not stopped the Dispute Settlement Board from making significant progress in both procedural and substantive matters through the sustainable development interpretation of the WTO Rules.\textsuperscript{100} The 1994 WTO Agreement has, in its Preamble, incorporated the sustainable development principle.\textsuperscript{101} Whilst preambles are not recognised as legally binding provisions like the substantive parts of the treaty, nevertheless they are certainly seen to contribute to

\textsuperscript{97} \textit{Iron Rhine}, para.59.  
\textsuperscript{98} Virginie Barral (n40) 387.  
\textsuperscript{99} \textit{Iron Rhine}.  
\textsuperscript{101} The WTO Agreement (n5).
the interpretation of treaties. At least under the provisions of international law, a treaty’s preamble is recognised as part of the context in which that treaty is to be interpreted and it also plays a significant role in identifying the object and purpose of the treaty.\textsuperscript{102} Though not really a legally binding declaration, at the Singapore Ministerial Declaration, sustainable development was broadened to include not only the ideal application of natural resources but also show it as a direct consequence of liberalized trade.\textsuperscript{103} The outcome of the Geneva Ministerial Conference is more outstanding since it was there that the WTO and the Member States officially identify sustainable development as not only linked to natural resources or unavoidable consequence of economic liberalization process but is also one of the objectives of the WTO.\textsuperscript{104} In a lot of its decisions, especially the AB’s decisions, the WTO has applied or interpreted the principle of sustainable development, positively.

The Appellate Body of the World Trade Organization, in the US \textit{Shrimps-Turtle} Case Report\textsuperscript{105}, invoked the concept of sustainable development by making reference to the Preamble of the 1994 WTO Agreement, which “explicitly acknowledges the objective of sustainable development”.\textsuperscript{106} The Appellate Body further stated that sustainable development is now a “concept” that “has been generally accepted as integrating economic and social development and environmental protection”.\textsuperscript{107} The Report further lauded the need for integration of economic development with environmental

\begin{footnotesize}
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\item \textsuperscript{102} Generally see Chapter Two for a detailed discussion of the perspectives under the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679 (VCLT) Art.31.
\item \textsuperscript{103} Singapore Ministerial Declaration (18 December 1996) WT/MIN (96)/DEC 36 ILM 218 available online: <http://docsonline.wto.org> para.16.
\item \textsuperscript{104} Geneva Ministerial Declaration (20 May 1998) WT/MIN (98)/DEC/1 available online: <http://docsonline.wto.org> para. 4.
\item \textsuperscript{106} \textit{Shrimps-Turtle}, para.129.
\item \textsuperscript{107} \textit{Shrimps-Turtle}.
\end{itemize}
\end{footnotesize}
concern and showed that the concept has now been accepted as integrating economic, social development and environmental protection.\textsuperscript{108} Even though it fell short of recognizing its customary international law nature, the WTO AB acknowledged its suitability in dispute resolution, even going far as extracting particular legal results therein.\textsuperscript{109} Numerous other GATT/WTO decisions impacting on sustainable development abound and these would be discussed under the following sub-head dealing with the principles of sustainable development, especially those touching on the precautionary principle, integration and interrelationship, sustainable use of natural resources and common but differentiated responsibilities.

5.5 Principles and Further Application of the Concept

In developing the conceptual justification of this thesis, which is the basis of this analysis, it is relevant here to point to the principles of international law relating to sustainable development as propounded by the International Law Association (ILA) Committee on the Legal Aspects of Sustainable Development.\textsuperscript{110} The New Delhi Declaration, though essentially a soft law instrument, identified seven key principles of international law in the area of sustainable development. These principles and how they have been interpreted especially by the GATT/WTO are explored below:

1. \textbf{The Duty of States to ensure Sustainable use of Natural Resources}

\textsuperscript{109} Shrimps-Turtle, para. 127-131.
\textsuperscript{110} New Delhi Declaration, (ILA, 2002) (n3). Principles 1-7 are mentioned below and Principle 7 is discussed in summary. See also Al-Saleem, K.I., The Legal Framework for the Sustainable Development of Iraqi Oil and Gas: A Study in Particular Reference to the Kurdistan Region, and with Special Emphasis on the New Delhi Declaration (UoP Ph.D. Thesis 2015).
It is a well-established principle of international law that all states enjoy sovereignty over their natural resources\textsuperscript{111}. They enjoy exclusive ownership and management of such resources in accordance with their environmental and economic agenda. However, this exclusive right is coupled with a corresponding responsibility on such states to ensure that they utilize such resources in an effective, sustainable manner for the benefit of their people, both present and future generations. The accompanying responsibility is one that requires states to ensure that the activities within their territory do not cause damage to areas beyond their national jurisdiction. As stated earlier, this obligation exists so as to balance their own right to the exclusive use of their natural resources. It is a way of striking a balance between environmental and economic concerns.\textsuperscript{112} It is said that this duty has been reflected in both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.\textsuperscript{113} The term ‘sustainability’ of natural resources was not in use when international law first moved in to accommodate both the environment and development as integrated concepts as established in the above declarations.\textsuperscript{114} The duty of States to ensure sustainable use of natural resources referred to under this principle is from the viewpoint of the social aspect of sustainable development.\textsuperscript{115} This aspect is clearly concerned with development that is geared towards meeting basic human needs.


\textsuperscript{112} (n2) 9.


\textsuperscript{115} ILA Declaration, Principle 1(2), also see Varral, (n.41).
The application of this principle could be seen from the state’s management of its natural resources in a sustainable manner. This type of management is what Segger and Khalfan referred to as ‘sustainable management approach’ whereby the states, as managers, set their own standards to regulate the rate of exploitation of these resources.\footnote{Segger & French, ‘Governing Investment in Sustainable Development…’ in (n11) 116.} So the principle of sustainable use of natural resources has direct bearing on environmental, economic and social concerns.

By way of application, the duty of States to ensure sustainable use of natural resources was tested under the GATT in the *Tuna-Dolphin I* case.\footnote{US-Restrictions on Imports of Tuna (Complaint by Mexico et al.) (1991), GATT Doc. DS21/R, 39th Supp.. B.I.S.D. (1993) 155 available online http://www.wto.org/english/res_e/bookspe/analytic_index_e/introduction_01_e.htm. Even though the GATT Panel disregarded the duty to ensure sustainable use of natural resources in its decision, the WTO AB overturned such conclusions in both the *Shrimp-Turtle I* (n.83) and *Shrimp-Turtle II* (n.83) and *Gasoline cases (United States-Standards for Reformulated and Conventional Gasoline)* (1996), WTO Doc. WT/DS2/AB/R (Appellate Board Report), available online: <http://docsonline.wto.org>.} It was a dispute involving Mexico and the United States wherein Mexico complained that United States adoption of the Marine Mammal Protection Act (MMPA) violated the GATT. The GATT Panel ruled in favour of Mexico by proclaiming that the MMPA was inconsistent with the provisions of GATT Article III.\footnote{See Chapter Four for a detailed discussion of all the fundamental provisions.} It further refused to account for the MMPA under GATT Article XX by stating that the exceptions provided by the GATT to protect human or animal life or health\footnote{GATT Art. XX (b).} or exhaustible natural resources\footnote{GATT Art. XX (g).} are only applicable to measures taken within the jurisdiction of the importing country. At issue also in the GATT are that its provisions effectively prevented any trade rules that exhibited ‘extraterritoriality’ and so the GATT Panel finally emphasised that a trade restriction could only be permitted under GATT Article XX (g) if targeted at the conservation of natural resources. Arguably, the reasoning of the Panel in *Tuna-Dolphin I* seems to be that no trade (import) restriction planned to take care of...
environmental concerns extraterritorially is justifiable under GATT Article XX, and even those measures addressing domestic environmental concerns required rigorous scrutiny before they can be valid.\textsuperscript{121} This might have informed why many commentators argued that the duty to ensure the sustainable use of natural resources was disregarded by the GATT 1947. Interestingly however, the Panel’s conclusions in the \textit{Tuna-Dolphin} regarding Article XX (g) did not escape the WTO AB’s scrutiny.\textsuperscript{122} The Appellate Body, in rendering its decision in the \textit{Gasoline} case, explained that GATT Article XX (g) in no way foist a “least GATT inconsistent” test to any trade measure that covers exhaustible natural resources.\textsuperscript{123} Likewise, in the \textit{Shrimp-Turtle I}, the WTO Appellate Board decision clearly overturns the Panel’s decision in the \textit{Tuna-Dolphin} case in relation to the provisions of GATT Article XX (g) by beaming its searchlight on the expression “exhaustible natural resources”.\textsuperscript{124} In reaching its conclusion, the WTO AB emphasised that “exhaustible natural resources” must be interpreted having regards to “contemporary concerns of the community of nations about the protection and conservation of the environment” supporting the conclusion/decision with the WTO Agreement’s unmistakable recognition of “the objective of sustainable development” in its preamble.\textsuperscript{125} The preamble remains the first point of reference in understanding what the framers’ intention was and as such “must add colour, texture and shading to our interpretation of the agreements annexed

\textsuperscript{122} See (n.95).
\textsuperscript{123} \textit{Gasoline} (n95), Markus Gehring and Alexandre Genest (n.97), it is noted however that GATT Article XX (b) did foist that test and as such relevant since it uses the enabling term “necessary”. Though despite all these the WTO AB finally refused to confirm U.S roles under GATT XX’s chapeau.\textsuperscript{124} The WTO AB argued that the expression necessarily includes living organisms, sea turtles included.\textsuperscript{125} \textit{Shrimp-Turtle I} (n83) para.129, see also the Preamble, WTO Agreement.
to the WTO Agreement”¹²⁶ this necessarily qualifies the GATT, particularly Article XX (g) in this respect.¹²⁷

2. The Principle of Equity and the Eradication of Poverty

This principle is concerned with both inter-generational (the right of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the right of all peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources)¹²⁸. The principle of equity, which is a key component to the promotion of sustainable development, is aimed at protecting natural resources, our common concern, from overexploitation. The principle further called for co-operation in the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the UN Charter and the Rio Declaration on Environment and Development as well as the duty to co-operate for global sustainable development and the attainment of equity in the development opportunities of developed and developing nations. It is worth noting here that the principle clearly viewed the eradication of poverty, just as is established in Principle 5 of the Rio Declaration, to be paramount in achieving sustainable development.¹²⁹

The application of this principle can be seen in Principle 3 of the Rio Declaration, the Programme of Action of the World Summit on Sustainable Development¹³⁰, which

¹²⁶ Shrimp-Turtle I (n.83) para.153.
¹²⁷ Noteworthy here is the fact that the AB did not particularly overturn the Tuna-Dolphin case on the basis of “extraterritoriality”, it rather examined that the U.S. trade measures in relation to the sea turtles established a “sufficient nexus” to the U.S. because the sea turtles moved around in U.S. territorial waters.
¹²⁸ (n17), Principle 2.1.
¹²⁹ Rio Declaration, (n17).
¹³⁰ WSSD (n34).
clearly recognized the need and resolve for poverty eradication, and the Monterrey Consensus on Financing for Development which sets out the objectives for poverty eradication and the need to mobilise resources, both domestic and foreign, towards achieving that goal.\textsuperscript{131} Although these are soft law instruments, nevertheless they represent recognition by the community of countries about the close connection between poverty eradication and sustainable development, and the significance of investment towards achieving both objectives.

