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ORIGINAL ARTICLE

Domestic Investment Incentives in International Trade Law

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Abstract

Domestic Investment Laws (DILs), a prominent tool of contemporary unilateral International Economic Law (IEL) in the context of the Liberal International Order (LIO), consistently provide for investment incentives as a key aspect of domestic industrial policies geared to influence investment location decisions. The various types of investment incentives include fiscal measures to attract investment, direct subsidies, and other regulatory measures aimed at creating favorable administrative and regulatory conditions for investment. This article analyzes how the provisions of the World Trade Organization (WTO) Agreements contain basic disciplines and set limitations for the distortive effects of investment incentives. It is argued that the relevance of WTO law for domestic investment incentives should not be under-stated; rather, DILs providing investment incentives should be treated as a limited exception to the ongoing move from international to domestic in the era of the LIO.

Keywords: domestic investment laws; investment incentives; liberal international order; subsidies; trade in goods; TRIMs; trade in services; agriculture

1. Introduction

The Liberal International Order (LIO) established in the aftermath of the Second World War is premised upon the various dimensions of liberalism: political, economic, as well as institutional.[1] The LIO 'is not just a collection of liberal democratic states but an international mutual-aid society – a sort of global political club that provides members with tools for economic and political advancement'.[2] International institutions play a key role in the LIO, and the World Trade Organization (WTO) is 'the most formal and developed institution' of the LIO.[3] Some commentators have even argued that the LIO is in crisis because of the underlying political and institutional tension at the WTO.[4]

Domestic investment incentives are key aspects of industrial policies aiming at economic advancement and welfare.[5] Investment incentives seek to influence foreign direct investment (FDI) location decisions, i.e. enhance the attractiveness of host country locations for new inward FDI or to avert the possibility for relocation of existing FDI. Wheeler and Mody have coined the

[1]J. Chaisse and G. Dimitropoulos, Domestic Investment Laws and International Economic Law in the Liberal International Order, this special issue.

[2]J. Ikenberry (2011) 'The Future of the Liberal World Order: Internationalism After America', *Foreign Affairs* 90(3), 56, 61

[3]Ibid., at 62.

[4]A. Sinha (2021) 'Understanding the "Crisis of the Institution", in the Liberal Trade Order at the WTO', *International Affairs* 97(5), 1521–1540.

[5]K. Thomas (2011) *Investment Incentives and the Global Competition for Capital*. London: Palgrave Macmillan, 155.

term 'international location tournaments' to describe incentives competition among governments for FDI.[6] These incentives are provided under Domestic Investment Laws (DILs), i.e. specialized domestic statutes, such as investment promotion and facilitation laws (IPFLs), which often apply equally to foreign and domestic investors,[7] and are likely to qualify as unilateral acts in international law.[8]

Despite the efforts to compile and systematize existing investment incentives schemes across various jurisdictions,[9] a joint report issued on 22 April 2022 by staff teams from the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), the World Bank, and the WTO takes due note of the still enduring data gaps and weaknesses regarding investment incentives central to contemporary industrial policies;[10] this is especially problematic since certain types of investment incentives, by virtue of their potential trade-distorting effects, are an area with a 'growing list of sinners' from all over the world.[11] It is thus striking how studies on the design, assessment, and administration of investment incentives schemes may sometimes even provide scarce, if any, references to international trade law as guidance to investment policy-makers.[12] In fact, there are only a few studies on how investment incentives are regulated under WTO law,[13] despite the number of WTO disputes pertaining to investment incentives,[14] and the risk of capital flight triggered by rulings of WTO-inconsistency.[15] It thus appears that the relevance of international trade law vis-à-vis investment incentives is somehow understated.

This is in stark contrast to the treatment of investment incentives through the lens of international investment law. Indeed, the relevance of IIAs and ISDS for investment incentives and relevant matters, such as performance requirement prohibitions, has already been highlighted

[6]D. Wheeler and A. Mody (1992) 'International Investment Location Decisions', *Journal of International Economics* 33 (1–2), 57–76.

[7]G. Dimitropoulos, The Right to Hospitality in International Economic Law, this special issue.

[8]J. Hepburn, The Past, Present and Future of Domestic Investment Laws and International Economic Law, this special issue.