Reference to intergenerational equity is now grounded in many international instruments, showing wide recognition of the principle in the way natural resources should be used.\textsuperscript{132} Equity, in both its ‘intra’ and ‘inter’ generational perspectives, has weaved together the human interests in environmental protection, socio-economic development and human rights.\textsuperscript{133} Sustainable development of natural resources and intergenerational equity are said to come together in the protection of ecosystems long inhabited by indigenous communities.\textsuperscript{134}

3. The Principle of Common but Differentiated Responsibilities

The notion of common but differentiated responsibility posits that in order to promote the concept of sustainable development, there is the need to take into account the differing capabilities of States.\textsuperscript{135} Both states and other actors within the state\textsuperscript{136} have common but differentiated responsibilities. All States are duty bound to co-operate in

\textsuperscript{131} Monterrey Consensus on Financing for Development, UN Doc.A/AC.257/32, March 2002.
\textsuperscript{132} See Preamble, para.23, see also Art 8 & 10, UNFCCC, (n28) and Preamble, para.20 Convention on Biological Diversity, (n43).
\textsuperscript{133} (n37).
\textsuperscript{134} (n37).
\textsuperscript{135} ILA Declaration, Principle 3(2).
\textsuperscript{136} Rio Declaration Principle 3.1.
order to achieve global sustainable development and environmental protection. All other actors, especially transnational corporations, are required to contribute to this global partnership. The idea of differentiated responsibility is primarily to take into account the economic and developmental situation of the state, particularly recognizing the special needs and interests of the developing countries and of countries with economies in transition. The principle further requires developed countries to bear special responsibility in reducing and eliminating their unsustainable patterns of production and consumption and play a leading role in matters relevant to sustainable development. The principle appeared both in the Johannesburg Plan of Implementation and the Climate Change Convention, which provides that parties to the convention should act to protect the climate system “on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities”. This idea has been recognized and accepted by States in treaty and other State practice.

The ILA New Declaration identified two elements to the differentiated responsibilities principle. First is the common responsibility of States for the protection of the environment at all levels. The second is the need to take into account each State’s contribution to the occurrence of a particular environmental damage and its ability to contain such environmental threat.

The principle of common but differentiated responsibility has been applied in various ways. State parties to the 1997 Kyoto Protocol agreed to differing commitments to

137 Rio Declaration
138 Principle 3.4, (n17).
139 UN (WSSD) (n34).
140 (n19).
141 ILA New Delhi Declaration (Principle 3(1) and 3(4)).
reduce greenhouse gas emissions\textsuperscript{142}. The 1972 Stockholm Declaration stressed the need to consider “the extent of applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for developing countries”\textsuperscript{143}. The 1992 Biodiversity Convention affirmed, “biological diversity is a common concern of mankind”\textsuperscript{144} and noted that the special needs of developing countries must be taken into account\textsuperscript{145}.

The WTO Agreements’ Special but Differentiated Treatment is similar to the ILA’s Principle of Common but Differentiated Responsibilities. In the \textit{Indian-Quantitative Restrictions} case\textsuperscript{146}, the WTO Panel, in dealing with the development needs of countries, invoked the WTO Preamble and accepted the rationale for the “special and differential” treatment in connection to a country’s economic potential as established under the WTO enabling document. The Appellate Body was more direct in reference to the issue of fair differentiation and also that of sustainable development by rejecting the European Communities’ (EC) arguments that the EC’s tariff preferences were founded on sustainable development objectives. Though it agreed with some of the arguments of the EC and even overturned some of the panel’s findings that interpreted the non-discrimination principle relative to the objectives of the GATT and the WTO, accepting that the differentiation between developing countries based on the needs of those countries remains a possibility. However, the Appellate Body on the other hand found that the objectives of the WTO could indeed be accomplished by applying the “General Exceptions” and inscribed that “the optimal use of the world’s

\begin{footnotesize}
\textsuperscript{142} See Annex B, Kyoto Protocol, (n27).
\textsuperscript{143} Stockholm Declaration, (n2), Principle 23.
\textsuperscript{144} The Biodiversity Convention, (n20), Preamble.
\textsuperscript{145} The Biodiversity Convention, (n20), Art.20 (5)(6) and (7).
\textsuperscript{146} \textit{India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products} (1999), WTO Doc. WT/DS90/R (Report of the Panel), para. 7.2.
\end{footnotesize}
resources in accordance with the objective of sustainable development” is long overdue.\textsuperscript{147}

As demonstrated above, though States have responsibilities to protect the environment and promote sustainable development, but as a result of their different social, economic and ecological positions, they must shoulder different level of responsibilities.

4. The Principle of Precautionary approach to Human Health, Natural Resources and Ecosystems

Article 4 of the ILA New Delhi Declaration stipulates “a precautionary approach is central to sustainable development in that it commits States, international organisations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.”\textsuperscript{148}

Many regional treaties and declarations have also recognised and included the precautionary principle, for example the Bamako Convention provides: “each party shall strive to adopt and implement the preventive, precautionary approach…”\textsuperscript{149}

According to the Maastricht Treaty: “community policy on the environment… shall be based on the precautionary principle and on the principle that preventive action

\textsuperscript{147} Gehring and Genest, (n.99), arguing further that this could be achieved via the application of the WTO exceptions like contained in Article XX(g) GATT.
\textsuperscript{148} ILA New Delhi Declaration, (n3), see also Art.7, 2000 IUCN Draft Covenant on Environment and Development (2nd ed. IUCN, Gland 2000).
should be taken…”\textsuperscript{150} The 1991 \textit{Ministerial Conference on the Environment of the United Nations Economic and Social Commission for Asia and the Pacific} invoked the precautionary principle thus: “in order to achieve sustainable development, policies must be based on the precautionary principle.”\textsuperscript{151}

With regards to non-binding instruments, the principle of precautionary approach has been earlier on enshrined in the Rio Declaration thus:

\begin{quote}
\textit{In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation}\textsuperscript{152}
\end{quote}

Sustainable development cannot be achieved if states and all others are not committed to avoiding all human activities that may cause significant harm to human health, natural resources or ecosystems. An aspect of the precautionary approach noted in the principle is the application of environmental impact assessments (EIAs) to identify possible harms.\textsuperscript{153} It means that in all activities that can affect human health, natural resources or the ecosystems, precaution should be taken even if no scientific certainty exists to show actual existence or certain future occurrence of harm or the extent of its severity on any of them.

\textsuperscript{150} Treaty Establishing the European Economic Community (amended by the Treaty on European Union), Art.130(r)(2).
\textsuperscript{152} 1992 Rio Declaration, Principle15, (n17), see also Agenda 21, JPOI.
\textsuperscript{153} ILA Declaration, Principle 4, EIA need is also noted in Principle 17 of the Rio Declaration.
Investment treaty tribunals have not addressed the precautionary principle expressly
neither have States specifically invoked it in their regulatory activity.\(^{154}\) However, the
WTO in the *EC-Hormone* case, made a reference to the principle in an obiter where it
maintained that the precautionary principle had become part of customary
international law.\(^{155}\)

The International Tribunal on the Law of the Sea, ITLOS, partly based its 1999
decision in the *Bluefin Tuna* on the reading of the precautionary principle.\(^{156}\)

Nevertheless, the precautionary principle has been relied upon in a number of cases as
a basis of legal obligation. The I.C.J had opportunity to comment on it in the
dissenting opinions of Judges Weeramantry and Palmer in the *Nuclear Tests Case*.\(^{157}\)

In 1973, New Zealand asked the I.C.J to ban France from testing nuclear weapons in
the atmosphere and before the I.C.J could make any pronouncement on it, France
stated that it was not planning to test any nuclear weapons, so the I.CJ dismissed the
case. In dismissing the case however, the court added, “if the basis of this judgment
were to be affected, the Applicant could request an examination of the situation”.\(^{158}\)
France was to withdraw its jurisdiction to the I.C.J later.

In 1995 France decided to launch an underground nuclear test and New Zealand
sought to sue it pursuant to the I.C.J’s decision to re-open the matter based on the

\(^{154}\) Marie-Claire Cordonier Segger & Andrew Newcombe, ‘An Integrated Agenda for Sustainable
Development in International Investment Law’, (n11) 121.
\(^{155}\) 1998 WTO *Beef Hormone* Case, EC Measures Concerning Meat and Meat Products (Hormones),
\(^{156}\) *Bluefin Tuna Cases* (New Zealand v. Japan, Australia v. Japan), Provisional Measures, ITLOS
Cases Nos. 3 & 4, Order of 27 August 1999, available in [www.itlos.org](http://www.itlos.org) (last visited 15 September
2016).
\(^{158}\) *Nuclear Tests*, 477.
1973 jurisdiction. In its argument before the court also, New Zealand invoked the precautionary principle. The majority decision considered New Zealand’s claims to be new, stating that France’s tests this time around were not atmospheric but underground and as such the I.C.J had no jurisdiction. The majority refused any comment on the precautionary principle invoked by New Zealand. However, Judge Weeramantry not only opined that the I.C.J had jurisdiction but went further to state that the precautionary principle invoked by New Zealand authorized an injunction to prevent potential harm to the environment and that in the relevant case, France’s activity posed significant harm to the environment and as such it had the burden of proving that its nuclear activity was safe. He concluded this aspect by stating “this last application of the precautionary principle, to which France is a party, has particular relevance to the matter presently before the court”. In his dissenting opinion, Judge Palmer addressed the relevance of the principle directly and stating that “the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment” and went on to say that “there are obligations based on Conventions that may be applicable here requiring Environmental Impact Assessment and the precautionary principle be applied”.

The Pulp Mills case is significant as it was the first time that a majority decision of the I.C.J directly addressed the precautionary principle. The Pulp Mills was a dispute between Argentina and Uruguay wherein Argentina accused Uruguay of violating the

161 Nuclear Tests, 348.
162 Nuclear Tests, 343.
163 Nuclear Tests, 412.
164 Nuclear Tests.
165 Pulp Mills (n71).
countries’ treaty obligation protecting the Uruguay River by authorizing the construction of a Pulp Mill that eventually polluted the river. Argentina maintained that under the precautionary principle, Uruguay had the burden of proof to show that its construction of the Mill will not cause significant harm to the environment. The court, in a majority opinion, rejected both Argentina’s application of the precautionary principle to shift the burden of proof\textsuperscript{166} and its use of the precaution to lower the standard of proof required of it to show the occurrence of environmental harm.\textsuperscript{167} The court stated, “While a precautionary approach may be relevant in the interpretation and application of the provisions of the statute, it does not follow that it operates as a reversal of the burden of proof”.\textsuperscript{168} Though the court did not find the application of precaution as necessary in the case, however its understanding of a broad application of the principle is important as it can be used to advance the argument that the court can sometimes issue injunctions in cases where some amount of harm is noted.\textsuperscript{169}

However, the dissenting opinion of Judge Vinuesa applied the principle positively in favour of Argentina. In agreeing with Argentina’s argument that authorizing the construction and the eventual construction of the Mill provided enough basis of uncertainty on the possible harm to the environment he opined “this will be no more than a direct application of the precautionary principle, which indisputably is at the core of environmental law. In my opinion, the precautionary principle is not an

\textsuperscript{166} Pulp Mills, para. 160.  
\textsuperscript{167} Pulp Mills, para. 164.  
\textsuperscript{168} Pulp Mills.  
abstraction or an academic component of desirable soft law, but a rule of law within
general international law as it stands today”.

It can be seen that though the I.C.J had the opportunity to pronounce on the
precautionary principle in a majority judgment in the Pulp Mills, it did not make any
explicit statement as to the exact meaning or status of the principle under international
law.

The precautionary principle essentially gives the benefit of the doubt to environmental
protection. Taking precaution is premised on the belief that natural systems are
susceptible to harm as opposed to being durable. Moreover, precaution in its
practical application, unlike other standards, is essentially preventive in nature while
other preventive standards may not necessarily be precautionary.

The effective participation of developing countries at the Johannesburg Summit can
be seen in the Summit’s call to “support developing countries in strengthening their
capacity for the sound management of chemicals and hazardous wastes by providing
technical and financial assistance.” From the perspective of sustainable
development, the precautionary principle can be seen to have gained recognition from
the sphere of environmental law to social and economic (investment) and even trade
law. This can be interpreted from the contributions of the World Summit on
Sustainable Development, WSSD seeking to redirect the debate from the exact

170 Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J., Dissenting opinion of Judge
Vinuesa (Order of July 13 2006) 5, 152.
171 Sands, (n40) 150.
172 Sands, (n40) 151, other preventive standards may not be precautionary in their application.
173 (n40), also JPOI, para.23.
position of precaution under international law to its endorsement and acceptance as complementary to the highly regarded science-based decision-making.\textsuperscript{174}

5. The Principle of Public Participation and Access to Information and Justice

The requirement of public participation and access to information and justice has been held by the ILA to be paramount to sustainable development.\textsuperscript{175} It viewed public participation especially to be essential to sustainable development and good governance ‘in that it is a condition for responsive, transparent and accountable governments’.\textsuperscript{176} Agenda 21 specifically posits “States will ensure broad public participation in initiatives for sustainable development through access to information and access to justice.”\textsuperscript{177} This principle is reflected in many domestic legal systems.\textsuperscript{178} States usually take it upon themselves to ensure that all citizens have access to information in possession of public bodies and private sectors, participation by minority groups, access to justice by the indigent and vulnerable groups, etc.\textsuperscript{179}

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Declaration on the Right to Development all contained provisions for public participation at national levels.\textsuperscript{180} The Declaration

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{174} WSSD (n34), see also (n40).
  \item \textsuperscript{175} ILA Declaration, Principle 5(1)(2)(3), (n3).
  \item \textsuperscript{176} (n.34), Principle 5.
  \item \textsuperscript{177} (n.17).
  \item \textsuperscript{178} See 1999 Constitution of the Federal Republic of Nigeria, Chapter IV, especially S.39, see also the 1992 Constitution of Ghana, Chapter V, 1996 South African Constitution (No. 108, as amended) Chapter II.
  \item \textsuperscript{179} Nigerian Constitution, 1999.
  \item \textsuperscript{180} Art. 21 of the Universal Declaration of Human Rights G.A Res.127 A, UN Doc.A/810 (1948) and Art 25 of the International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) and the UNGA 1986 Declaration on the Right to Development.
\end{itemize}
\end{footnotesize}
on the Right to Development recognised it as central to fair socio-economic development.\textsuperscript{181} The Brundtland Commission Report and the Johannesburg Plan of Implementation also recognized the principle to be central to the promotion of sustainable development.\textsuperscript{182}

People can only participate in the decision-making process that affects them if they have access to information necessary for participation. So States are expected to make such information easily accessible to the public to ensure their effective participation. Finally, access to justice to all those that might be affected by governmental decisions is fundamental to the realization of sustainable development. According to the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), this will allow individuals make and enforce their rights before national courts and tribunals.\textsuperscript{183} To achieve this, the committee further states that all State parties should allow all universally recognised human rights standards to operate directly in their national legal systems.\textsuperscript{184}

The Brundtland Commission, in identifying “effective participation” as a necessary part of sustainable development, specifically pointed to the importance of Non-governmental Organisations (NGOs) and indigenous people’s participation.\textsuperscript{185} The Commission considers their participation as very significant in promoting sustainable development.\textsuperscript{186}

\textsuperscript{181} UDHR, see its Preamble and Art.1 respectively.\textsuperscript{182} (n1, 17 AND 34 respectively).\textsuperscript{183} United Nations Committee on Economic, Social and Cultural Rights, UN ESCOR, 2000, UN Doc. E/C.12/2000/.\textsuperscript{184} UN ESCOR, General Comment No.9, Domestic Application of the Covenant. See also (n.45).\textsuperscript{185} Our Common Future (n1).\textsuperscript{186} Our Common Future, (n.1).
6. **The Principle of Good Governance**

The principle of good governance has been recognised in the Johannesburg Plan of Implementation (JPOI) of the UN World Summit for Sustainable Development in holding that good governance is a fundamental principle that will ensure sustainable development. The JPOI states that:

> ‘Good governance within each country and at the international level is essential for sustainable development…’

187

Further to the above, the Johannesburg Declaration also recognized the importance of the principle by stating its commitment to:

> “Undertake to strengthen and improve governance at all levels for the effective implementation of Agenda 21, the Millennium Development Goals and the Plan of Implementation of the Summit.”

188

The principle of good governance is at the core of human development. This is a principle that is much more relevant to the developing world today where there is a dire need of reforms in both institutional and administrative frameworks that will ensure good governance. The Principle of good governance as advanced by the ILA is one that requires States to ensure that strong and coherent institutions exist to allow

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187 JPOI (n34).
188 Johannesburg Declaration on Sustainable Development, (n34).
citizens to realize their potential, exercise their individual and collective rights and live in an environment where the rule of law is respected.\textsuperscript{189}

All major financial institutions and development organisations have recognized and insist on the requirement of good governance both at the domestic and international levels to foster development.\textsuperscript{190} The United Nations Development Programme set out the characteristics of good governance to include the rule of law, participation, responsiveness, transparency, accountability, equity, consensus orientation, effectiveness and efficiency and strategic vision.\textsuperscript{191}

The issue of good governance is not only central to the eradication of poverty and the promotion of sustainable development everywhere but also to the maintenance of global security, harmonization of national developmental policies, transparency, accountability and strengthening of both administrative and judicial institutions for effectiveness.

The principle of good governance also requires States to ensure the development of a socially responsible investment climate.

\textbf{7. The Principle of integration and Interrelationship, in Particular in Relation to Human Rights and Social, Economic and Environmental}

\textsuperscript{189} ILA Declaration, see Principle 6(1)&(2).

\textsuperscript{190} Generally see the 1989 World Development Report by the World Bank, the New Partnership for Africa’s Development Peer Review Mechanism, the African Development Bank, ADB, the DFID, the 1992 World Bank’s Governance and Development Report, United Nations Convention to Combat Corruption, United Nations Development Programme’s Governance Policy Paper 1997, the 1997 IMF Report (wherein the Fund decided to incorporate good governance as a criterion for getting its assistance), same position was taken by the Organisation for Economic Co-operation and Development (OECD), etc.

Objectives

The last principle is an all-encompassing one in that it suggests an integration and interrelationship of the principles of social, economic, and environmental objectives. The Johannesburg Plan of Implementation, in its objectives, states that governments “will promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars”.

In the application of the integration principle, Segger and Khalfan stated that four degrees of the principle could be identified from the perspectives of those regimes that view international economic, social and environmental law as separate and distinct fields and the other regimes that fully integrate these three areas of law and consider them as one. They identified these degrees as separate spheres, parallel yet interdependent spheres, partially integrated spheres and highly integrated new regimes. Their entire argument centered on taking holistic approach to the analysis of integration, as they put it, “one which describes and tracks the degree to which international regimes integrate economic, social and environmental law” something sustainable development can achieve by the integration of trade and investment.

The Principles mentioned in the Declaration include the duty of States to ensure sustainable use of natural resources, the principle of equity and the eradication of

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192 WSSD (N34), para.2, other soft law instruments that recognized the principle include the Agenda 21 and 1992 Rio Declaration and the Stockholm Declaration of 1972.
193 Segger & Khalfan (n2) 106.
194 Segger & Khalfan (n2) 107. It is not the place for the present discussion to go into the details of these spheres.
195 Segger & Khalfan (n2) 106-107.
poverty, the principle of common but differentiated responsibilities, the principle of precautionary approach to human health, natural resources and ecosystems, the principle of public participation and access to information and justice, the principle of good governance and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. The last principle is an all-encompassing one in that it suggests an integration and interrelationship of the principles of social, economic, and environmental objectives. The Johannesburg Plan of Implementation, in its objectives, states that governments “will promote the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars”.196

Trade’s relationship with both the environment and social development necessarily depends on how the regimes’ rules and method of application prescribed the extent to which trade advances sustainable development goals.197 It is argued that public international law, under the aegis of which international trade is situated, ‘can and should adopt a principled approach to ensure that it can deliver on its global objective of sustainable development’.198 By way of application, the WTO Panel, in the EC-Biotech case199, pointed out that a WTO Panel may examine “other relevant rules of international law when interpreting the terms of WTO agreements if it deems such rules to be informative”.200 In the China-Raw Materials201 case, the WTO Panel affirmed the principle of permanent responsibility over natural resources, the freedom

196 JPOI para.2.
197 Gehring and Genest, (n99) 381-382.
198 Gehring and Genest, (n99) 382.
200 EC-Biotech, (Panel Report), para.7.93.
to exploit these resources for development sake and the position of GATT Article XX (g) that further emphasises the need to also manage these resources in conformity with sustainable development.\(^{202}\) The Panel finally reached the conclusion that overall economic development and conservation of these natural resources can certainly work in symmetry and alongside WTO obligations.\(^ {203}\) This, the Panel hope, will make it possible for sustainable development to expand into future WTO decisions.\(^ {204}\)

### 5.6 Grounding of Sustainable Development under International Investment Law

Generally, sustainable development concerns and their relationship with investment can be reviewed from the perspectives of treaty texts, investment and other disputes and academic writings. These three areas, though rather different from each other, all are interconnected in the way they deal with sustainable development in international investment agreements.

The Brundtland Report’s definition of sustainable development\(^ {205}\) has come to be accepted as the most widely recognized and applied definition of the concept. However, that could not be said of the definition of investment. Even the most widely accepted investment law instrument, the ICSID Convention\(^ {206}\), did not directly define investment though the language of Article 25 of the Convention is quite clear in stating that an ICSID tribunal can only have jurisdiction where the dispute in question

\(^{202}\) See *China-Measures*, paras.7.378-7.381.

\(^{203}\) *China-Measures*, para.381.

\(^{204}\) *China-Measures*, para.381.

\(^{205}\) Our Common Future (n1).

\(^{206}\) Popularly called The Washington Convention; The International Centre for Settlement of Investment Disputes was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It has been ratified by at least 159 countries; see [www.icsid.worldbank.org](http://www.icsid.worldbank.org) (last accessed 29\(^{th}\) December, 2016). However, a lot of ICSID tribunals define investment using the notion of development.
arises ‘directly out of an investment’.

So flowing from the provisions of Article 25, Parties must signify their consent before submitting any dispute to ICSID. States usually do this through International Investment Agreements (IIAs) (which are usually in the form of Bilateral Investment Treaties, BITs) or through other recognized instruments.

The IIAs definition of investment only represents the investment-protection perspective that reflects the asset-based approach. However, the IIAs usually failed to set out any criteria that can be used to ascertain whether an asset qualifies as an investment. In such situations, the ICSID tribunal is left with two options, either to consider the activities of the investor as investment within the jurisdiction of the ICSID tribunal or be allowed the latitude of making its own findings and determination. Since there is no common definition of the concept of investment in both the ICSID and the model IIAs, then there is the need for a shift in approach to the developmental element of investment canvassed by a number of ICSID tribunals, an area this thesis will impact by advocating future investment treaties to include sustainable development/investment in their definition of investment.


Article 25 essentially covers jurisdiction, and submission to jurisdiction of a court or tribunal is a general rule under international law.

Article 25.

Jezewski, M., ‘Development Considerations in Defining Investment’ (n11) 215.

Jezewski.

Jezewski, see also Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic (Decision of the ICSID Tribunal on Objections to Jurisdiction, (24 May 1999), known as CSOB v. Slovakia), MHS v. Malaysia, Case No. ARB/05/10, (Award of 17 May 2007), see also the US Model BIT (of 2004), German Model BIT of 2005 and US-Mozambique BIT (signed in 1998). The author argued that this approach is one that makes the concept of contribution to the host State’s economic development a central feature in the definition of investment and the system of investment treaty protection.
In the *Malaysian Historical Salvors Arbitration, MHS v. Malaysia*\(^{213}\), the pertinent issue before the tribunal was whether the salvage of antiquities qualified as an investment. The first arbitral tribunal held that it did not qualify as an investment under the ICSID because it did not contribute to the economic development of the host country. However, the annulment committee held that the first tribunal was in error in giving too much significance to the need for socio-economic development because there is no objective meaning or criteria for determining whether or not a particular investment contribute to socio-economic development. Moreover, though the opening sentence of the ICSID Preamble referring to the “need for international cooperation for economic development”\(^{214}\) cannot in any way qualify as definition of investment, it nevertheless suggests that for an ICSID tribunal to have jurisdiction, the outcome of the investment must be of “some positive impact on development”\(^{215}\) of the particular host State.

Furthermore, though there is no system of stare decisis in the ICSID, but decisions and awards can still carry some precedential value if they are well reasoned.\(^{216}\) As such, in *MHS v. Malaysia*, all the cases considered by the arbitrator as valuable to the interpretation of the notion of investment under the provisions of Article 25(1) underscore economic development as a necessary component of investment.\(^ {217}\) Finally, the decision may help in defining whether or not BITs should protect portfolio investment. There is also the argument by a segment of the investment

\(^{213}\) *MHS v. Malaysia*  
\(^{214}\) The ICSID Convention.  
\(^{215}\) Schreuer (n185) 125.  
\(^{216}\) Schreuer.  
\(^{217}\) The arbitrator considered seven ICSID Cases, among which was *Patrick Mitchell v. Dem. Rep. Congo*, ICSID Case No. ARB/99/7 wherein the tribunal required that the investment in question must contribute “in one way or another to the economic development of the host State”. It is instructive here to note that though the decision was subsequently annulled, but the tribunal in *MHS v. Malaysia* considered the Award not the Annulment, (n190).
community to the effect that foreign investment should contribute to the host State’s development.  

Traditionally, these treaties were negotiated between the developed and developing states. On the one hand, the developed States entered into these treaties with the primary concern of making profit and always protecting their corporations or nationals’ investments from the possible discriminatory policies or unfair treatment of their host, developing States. On the other hand, the developing, host states do so to attract Foreign Direct Investment, FDI to further their development. However, one could argue whether the proliferation of IIAs essentially promotes FDIs and whether the increase in FDIs necessarily promotes development?  

It is trite that the investment canvassed by developing States is one that should positively contribute to their development but a reading of the texts shows that most of these traditional IIAs were not designed to achieve any development outcomes, sustainable or otherwise. Where some eventually refer to development, they do so marginally, and as Joubin-Bret put it, “as a political goal that is not specifically aimed at the developing country treaty partner, but at the economic development of all contracting partners, irrespective of their status”. This has been the focus of almost all the older IIAs, a trend that still finds its way into current treaty practice as various developments in the area have done little to integrate sustainable development principles in the majority of

219 According to the United Nations Conference on Trade and Development (UNCTAD)(2007), there are now more than 3200 IIAs involving 194 States in operation, see Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties, available at <http://www.unctad.org/Templates/WbeFlyers.asp?infItemID=3150&lang=1>
220 Anna Joubin-Bret et al., International Investment Law and Development (n11) 16.
221 Anna Joubin-Bret, a further insight on this is discussed below.
222 Anna Joubin-Bret. Furthermore, these IIAs are mostly, as stated above, only protective in nature with little concern for the promotion of investment or transparency.
modern IIAs. The mention of development is at least a pointer to the need for sustainability approach that will incorporate such concern.

However, from the works of the International Institute of Sustainable Development (IISD) and some scholarly writings, certain development-related innovations are emerging as proposals for inclusion in IIAs. This is with a view to integrating environmental, economic and social concerns into investment agreements.

The International Institute for Sustainable Development has so far proposed a Model International Agreement on Investment for Sustainable Development, popularly known as the IISD Model. The model is relevant to this discourse as it tries to integrate sustainable development with international investment. It is doing this having observed that currently, almost all existing IIAs have a single-track approach to investment, which is the protection of foreign capital and investment. The Preamble exhaustively presents the perspective of the proposal, clearly emphasizing the need for a balanced approach to investment, looking at both rights and obligations that should exist between investors, host countries and home countries, or as one writer puts it, “emphasizing both investor rights and public goods”. The Model aligned its project with the perspective of sustainable development as propounded in the Brundtland report, the Rio declaration, the 2002 World Summit on Sustainable Development (WSSD) and the Millennium Development Goals, and it is now consistent with the current United Nations Sustainable Development Goals.

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224 See the IISD Model, available online at <www.iisd.org/investment> the Model was first proposed in (2005). See also (n11) supra for a collection of expert articles pointing to this development.
225 IISD Model.
226 See (n2) 219.
227 Preamble to the IISD Model Agreement, (n202).
228 IISD Preamble, (also the SDG 2030).
More importantly, the Model’s focus on the notion of investment covers only activities that are actually taking place in the host country in the form of operations or undertakings and also recognizes the permanent character of the investors’ contribution to the development of the host country.\textsuperscript{229} According to the provisions of Article 2(c) of the IISD Model definition, any activity, operation or undertaking physically present in the host State as an investment will satisfy its notion of investment provided that:

a) “Such investments are not in the nature of portfolio investments...:

b) There is significant physical presence of the investment in the host State;

c) The investment in the host state is made in accordance with the laws of that host state:

d) The investment is part or all of a business or commercial operation; and

e) The investment is made by an investor”.\textsuperscript{230}

From the viewpoint of investment arbitration, the position of the home State in terms of environmental regulations contained in a number of recent IIAs has also been challenged. The resulting awards interestingly found in favour of the host State’s environmental measures. A case in point is the \textit{Glamis Gold v. United States}\textsuperscript{231}, which was brought by a Canadian mining company under the North American Free Trade

\textsuperscript{229} See (n185), it was further argued here that this development is only measured from the perspective of the host State’s set goals but is not an objective standard. See below a discussion of similar point from the perspective of national treatment standard.

\textsuperscript{230} Article 2(c)(v)(a-e) Model IISD Agreement.

\textsuperscript{231} \textit{Glamis Gold v. United States}, Award (NAFTA Arb Trib, 2009), available online at \url{http://www.state.gov/documents/organisation/125798.pdf}, also known as the Gold Standard Case in investor-state arbitration, (last accessed on 23\textsuperscript{rd} December 2016).
Agreement (NAFTA). The case was instituted after California enacted a law that required the complete backfilling of open-pit mines located around a Native American sacred site. Coincidentally, the Glamis Gold project site was located near this sacred site and Glamis Gold initiated an arbitral proceeding, arguing that complete backfilling of this site will substantially make its mining investment in the project uneconomical and that the law was a violation of the previous standards under which the project was initiated. On the other hand, the United States responded that mining is a highly regulated business and that the Native American sacred site has been an area of regulation for several years and that Glamis Gold, a company holding mining rights in the area should expect such regulation to be in place and enforced. The tribunal, in giving its award in favour of the United States, discussed among other things, the position of the environment in relation to investment measures such as regulatory takings and fair and equitable treatment.

Another interesting arbitral award is also a NAFTA Award in the Methanex Corp v. United States where the tribunal, in finding in favour of the State, had the opportunity to make pronouncements on investor-protection agreements especially as regards human health, public participation and environmental rules.

5.7 Academic Commentary

Sustainable development concerns in international investment law are also achieving prominence within academic circles from the myriad of literature available now in the

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232 Glamis Gold, see also Romson A, 41.
233 This is within the legitimate expectation of the Glamis Gold.
234 Methanex Corp v. United States, Final Award on Jurisdiction and Merits, available online at http://www.state.gov/documents/organisation/51052.pdf. There are other cases pending before several investment tribunals concerning environmental regulations etc. for example the Marion Unglaube v. Costa Rica that is pending before the ICSID, see ICSID Case No. ARB/08/1.
235 Methanex.
area. According to the provisions of Article 38(1)(d) of the Statute of the International Court of Justice, the writings of highly regarded publicists are among the traditional sources of international law.\textsuperscript{236} These publications range from proposals to host States on how to negotiate new IIAs to arguments in support of developing States to re-interpret and redirect existing IIAs taking into cognizance sustainable development concerns with a view to ensuring that environment, social and economic problems are taken into consideration.\textsuperscript{237} Many academics have reviewed the development of the concept from various perspectives and advanced arguments as to its nature, current status, applicability and future expectation. Gehring and Newcombe, in their introductory contribution to the book Sustainable Development in World Investment Law, reviewed the history of the inception of the concept and reached the conclusion that “the concept did not focus on limiting economic activity but rather on re-directing development in order to ensure the potential for long-term sustained yield”.\textsuperscript{238} They maintained that though there is a general consensus on the importance of FDI’s in the drive towards sustainable development, a lot needs to be done to make sure that current international investment law regimes are re-balanced and re-interpreted so as to promote sustainability.\textsuperscript{239}

\textsuperscript{236} Article 38, ICJ Statute.
\textsuperscript{237} See Morocco-Nigeria BIT (2016) and UNCTAD Reports 2016-2017 on these developments.
\textsuperscript{238} (n11) 3. The book is one of the current collections of expert articles by senior academics and investment experts that centrally look at sustainable development and its implication within the current regime of international investment law.
For example, Mayeda\textsuperscript{240} contended that existing IIAs are not designed nor are they suitable for ‘the promotion of a comprehensive conception of development’\textsuperscript{241}. He further observed that both the negotiating parties and the tribunals that later interpret these IIAs have not deemed it appropriate to see investment issues through a sustainable development lens and failed to ‘recognize that sustainable development involves a ‘cross-sectional’ analysis that implicates issues of human rights, environmental law, and distributive justice’.\textsuperscript{242} They owe legal obligations to their communities because these treaties will impact on their subsequent policy decisions such as regulating the environment, water services, roads etc that are owned or managed by foreign investors. This is the main reason why even the New Model US and Norwegian BITs explicitly provided that the parties should not lower their environment and labour standards in order to attract investment. In fact, the US Model BIT 2012 strengthens the right of States to regulate. Today, many modern treaties are taking this interesting approach.

Mayeda’s position is that the best way of ensuring that IIAs are compatible with sustainable development is for states to ‘negotiate sustainable investment agreements’\textsuperscript{243}. His proposal in the design of future, more sustainable investment agreements, advocates for the incorporation of certain features that will assist host States’ ability to promote sustainable development.\textsuperscript{244}

\textsuperscript{240} Mayeda G., ‘Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries’, 535 (generally) in (n11).
\textsuperscript{241} (n11) 542.
\textsuperscript{242} (n11), see also Zarsky (n217) and Jezewski (n188).
\textsuperscript{243} (n11) 544.
\textsuperscript{244} (n11).
The proposal signifies a radical departure from existing IIAs with a significant shift to development perspective to aid the host States’ use of foreign investment to develop not only infrastructure but also institutions, something this thesis is also advocating.

5.8 National Treatment in the Context of Sustainable Development – An example of the Relationship between Investors’ Rights and Host States’ Regulatory Space

The principle of national treatment is misleading in its simple formulation. In its standard phrasing across BITs, it comprises of the contracting States’ obligation to accord treatment ‘no less favourable’ than they accord to their own investors ‘in like circumstances’. The phrase ‘like circumstances’ is used to determine a violation of the standard. The broad connotation of the obligation has given latitude to investment arbitrators to apply an excessively wide interpretation of the standard, making them group public welfare regulation of general application to be a violation of the standard. This latitude can be employed to incorporate sustainable development in the interpretation of national treatment.

In considering the principle of national treatment, the starting point is determined by the treatment host States accord domestic investors in relation to foreign investors who are in like circumstances. The fallout from this is the extensive application of the principle to regulations and other governmental decisions. Most importantly also, such an extensive application and expansive interpretation of the standard has the negative effect of restricting otherwise beneficial, though sometimes controversial, governmental policies. This will finally result in ensuring the creation of standards of

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245 Kate Miles (n11) 268. See Chapter two supra for an in-depth discussion of the interpretation of ‘like circumstances’/’likeness’.
247 Kate Miles (n11) 268.
investor protection that will be quite outside the realm of the protection of investors from arbitrary or negative State conduct to a shield against the influence of otherwise legitimate public welfare regulations.\textsuperscript{249}

Seeking to establish, nurture and support projects that meet sustainability requirements, States usually, in fact necessarily, differentiate among future projects and investments based on such developmental needs. This may subject the host State to investor claims of discriminatory treatment where the said regulation either prohibiting the investors from certain activities or denying their participation in profitable ventures was simply because it is only the domestic investment that meets sustainability requirements.\textsuperscript{250} And as such, differentiating between the domestic and foreign investors simply based on sustainable development concern will be viewed as a breach of the principle of national treatment. This, it is argued, will greatly limit the available regulatory space for States to actively drive their development/sustainability agenda without the fear of evident investor claims. It is submitted here that differentiation based on the State’s need for development and/or sustainability can be justified based on rational grounds of allowing developing States viable policy space to ‘develop domestic law and policy in the public interest’.\textsuperscript{251}

However, as Kate Miles and Cordonier Segger argued, host States measures leading to sustainable development cannot be realized without impacting on the interests of foreign investors, and this will, inevitably, lead to a ‘regulatory chill’.\textsuperscript{252} The regulatory chill theory argument posit that the possibility of investor claims against

\textsuperscript{249} (n11) 268-272. 
\textsuperscript{250} (n11) 
\textsuperscript{251} (n11) 
\textsuperscript{252} Kate Miles (n11) 271, Marie-Claire Cordonier Segger, ‘From Protest to Proposal: Options for an Americas Investment Regime?’, in \textit{Beyond the Barricades: The Americas Trade and Sustainable Development Agenda}, Marie-Claire Cordonier Segger & Maria Leichner Reynal (eds), (Ashgate: Publishing Limited, 2005) 146 at 155.
host States implementing such sustainable measures will prevent effective public welfare regulation and constrain sustainable development concerns. The host States fear here is understandable as most of them, being relatively poor, cannot contend with the potential for enormous damages award and arbitral proceedings costs. All these will have important implications in realizing the sustainable development objectives of developing States.

One important objective can be discerned from the above preliminary survey, i.e. the recognition of the need for sustainability of development activities. The Brundtland Report, modern investment treaty texts’ and academic commentaries reviewed above all shared that objective. It is only when economic policies are directed towards ensuring effective use and long-term sustainability of resources that they can say to be working towards meeting the core objectives of sustainable development. This could also be said to be the desired objective of international investment law.

5.9 Soft Law Instruments

The further grounding of sustainable development in international investment law can be reviewed from several other soft law instruments, policy papers and reports. It has already been enshrined as a clear objective in more than fifty binding international treaties. The provisions of Agenda 21 of the United Nations Conference on Environment and Development, the World’s Plan of Action, pointed out the relevant sustainable development challenges linked to investment:

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255 Kate Miles (n11) 272.
256 (n11).
257 (n34).
“Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.” 258

The language employed by Agenda 21 is clear: without the much needed investment and capital flow, developing nations cannot meet the basic needs of their teeming populations in a sustainable manner.

Addressing the impact of the global financial crisis on the flow of FDIs, the G8 Heads of State, at their 2009 Summit on Responsible Leadership for a Sustainable Future, reiterated their commitment to capital flow and further investment to ensure sustainable growth. The Summit’s declaration states in part that:

“The current financial crisis has affected capital flows, including FDIs, which represent an important source of financing and a driver for economic growth and integration. We stress the positive role of long-term investments. We will work to reverse the recent decline in FDIs by fostering an open, receptive climate for foreign investment, especially in emerging and developing countries.” 259

Furthermore, the International Conference on Financing for Development (ICFD), in what is popularly known as the Monterrey Consensus, states in paragraph one that:

258 The Rio Earth Summit, (n17).
259 The G8 Declaration.
“Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term”.260

Though the G8 Declaration and the Monterrey Consensus are political exhortations that may have no legal force, nevertheless they provide some context for the operation of foreign investment in local economies. The documents further recognised the importance of foreign investment in stimulating economic growth and therefore the need to protect and encourage foreign investment along that line.

The 1994 Marrakesh Agreement establishing the World Trade Organisation (WTO) also considers sustainable development as a fundamental objective by ‘allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development’.261 In the 1998 Geneva Ministerial Declaration on the WTO, the Ministers state that ‘We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development’.262

262 Para.4, Geneva Ministerial Declaration, WTO Doc, WT/MIN (98)/DEC/1, May 1998.
5.10 Conclusion

The above summarises the argument from which the concept of sustainable development could serve as useful analytical tool in the context of investment treaty arbitration. From the overview, scope and legal justification of the concept, it can be discerned that investment treaty arbitration will not stand alone in utilizing the concept and its associated principles in resolving investment disputes. This is particularly important when the current jurisprudence of investment treaty arbitration fell short of allowing developing States enough regulatory space to enact legislation that will ensure development in the social, environmental and economic spheres. Indeed, the suitability of the concept is much more compelling in the natural resources sector where resort to local content legislation are pervasive and generating a lot of concern among investors, host States and local/indigenous people. To date, no tribunal has dealt with a dispute in which national treatment standard need to be interpreted in situations where empowerment laws, whether in the language of local content or not, are developed by host States. However, the South African Black Economic Empowerment, BEE\textsuperscript{263} law and the Nigerian Local Content Act (NLCA)\textsuperscript{264} are good examples of such empowerment laws. In a purported violation of South Africa’s investment treaty obligations, especially the national treatment provisions, the State enacted a law ordering mining companies to acquire 51% black partners and shareholders as a way of empowering the black community after apartheid.\textsuperscript{265} The main stay of the law is the provision of equitable employment opportunity for black

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} The Act is known as the Nigerian Content or Local Content Act (NLCA) 2010.
\item \textsuperscript{265} Peterson L.E, South Africa’s Bilateral Investment Treaties, Implications for Development and Human Rights, in Dialogue on Globalisation, Occasional Papers, Geneva, IIISD, Friedrich Ebert Stiftung, No,26, Nov 2006, p.16. Furthermore, though the dispute was never arbitrated and a settlement was reached reducing the stake to 26% to be achieved within a decade of the enactment, the substantive argument remains. Other developing countries have similar provisions in different sectors of the economy especially the energy and other natural resources sectors. Nigeria and Ghana have similar legislations.
\end{itemize}
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South Africans and increase in their human development index.\textsuperscript{266} Perhaps another sustainable development measure that may potentially raise national treatment obligation questions is the compulsory licensing of patented drugs (e.g. Anti-HIV Drugs) that might infringe foreign investors’ intellectual property rights.\textsuperscript{267} It is in the context of such and similar dilemmas that the concept of sustainable development could be explored with a view to equipping tribunals with a systemic analytical/interpretative tool for resolving investment disputes.

\textsuperscript{266} NCA 2010, see a detailed discussion of the provisions of the law. 
Chapter Six

Synthesis: Making a Case for the Convergence of the Trade and Investment Regimes

6.0 Introduction

In any study that involves comparing two legal regimes with a view to developing a coherent interpretation for both of them, the fundamental thing will first be any lessons that could be learned by one regime from the other in an attempt to answer similar questions. Developing a common thread that will bring a coherent interpretation for both will then follow this. From the in-depth analysis of the regimes of investment law and the WTO in Chapters 3 and 4, some similarities and differences could be seen. The similarities in the shared history and import, and for the direction of the thesis, the differences in the way the two regimes interpret the non-discrimination principle most importantly, provided the foundation based on which the concept of sustainable development was chosen to see to what extent it can serve as an interpretative tool for analysis in these regimes of international economic law.

Notwithstanding that the above-mentioned chapters have reviewed the interpretation of non-discrimination in the two regimes and chapter five has operationalized the discussion in the context of sustainable development, this chapter will synthesise the arguments by showing how Article 31(3)(c) will be employed to do this. In doing this, the chapter will then conclude the findings against the research questions as set down in chapter one. The first research question tried to find out whether sustainable development can be used in order to achieve the convergence of the regimes of trade
and investment. This was partly answered in Chapter Five wherein the application of sustainable development by both investment and trade tribunals was established.

More importantly, Chapter Five also addressed a significant part of the second research question (How can Sustainable Development help in reducing the inconsistent interpretations in these fields of international economic law?) by reviewing some investment awards and WTO Panels and AB’s decisions wherein sustainable development concerns were raised or applied in the interpretation of the non-discrimination standards of NT, FET and MFN.

In Chapter Six, making a case for convergence using the sustainability argument further deepened this application. This Chapter will answer the most fundamental part of the research question by providing justification for the convergence of trade and investment regimes. Chapter Six will provide justification on how the provisions of Article 31(3)(c) will be used in the interpretation of treaties/non-discrimination principle using the concept of sustainable development.

This chapter accomplishes the above under five headings. In all the headings, the central theme is about making a case for convergence of trade and investment by providing justifications for doing so, namely, one, justification based on the need of sustainable development interpretation, two, justification based on interpretive discrepancies, three, justification based on shared history and commonality of legal terrain, four justification based on movement between actors, and five, justification based on jurisdictional overlap and lack of legal reasoning in arbitral awards.

6.1 (a) Making a Case for Convergence – Justification Based on Need for Sustainable Development Interpretation, Article 31(3)(c) Vienna Convention to the Rescue.
While it is acknowledged that there are several convergence bases for the WTO agreements and the international investment law regime, the rules against protectionism and discrimination ensuring equal treatment of foreign and domestic products remain the major converging points of the regimes of international trade and investment arbitration. It points to the fundamental philosophy and importance of the success of the objectives of both the WTO and the investment regime and convert these into genres of supporting equal conditions of competition and opportunities.¹

Non-discrimination has come out as a distinct feature of treaty based international economic law generally, employed to deal with inequalities in the realm of social and economic development. ² The principle of non-discrimination is found in all the fields of international economic law from investment protection generally to the protection of intellectual property rights to liberalization of trade in goods and services. Though the tests embodied in the non-discrimination obligations in trade differ from that in investment, both regimes clearly have rules that regulate measures that differentiate directly – *de jure* and also prohibit indirect – *de facto* discriminatory measures.

Although they apply different standards and even interpret same or different standards differently, the rationale underlying non-discrimination claims under trade and investment are very similar.³ The most common standards embodying the non-discrimination principle in trade and investment, i.e the national treatment (NT) and the most-favoured-nation (MFN) treatment have been treated in detail in chapters three and four. A good number of BITs also contain the Fair and Equitable Treatment (FET) standard, a clause that also explicitly prohibits discrimination; in fact non-

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discrimination is one of the major elements of the FET. The non-discrimination principle maintains its superiority over all the standards treated because of the way it permeates these and other substantive standards of treatment in both trade and investment.

The economic rationale binding the trade and investment regimes together uses the non-discrimination principle to protect any foreign market actor accessing the domestic market by ensuring the foreign actor enjoys equal, competitive limitations when compared to similar domestic actors. For all these, there seem to be no clear reasons for the application and/or interpretation of different protection standards to regulate these regimes of international economic law.

However, though various international tribunals have applied the non-discrimination obligations, the inconsistencies in the interpretation of the standards mirroring the principle have left parties feeling uncertain as to the consequences and implication of the application of the non-discrimination obligation. This may be as a result of the fact that no clear and agreed tool exists for the interpretation. In the next sub-head, the thesis will address, mainly by way of cross-reference, the features and application of the principle of non-discrimination in the treaty-based standards as discussed in chapters three and four. Though intermittent references will be made to all the relevant standards, the sub-head will, in this chapter, restrict the analysis to the standard of national treatment (NT) only, which remains the main domain of non-discrimination in investment treaty arbitration.

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5 This rationale could also be seen as the egalitarian or legal egalitarianism rationale.

6 Nicolas Diebold (n3).

7 Herein lies the essence of the Austinian Philosophy of legal positivism, showing law as it is and not as it ought to be, thereby subscribing to the notion of legal predictability.
Since the main aim of both trade and investment law is economic growth, it will serve both trade and investment arbitral tribunals well to make the issues of sustainable development, otherwise sustainable investment and trade to be the main focus in their interpretation of the non-discrimination principle as depicted in the standards of national treatment, fair and equitable treatment and most-favoured nation treatment. This position is achievable in the sense that sustainable development concerns remain the focus and interest of both States and investors in the areas of trade and investment. This can be done in a number of ways.

First, States concluding any international investment agreements – IIAs need to have sustainable development in focus, a process that has already commenced in the new generation IIAs as in the recent UNCTAD Reports and will increasingly be the trend in the years to come in light of the UN 2030 Agenda on Sustainable Development Goals (SDGs) as a follow-up to the Millennium Development Goals (MDGs) 2015.\(^8\) This will then ensure that the State acts in the best interests of the State and also sees to it that investors operate within certain guiding principles that ensure that sustainability remain the watchword. Such IIAs will then definitely include relevant investment rules that will assist private investors to have a direct line access to arbitration without the necessity of going through any dispute settlement mechanisms set out in the relevant IIA.

Secondly, host States negotiating future IIAs have better latitude to redesign their treaty outlook so as to take care of sustainable development concerns in the negotiation and design processes. Host States will do well to accommodate such areas of sustainable development goals as the environment, human rights and social

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development that they have already committed themselves to under various enabling international instruments.

The failure of the multilateralisation of investment at the Havana conference should not be the last word towards harmony between the two historically linked but currently contending regimes of international economic law. Presently, new treaties are being negotiated and designed with attention being focused mainly on the sustainable development goals they set out to achieve. These new treaties will, of course, offer investment tribunals tools of interpretation that are no different from what they are used to but are streamlined to ensure coherence, consistency and harmony of interpretation of the non-discrimination standard. This type of interpretation will only be possible because of the sustainable development objectives contained in the newly negotiated and designed treaties. This seems to have already started with the Morocco-Nigeria BIT⁹ signed recently.

Further to the provisions of Article 31(3)(c), it is trite that judges, while interpreting any legal provisions can rely on or make reference to other existing rules as long as such are relevant. Here, it is submitted that sustainable development is aptly suited to serve as a useful interpretative tool, especially where it is already part of the treaty being interpreted either as a preamble or present as a substantive part of the treaty. It has the hermeneutical function to be effective both as a customary principle and as a conventional rule. Its functionality and flexibility as a notion affords the arbitrator a high degree of freedom on the way to apply it based on the choices that need to be made. Apart from the natural functionality and applicability of sustainable development as an interpretative tool, the concept is very much applicable outside conventional reference. This is so because Article 31(3)(c) clearly established that

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⁹ Morocco-Nigeria BIT (December 2016).
‘any relevant rules of international law applicable in the relations between the parties’ must be taken into account in the interpretative process. This means that either as a principle of customary international law or as an extraneous conventional rule, the concept of sustainable development is applicable in treaty interpretation in as much as it is relevant for such an interpretation and is also applicable in the relations between the parties. In practice, this has however remained unclear, not straightforward and sometimes even problematic.

So far, the above types of treaties have been taking root for some time. The prototype of the international sustainable development centre seems to have influenced the negotiation and design of the Norwegian BIT and the US 2004 models. The most recent and outlandish has been the Nigeria and Morocco BIT referred to earlier in this chapter. Its contents are far-reaching and extensive especially as sustainability of investment is concerned. These newly negotiated BITs, apart from incorporating sustainable development issues, also produce a more balanced investment treaty taking care of the investors through the protection of their investment and the host State through the recognition of their sovereignty in providing the regulatory framework for such investments to succeed. This represents a far cry from current BITs that States argued are imbalanced since their interpretation seems to give investment tribunals the necessary impetus to be more concerned about investment protection rather than host State development imperatives.

Though existing IIAs must be arbitrated based on their present content and context, however, it is hereby submitted that arbitral tribunals still have the discretion to interpret in a sustainable development friendly way thereby ensuring the sustainability of the investment under consideration. The arena is not free from such cases that have
rendered this postulation not only hypothetical but also real. The *Methanex* tribunal decision is relevant here.

Apart from the call for arbitral tribunals’ to interpret existing IIAs in a sustainable development friendly way, one cannot fail to notice the background provided by soft law instruments in this regard. A lot of these soft law instruments have been at the forefront of providing the foundation for the recognition of environmental, hence sustainable development concerns by drawing attention to their importance. Agenda 21 is one of such soft laws, though despite it and several others, lots of room exists for improvement to see that current investment regulatory framework did promote sustainability. Now an informed analysis on how the Vienna Convention can be applied is apt here.

The way IIAs are drafted, especially IIAs drafted in the form of BITs containing extensive and unclear terms, necessitates the need for their interpretation with a view to getting to the root of what their meaning entails. It is argued that the more imprecise the contents of a particular treaty, the more applicable or need for the application of the Vienna rules because of its inherent provisions to allow the incorporation of external provisions in order to aid interpretive procedure.  

As detailed in Chapter Two, in any treaty, the logical starting point for any interpretative process has always been the meaning or meanings that can be attached to the terms of the treaty as words hardly possess only a singular meaning. Agreed, interpretation is not amendment and as such the import of the Vienna rules is to simply find out what the ordinary meaning of the terms of the treaty in question that

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11 See Chapter Two; see also Richard Gardiner (Chapter Two) 164, also see G. Schwarzenberger, ‘Myths and Realities of Treaty Interpretation, Articles 27-29 of the Vienna Draft Convention on the Law of Treaties’ *Va J Intl L* 13.
will most closely result in the parties’ intention is. It is following from this that the Vienna rules is further employed by an interpreter in resolving conflicts of norms in interpretation when he or she has to choose between two or more contending interpretations.\textsuperscript{12} It is not only in resolving contending interpretations that the rules are applied but following the argument that IIAs contain clauses that have multiple meanings; it is now accepted into reckoning that they possess inherent ability to harmonize investment/trade protection and issues of sustainable development concerns.\textsuperscript{13} For example, as explained under the discussion of the interpretation of the non-discrimination standard of FET in Chapter Three, the terms ‘fair’ and ‘equitable’ are so fluid and unclear when interpreted literally. So Article 31 VCLT views interpretation as a ‘single combined operation’ rather than simply an exercise wherein other means of interpretation will necessarily be employed in case the literal rule fails to provide a clear meaning.\textsuperscript{14}

So as established in assembling the elements of Article 31 VCLT in Chapter Two, it is the object and purpose of a treaty and the context in which the treaty’s provisions appear that are most relevant in the interpretation of the treaty. They are fundamental in the reconciliation of investment/trade protection and sustainable development. However, the argument of employing the purpose of a treaty in its interpretation has not been without criticisms. Since IIAs are fundamentally about investment protection, some will argue that their object and purpose forbids rather than supports any deliberations of sustainable development concerns. However, this criticism seems to miss the point, since the object and purpose of a treaty are not necessarily always

\textsuperscript{12} Though some arguments exists as to the desirability or workability of applying the Vienna rules in complex conflicts of norms situations. This will provide a ground for some recommendations in the thesis; it is outside the realm of this thesis to further the discussion here. Suffice it to state here that the rules do not provide a gateway for States from the principle of \textit{pacta sunt servanda}.\textsuperscript{13} Katharina Berner (n10) 185.\textsuperscript{14} See Chapter Two for a discussion on single combined operation in treaty interpretation.
one-dimensional and if they are, that will not be enough to restrain the tribunal from applying sustainable development concerns in its interpretation.\(^{15}\) Suffice it to say, as explained earlier, a look at a treaty’s object and purpose necessarily entails taking the treaty as a whole from its preamble to the entire substantive provisions. This emphasis becomes necessary here because of the erroneous argument that it is the preamble that represents the entire content of the treaty and that the preamble usually mentions only investment protection. So both the preamble and substantive provisions are important in treaty interpretation; for example, where a particular treaty refers to ‘economic development’ in its preamble, the tribunal can interpret such broadly to include ‘long term sustainable development’ rather than a narrow interpretation that limits it to short term economic development.\(^{16}\) So a good reading of both the preamble and substantive provisions of a treaty and any other attachment therein will show that the treaty aims at more than investment protection. And assuming that a treaty’s aim is only for investment protection that is not to say that, as argued above, it cannot be interpreted by invoking sustainable development. That interpretation would be narrowing the treaty’s object and purpose, which is not what Article 31(3)(c) VCLT envisaged.\(^{17}\)

Article 31(3)(c) VCLT as a principle of systemic integration, is clearly suitable for not only integrating sustainable development into investment agreements, but also because of its broad application of the context in which the treaty occurs, it can safely

\(^{15}\) Katharina Berner (n10) 185.


\(^{17}\) For example in a situation where there is a conflict between a Host State and a foreign investor regarding the Host State’s action that was purely informed by sustainable development concerns, and there was ambiguity as to whether the relevant investment protection standard prohibits such action, here, a narrow object and purpose interpretation will portray the Host State’s action is not prohibited as the protection standard merely set out to protect against measures directly connected to the ‘narrow’ object and purpose – at least this was the unconventional reasoning in Lemire v Ukraine, ICSID Case No ARNB/06/18, Decision on Jurisdiction and Liability (14 January 2010), Katharina Berner (n10) 186.
be used to interpret any provisions, especially the non-discrimination provisions as contained in the relative standards. This is so because the reference to ‘other rules’ under the article is beyond those rules applicable to the subject matter of the treaty but also includes all those rules that are relevant and will assist in the understanding of the relative terms of the treaty.\(^{18}\) So for example in a BIT, the arbitral tribunal, further to the provisions of Article 31(3)(c), may make reference to the provisions of another treaty binding between the parties before it or to the rules of customary international law in its findings.\(^{19}\) There is no doubt that other rules of international law applicable necessarily relate to the presence or appearance of the concept of sustainable development.\(^{20}\)

### 6.2 (b) Making a Case for Convergence – Justification based on interpretive discrepancies

It is not an overstatement to say that the non-discrimination principle featured in all the standards discussed in chapters three and four, international investment agreements (IIAs), mainly the bilateral investment treaties (BITs), protect and ensure the liberalization of investment flow through some fundamental guarantees against discrimination and any unfair conduct by host states. The principle of non-discrimination is included in most modern IIAs using the nationality of the investor (covered by such standards as the national treatment and the most-favoured-nation treatment standards), and such absolute standards like the

\(^{18}\) See Chapter Two for an analysis of other rules and the parties they apply to – State parties to the treaty under consideration.

\(^{19}\) Chapter Two, the crystallisation of Article 31(3)(c) VCLT into a rule of customary international law has been well explained therein, though customary international rules application to interpretation in multilateral treaty using Article 31(3)(c) VCLT is not as easy to apply as under the BITs.

\(^{20}\) As shown in Chapter Five, the tribunal may refer to or take account of a range of sustainable development environmental agreements like the 1992 Rio Convention on Biological Diversity, the 1985 Vienna Convention for the Protection of the Ozone Layer, or even Human Rights treaties.
principle of ‘fair and equitable treatment’, and guarantees against expropriation.\(^{21}\) Though these standards depict the availability of the principle of non-discrimination in the two major fields of international economic law, both the definition of the principle and its interpretation/application using those standards remain problematic. Since these investment norms are seen as instruments of ‘judicial integration’, the responsibility of the arbitral tribunal in the interpretation and application of the standards is of the utmost importance.\(^{22}\) Arbitral tribunals and WTO Panels and Appellate Bodies (ABs) have given different interpretations to the elements of ‘likeness’, ‘less favourable treatment’ and ‘regulatory purpose’ leading to a varying understanding of the non-discrimination principle in international economic law.\(^{23}\) Unfortunately, these varying and inconsistent interpretations occur despite the similarities in the fundamental economic philosophy in both trade and investment regimes.

In order to assess the effect of these varying and inconsistent interpretations, raw literature abounds from the complex network of over 3,000 IIAs from which there were more than 380 investor-State disputes that have resulted in an interesting body of arbitral jurisprudence of over 180 decisions on both procedural and substantive aspects of international investment law.\(^{24}\) Following the analysis of some of these arbitral decisions in Chapter Three and Panels and AB decisions in Chapter Four, this thesis argues that there still exists a vast gap of inconsistency in the way in which arbitral tribunals interpret these standards of treatment, especially the national treatment standard, even in the same IIA, hence the need to look elsewhere for harmony in interpretation beyond the insistence of arbitral tribunals on investment

\(^{23}\) See Chapters Three and Four above; see also Nicolas Diebold, (n3).
\(^{24}\) See Chapter Three, generally.
protection only to the detriment of the Host State’s other more fundamental concerns like sustainable development.\textsuperscript{25} Ahead of showing how these tribunals, in the interpretation of investment agreements can utilize the concept of sustainable development, a synthesis of some cases where the inconsistencies were much pronounced may serve as a necessary foundation.

Due to the nature of the national treatment provision as an ambiguous, relative right of the foreign investor, the argument centred on the extent the Host States are supposed to go in the protection of the foreign investors or their investment or the relative level of protection to be given.\textsuperscript{26} Cumulatively seen, the interpretation of these arbitral decisions depends on the examination of the facts and circumstances of each case.\textsuperscript{27} Effectively, this leaves lots of discretion for independent arbitrators interpreting the non-discrimination obligation in national treatment and opens a wide door to inconsistency and incoherence.

International investment law is still considered to be in its developmental stage. The cases analysed in Chapter Three on the interpretation of the principle of non-discrimination as contained in the national treatment standard in IIAs point to high levels of inconsistency in the interpretation of the meaning and function of the notion underlying the utility of this standard. No doubt, investment tribunals have differed in their comprehension of various aspects of the standard, from the nature of the relationship between parties to be compared, the relevance of discriminatory intent and the discriminatory measure and the policy objective establishing the different treatment under consideration. In reality, the tribunals failed in all the three

\textsuperscript{25} See a detailed analysis of these inconsistent interpretations in chapter three, see also Federico Ortino, (n21), 345 on this particular point.


\textsuperscript{27} \textit{S.D. Myers Inc v. Canada}, Chapter Two.
parameters usually applied in trying to understand these standards, necessarily paving the way for the need for a fresh look at interpretation here. The construction of the national treatment standard in investment treaties left it unlocked for regulatory measures to be evaluated at either the likeness or the justification stage. First, on the basis of likeness, two different arbitral tribunals seem to have taken diametrically opposing views. While the tribunal in *Occidental* took a much wider reading of the concept of likeness by comparing a foreign oil exporter with a domestic flower exporter, the tribunal in *Methanex* took a much narrower, stricter reading of likeness by comparing only identical investors. In *Methanex*, the UNCITRAL tribunal, in its attempt to understand ‘like circumstances’, was quite reluctant to employ the concept of direct competition relative to the companies under consideration under the guise that the NAFTA text did recognise or employ the phrase ‘direct competition’. On the other hand, the ICSID tribunal in *Occidental* expansively applied ‘like circumstances’ to all domestic producers irrespective of the line of commercial activity they are engaged in. The *Occidental* arbitral decision and its reasoning is supported to the extent that the non-discrimination principle under international investment law, at least historically, has never been about competing business.

The *Occidental* and *Methanex* tribunals have been both criticised and praised.
Criticised for their failure to add some economic rigor to their analysis of the test for likeness just like the WTO did in its assessment of National Treatment; which also necessitates a look at the likeness comparator. What these tribunals did was simply to limit the tests to be based on equality of competitive opportunities. On the other hand,

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28 *Methanex*, para.33.
some others, for judiciously integrating a shared standard of competing products
under the GATT into a spread out, celebrated the tribunals.

The ICSID tribunal in Loewen v. United States argued in a way that no comparator in
like circumstances exists that could be used to determine the violation of the principle
of non-discrimination. On the other hand, an UNCITRAL tribunal, in Sergei Paushole
v. Mongolia, argued that any test for discrimination to determine likeness will
necessarily involve an assessment of the sector or sectors the investors operate, which
in this case happened to be the Mongolian gold sector. It is noted here that the tribunal
seems to be borrowing from the WTO notion of sector that is something squarely
connected to competitive and substitutable products as developed under the
jurisprudence of the trade regime.

In the interpretation of the MFN standard, no less confusion exists in the way of
arbitral tribunals dealing with interpretation. In MTD v Chile, the ICSID tribunal for
example applied the MFN in a kind of a bizarre way by using it to bring an obligation
to award permits to the investor, itself construed as an extension of the FET standard
found in Chile’s BIT with Denmark. Another ICSID tribunal in the case of Maffezini,
in quite an expansive and inclusionary reading, ordered that the broad definition of
the MFN standard as contained in the Argentina-Spain BIT, apart from substantive
rights, also involved dispute settlement procedures that allow foreign investors to
resort to investor-State dispute settlement that has not been expressly provided by the
relevant treaty in consideration but which had, however, been granted in another IIA
to which the host State is a party. The Siemens v Argentina tribunal followed the line
of thinking of the Maffezini tribunal. The Siemens v Argentina tribunal clearly
allowed the claimants to apply the MFN standard in the relevant treaty to invoke the
investor-State dispute settlement mechanism in another instrument for the simple
reason that there was no valid reason not to do so. However, the ICSID tribunal in *Plasma Consortium v Bulgaria*, in a strict, narrow reading of the MFN provision, ruled that whenever the IIA is silent on the extent of the MFN standard in respect to the coverage of procedural matters contained in other treaties, then the tribunals should not regard such an extension to be applicable. This is in stark contrast to the decision of the tribunal in *Maffezini*. It is easy to appreciate the tension in the two contrasting decisions. The expansive, inclusionary reading of *Maffezini* and the narrow, strict reading of *Plasma* clearly represent the argument of this thesis of the inconsistency in arbitral decision making which may variously appear to support the interests of investors or States depending on the composition of a given tribunal. Although the doctrine of *jurisprudence constante* is fast developing, no doctrine of *stare decisis* exists in the jurisprudence of investment arbitration, as such investment tribunals are in no way compelled to follow the decisions/reasoning of previous tribunals thereby setting a de facto precedent in contradistinction to applying the Vienna rules. They are absolutely free to make their own decisions, applying legal reasoning as they deem fit based on the arguments canvassed before them in relation to the applicable treaty. However, regarding legal reasoning, apart from the problems identified in various chapters\(^{29}\), the arbitral tribunals mostly, completely ignore the requirements of the Vienna rules of a ‘single combined operation’ in any of their interpretative processes/approaches.\(^{30}\)

From the above cases, it need not be said that investment arbitration lacks the necessary coherence and consistency to ensure the legitimate expectation of both States and investors. The system is flawed with these inconsistent decisions, incoherence and as such lack of predictability in arbitral decision making. The

\(^{29}\) See especially chapters Three and Five for a discussion of faulty arbitral reasoning.

\(^{30}\) As stated under 6.1 above, this point was discussed when analysing the substantive application of the Vienna Rules in Chapter Two.
argument of this thesis in answering the research question, how can Sustainable Development help in reducing the inconsistent interpretations in these fields of international economic law? is that both investment tribunals and WTO Panels and ABs would be better suited with a framework that will ensure that their decisions are predictable based on the enabling framework they work with, that their decisions are coherent, safeguarding the legitimate expectations of the parties and as such are probable. If these are to be achieved, sustainable development seems to be the best possible alternative. As noted in 6.1 above, arbitral tribunals can use sustainability issues as their framework for the interpretation of these applicable non-discrimination standards regardless of the type of BIT under consideration.

6.3 (c) Making a Case for Convergence – Justification based on Legal Reasoning in Arbitral Awards

Arbitrators rendering an award run a herculean task trying to please the parties before them, and at the same time, justify their decisions on the balance. This sub-head deals with arbitrators’ reasoning and what informed their awards. A lot of factors seem to be responsible for the attacks against arbitrators. Host States remain the major critics of these arbitral tribunals. These States argued that tribunals are biased against the State in the majority of awards, effectively stifling their regulator capacity, which in turn usually leads to a regulatory chill. 31 The host States further accused the arbitrators of rendering awards that mainly have the interest of the investors not the host States at heart. This is said to do a lot with the background of the arbitrators and their relationship with the disputing parties. Here we are not talking of arbitrators’ bias due to corruption, their training, level of education, jurisdiction, culture and even

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origins are all at play, and the effects of all these have led to contending arguments on the quality of their decisions.

There is the argument that arbitrators are mostly from the West; educated in the legal tradition there, acquired their skills there and mostly defend investors from the west. Though they are required to render awards based on the principle of utmost good faith, this has not always been the case. Some awards seem to be delivered mainly with the investors not the host States in mind. This is necessary as the investors, at whose pleasure they serve, mainly retain their services. Their argument before investment tribunals is towards a favourable interpretation of investment treaty standards so as to protect investment, stifle regulation and ensure hassle free repatriation of profits. So as investors become satisfied with the entire system of investment arbitration, more claims surely showed up and more arbitral panels established.

Secondly, since the majority of arbitrators are from the west and hence whenever they sit with others especially from the developing world, they tend to dominate the landscape by way of their intimidating presence and polished mannerisms against

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33 It is recognised that recent empirical studies have shown that in the majority ISDS, host States have won the case against foreign investors, balancing the above argument against arbitrators’ Western outlook and bias, see – Susan Franck, ‘Development and Outcomes of Investment Treaty Arbitration’: <http://papers.ssrn.com/so13/papers.cfm?abstract_id=1406714>, see also Rachel L. Wellhausen, ‘Recent Trend in Investor-State Dispute Settlement’, (2016) 7, Journal of International Dispute Settlement 128-129.

their less exposed, less educated counterparts.\textsuperscript{35} Their outlook is western, their drive is the huge professional fees they charge, which makes them less willing to see the necessity of good faith only interpretation of treaties. The cultural background of these arbitrators also greatly involved their practice, necessitating tension with arbitrators from developing countries with a different training, skills and mindset. All things considered, foreign investors are not oblivious of the above attributes of some of the arbitrators and usually make their choice selectively, careful to drive the maximum benefit.

However, counter arguments do exist to all of the above submissions. Reacting to the claim of bias against arbitrators’ background by developing States, Jan Paulsson posits that though historical anxiety exists about such arbitrators’ bias in investment-related arbitration, “the dice are loaded no longer”\textsuperscript{36}, he argued that it is high time developing States come to terms with “international arbitration as it is: a neutral means for the resolution of conflicts… to be mastered rather than complained about”.\textsuperscript{37} Susan Franck, who undertook numerous empirical researches on this subject, has shown that in reality, in the majority of Investor-State Dispute Settlement (ISDS), host States have won the case against them.\textsuperscript{38} She argued that governments ‘can and did win investment disputes’, with governments more likely to succeed in arbitration (57.7%) than foreign investors (38.5%), with the foreign investors only getting a fraction (about US$10 million) as against what their typical claims (about


\textsuperscript{37} Jan Paulson, 33.

US$343) are. Her conclusive argument was that no reliable evidence exists to show that “the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between those two variables”.40

6.4 (d) Making a Case for Convergence – Justification based on Shared
History/Commonality of Legal Terrain – Convergence Factors

Commonality of the legal terrain of both trade and investment is quite true despite the fact that there is the existing view that the separation of the two regimes seems to be airtight. From the trade angle, it is evident that foreign investment in the services sector is regulated extensively within the WTO against the vital role of that sector as a proportion of global foreign direct investment (FDI) flows. The regime incorporate a number of shared micro norms notably their restrictions against State discrimination in the form of both NT and MFN. Both disciplines essentially guarantee competitive opportunity between foreign and domestic goods, services and investors. States parties are now paying attention to managing potential conflicts between investment treaty norms and WTO law and have even moved on to review their commitments by inserting flexibilities for State regulation vis-à-vis foreign investors and their investment. Interestingly, these States do this by drawing on the WTO model to guide these reform efforts. In a lot of FTAs, full WTO exceptions are simply incorporated into investment chapters by reference, for example in the Australia-ASEAN-New Zealand Free Trade Agreement.41

41 AANZFTA (2009).
6.5 (e) Making a Case for Convergence – Justification based on Jurisdictional Overlap

A measure can fall within the jurisdiction of both regimes and can even be adjudicated simultaneously. This entwined relationship between the two regimes can be seen in the *Softwood lumber* dispute between the US and Canada that triggered both WTO and NAFTA claims. The convergence between the two systems is further evident in the complex ‘*Soft drinks*’ dispute between Mexico and the US that triggered NT claims both by the US as a State party in the WTO and also by a scope of US investors under NAFTA Chapter 11. It should be noted that the fact that these proceedings have been completed does not stop the likelihood of overlapping litigation or parallel proceedings.

Further to the above, the very prospect of the above parallel proceedings is driven by economic logic and reality, especially the manner in which cross-border trade and foreign investment is increasingly inter-dependent.

6.6 (f) Making a Case for Convergence – Justification based on Movement of Actors

One area that deserves attention considering the possibility of the convergence of the trade and investment regime is the movement of actors across the two fields of international economic law. It is an area that merits deep introspection especially by the critics to the idea of systematic convergence as is advocated in this thesis.

The multilateral nature of international trade law as depicted in the WTO show the Panels and Appellate Board having a sophisticated dispute settlement mechanism usually populated by professionals experienced in trade disputes. It has been observed that these members at various times in their professional calling have straddled to the other side of the divide to offer their professional services based on their calling.
Members of the Appellate Board have had occasions to participate as arbitrators in investment disputes – a case in point is that of the late Justice Florentino Feliciano whose professional calling saw him not only chairing the Appellate Board of the WTO but also serving as a member of the Panel of Arbitrators and Panel of Conciliators at the ICSID, member of the Panel of Arbitrators at the International Centre of Commerce (ICC), rendering various decisions such as the *Amco Asia Corporation v. Republic of Indonesia*42, *Southern Bluefin Tuna Cases*43 etc. Certain arbitrators have also had occasions to participate in WTO Panels and AB decision-making processes. In both instances, it is argued that the two regimes relied on the relative knowledge, experience, expertise and pedigree of such experts, hence the need for their appointment to serve. Now the issue here is, why have confidence in the experts to adjudicate in disputes while denying the system that appoints them the necessary need to converge? It is submitted that having confidence in the system should be relative to having confidence in the professionals that serve the system. It is the system that develops them; given the status and enabling environment to succeed. It seems hypocritical for the systems to have confidence in their appointees but not in themselves. It is to the benefit of the systems that the two regimes of international economic law converge for the better. Arbitrators and trade adjudicators can share the platform together, the experiences acquired will serve each other and the lessons gained will go a long way towards stabilising the system, ensuring consistency, coherence and predictability. It is the shared history, commonality in legal terrain, jurisdictional overlap, interdependence between legal regimes of trade and investment in their cross-border relations and cross-fertilisation between trade and investment

\[42\] ICSID Case No.ARB/81/1, Annulment Proceedings 1985-1986; Award Rendered 16 May 1986 (annulling prior ICSID decision).
that gives these actors the wherewithal to be able to navigate the contours of the two regimes.

Necessarily, the arguments they proffer in their decision-making processes definitely always take care of the background of the dispute, any constituent jurisprudential underpinning, relevant documents and the submissions of the parties.

The multilateral development of the trade law regime has a lot to offer the investment arbitration regime in terms of its jurisprudence, legal nature, exceptions and most importantly the dispute settlement mechanism – DSU of the WTO. It is evident no one is calling for a hardcore convergence or collapse of one regime into the other sweepingly, rather this is advocating a gradual, harmonious, sustainable development friendly interpretation of the investment/trade non-discrimination protection standards that are at the core of the substantive provisions of the two regimes. Achieving this is a sure way towards relative convergence.

6.7 Conclusion

As argued in the preceding chapters, especially in Chapters Three and Four, tribunals, in the interpretation of treaties and especially in the interpretation of the non-discrimination standards, have been at best inconsistent, a situation more prevalent in the investment treaty arbitration. This is an area that may call for learning from the trade jurisprudence. The WTO, from the cases analysed in Chapter Four which, despite the system’s own manifest problems, showed a more advanced and settled jurisprudence with its dispute settlement mechanism and in Chapter Six, the cases showed how sustainable development was applied by the WTO and how Article 31(3)(c) was employed in the interpretative processes, clearly sheathing the sword of criticism and providing potential learning curves for the investment regime. Hence the WTO can serve as a solution to the problems of the discrepancies and incoherence.
that are visible in the interpretive process in the investment field. Now the case for sustainable development can then emanate from the WTO, which has already found sustainable development to be suitable and applicable. Though there is the argument that sustainable development is a pseudo *lex specialis* that is rooted in environmental law and as such unsuitable for application elsewhere, the discussion in Chapter Six with support from various judicial authorities and recent State action in the conclusion of modern treaties may have laid that to rest. The root and relevance of sustainable development in environmental disputes can be extrapolated to the entire fields of trade and investment. Sustainable development can serve as a tool for convergence rather than as a mechanism for resolving environmental related disputes only. Convergence clearly has a multiplier effect because if the two regimes, trade and investment are to converge, that will definitely reduce the manifest inconsistencies, incoherence and contradictory findings. The next chapter, Chapter Seven, will provide some conclusions.

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44 Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (PULP 2007) for a comprehensive analysis of sustainable development as a *lex specialis* that has its root first and foremost in environmental law before its advancement to other areas, and other areas of legal practice.
Chapter Seven

Summary, Recommendations and Conclusion

7.0 Summary
This research has shown the effect of the existing bifurcation of the regimes of international economic law especially the fields of trade and investment law. The inconsistencies and incoherence in the interpretation of the relative standards of treatment covering the principle of non-discrimination for example have denied investors any certainty in predicting the outcome of awards and narrowed host States’ regulatory space.

It was against the above background that the thesis framed the question how could sustainable development be used to achieve legal convergence between international trade law and international investment law? At the crux of the research questions was the concept of sustainable development, which was applied in the thesis as both an interpretative and a convergence tool. The concept, as argued throughout the thesis and especially in Chapter Six, can serve not only as a convergent tool but also as an interpretive lens that can be used by arbitral tribunals and WTO Panels and Appellate Board to interpret the principle of non-discrimination, which permeates all the standards of treatment. The thesis applied comparative legal analysis and deductive legal reasoning in analysing the jurisprudences of the WTO, PCIJ/ICJ, ECtHR, ITLOS and NAFTA regarding the interpretation of standards of treatment and harmonisation of contending legal regimes.

The thesis has reacted to the incoherence in the interpretation of not only the principle of non-discrimination in the two main regimes of international economic law but also to the entire interpretation of treaties by appreciating the relevance of a uniform
framework for interpretation/analysis in the two fields. It identified the relevance of sustainable development not only as a ‘fabric of modern life’ but as a tool for sustainable justice between investors and host States.

Placing the utility of sustainable development in context, the thesis analysed how the principle of Systemic Integration under Article 31(3)(c) can be used to apply sustainability concerns in not only interpretation of treaties and protection standards but also in the design and negotiation of future treaties.

Finally, assuming that sustainable development concerns are not even part of the treaty under consideration and cannot be viewed as such for whatever reasons, the thesis pointed out that the tribunals have a role to play in seeing that it is not dispensed with completely in its interpretation. Sustainable development issues can still be raised before the tribunal. First, a tribunal can, *suo moto*, raise a sustainable development issue itself without either party doing so. Through the long held dictum of *jura novit curia*, the tribunal is adjudged to know the relevant and applicable law in any situation and at whichever stage. It is trite that the parties before a court of law need not necessarily raise questions of law but the court can examine such questions *proprio moto* such as raising issues of environmental concerns/agreement even if the parties before the court did not consider it right to do so.

From our discussion in chapter two, the usefulness, relevance and applicability of the Vienna Convention in the interpretation of treaties, investment treaties in particular, has been examined in detail. The Convention is generally seen as relevant to integrate sustainable development concerns into emerging IIAs especially of the BIT types.

This can be done either through an informed inquiry into whether the IIA in question

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falls under the purview of the Vienna Rules or whether an arbitral tribunal is necessarily authorized to apply the Vienna Rules to interpret a particular agreement. The provisions of Article 31(3)(c) can indeed be applied anytime a tribunal is or needs to take sustainable development concerns into account in its deliberations. As shown in different places in the thesis, several courts and tribunals have invoked this particular article. For example, the Appellate Board of the WTO, in the *EC-Biotech Products*, held that Article 31(3)(c) of the Vienna Convention required ‘consideration of the rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted’. The WTO has been at the forefront of the strict application of the Vienna Convention in its interpretation, requiring all Panels and Appellate Boards to ensure that interpretation strictly followed the Convention.

### 7.1 Recommendations
Flowing from the discussion and conclusions reached in various chapters, especially from the findings in chapters five and six; the research hastens to narrow down to the following specific recommendations:

- In order to ensure coherence, convergence and the legitimate expectations of the parties, the topmost priority ought to be the multilateralisation of investment rules (just like the jurisprudence of or together with trade rules) in order to form one single, reliable, easily applicable legal/economic/policy framework following the enabling foundation provided by sustainable development. The success or not of the TPP and TTIP agreements offering not only multilateralisation but a dispute system (for example an investment court advocated by the TTIP) with precedential value may provide enough materials for future research in this area.
- In the alternative, judges and arbitrators need to be more imaginative and visionary by churning out more reasoned awards that allow (not necessarily a seamless/wholesale borrowing as this is not necessarily possible from the reasons adduced in the *Methanex* case, but) a learning curve by one regime from the other, ensuring ‘sustainable justice’ in the process? This will allow sustainable development to be developed and achieved through judicial activism.

- As argued in the body of the thesis, before waiting for disputes to arise so that sustainable development will be used in interpretation, a far more pragmatic approach is for treaty drafters to ensure that new IIAs are drafted in a ‘sustainable development’ friendly way as shown by the example in the 2016 Nigeria-Morocco BIT.

- *Ab initio*, a novel approach will be to incorporate social, economic and environmental factors relative to sustainable development and green all the standards of treatment in the negotiation/design of future investment treaties.

- Investment tribunals will do well to apply sustainable development ‘evolutionary interpretation’ in all treaty terms.

The above recommendations have been discussed in different areas of the substantive work.

**7.2 Conclusion**
In conclusion, this thesis has made a modest contribution in developing a body of knowledge and has contributed to the discussion of a more coherent and harmonious way for the interpretation of treaties and the principle of non-discrimination through the lens of sustainable development. Furthermore, the thesis provides the guideline on how sustainable development can be used to ensure the convergence of the regimes of
trade and investment. It showed how the insights gained from studying the jurisprudence of the WTO and the ICJ helped in pointing to the utility of sustainable development as a veritable tool than can harmonise and eventually lead to the convergence of two contending regimes. This study serves as an academic attempt for the development of an intellectual lens that can assist policy makers in the negotiation and design of treaties that take sustainability into consideration and help tribunals in balancing the concerns of the legitimate expectation of investors and host States’ responsibilities to their populace.
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