[9]See e.g., www.incentivesmonitor.com and www.wavteq.com/products/tracking-incentives-for-investments (accessed 1 May 2022); J. Bonnitcha (2017) *Investment Laws of ASEAN Countries: A Comparative Review*. Manitoba, International Institute for Sustainable Development, www.iisd.org/system/files/publications/investment-laws-asean-countries.pdf (accessed 1 May 2022).

[10]IMF, OECD, World Bank, and WTO (2022*), Subsidies, Trade, and International Cooperation: Prepared by staff of IMF, OECD, World Bank, and WTO*, www.wto.org/english/news_e/news22_e/igo_22apr22_e.pdf (accessed 1 May 2022).

[11]P. Sauvé (2006) 'Multilateral Rules on Investment: Is Forward Movement Possible', *Journal of International Economic Law* 9(2), 325, 344.

[12]For example, see A. Bulman, K.Y. Cordes, L. Mehranvar, E. Merrill, and Y. Fiedler (2021) *Guide on Incentives for Responsible Investment in Agriculture and Food Systems*. Rome: Food and Agriculture Organization (FAO) and Columbia Center on Sustainable Investment, https://doi.org/10.4060/cb3933en (accessed 1 May 2022); United Nations (UN) and the Inter-American Center of Tax Administrations (CIAT) (2018) *Design and Assessment of Tax Incentives in Developing Countries: Selected Issues and a Country Experience*. New York: United Nations, www.ciat.org/Biblioteca/Estudios/2018_design_assessment_tax_incentives_UN_CIAT.pdf (accessed 1 May 2022); K. Tuomi (2012) 'Review of Investment Incentives: Best Practice in Attracting Investment', International Growth Center Working Paper (2012), International Growth Centre, London, United Kingdom, www.theigc.org/wp-content/uploads/2014/09/Tuomi-2012-Working-Paper.pdf (accessed 1 May 2022).

[13]For the three notable exceptions, see D. Collins (2015) *Performance Requirements and Investment Incentives under International Economic Law*. Cheltenham: Edward Elgar, 149–183; L. Johnson (2016) 'Regulation of Investment Incentives: Instruments at an International/Supranational Level', in A.T. Tavares-Lehmann, P. Toledano, L. Johnson, and L. Sachs (eds.), *Rethinking Investment Incentives: Trends and Policy Options*. New York: Columbia University Press, 264–322; B.V.R. Subrahmanyam (2006) 'Investment Incentives and Multilateral Disciplines', in S. Evenett and B. Hoekman (eds.), *Economic Development and Multilateral Trade Cooperation*. Washington, DC: World Bank Publications.

[14]For an overview of the WTO cases brought for SEZ-related incentives only, see S. Shadikhodjaev (2019) 'SEZs under the WTO's Scrutiny: Defining the Scope of Trade Issues', in J. Chaisse and J. Hu (eds.), *International Economic Law and the Challenges of the Free Zones*. Alpen aan den Rijn: Kluwer, 225–228.

[15]P. Delimatsis (2021) 'Financial Services Trade in Special Economic Zones', *Journal of International Economic Law* 24(2), 291.

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as a key issue in international investment law literature.[16] Indeed, the design of international investment agreements (IIAs) is itself reflective of the legal and policy options surrounding the admission and establishment of FDI in a given jurisdiction, investment incentives included. IIAs thus not only contain substantive standards of protection readily capable of affecting domestic investment incentives, but also often cross-reference the disciplines of the WTO Agreement on Trade Related Investment Measures (TRIMS), establishing TRIMs or TRIMs+ prohibitions, potentially leading to domestic incentives-related disputes in investor–state dispute settlement (ISDS).

Accordingly, this article opts to emphasize the legal and practical relevance of international trade law in particular for the regulation of investment incentives, and dispel doubts to the contrary. The position taken here is that WTO law, even if not featuring optimum disciplines for the distortive effects of investment incentives,[17] still establishes important restraints regarding their design and implementation, and constitutes an example of transition from domestic to international in the era of the LIO.

The argument will unfold as follows: Section 2 offers an overview of the definitions, typology, and impact of investment incentives. Section 3 turns to the WTO trade agreements that affect domestic investment incentives, namely the General Agreement on Tariffs and Trade (GATT), the TRIMS, the Agreement on Trade in Services (GATS), and the Agreement on Agriculture. Section 4 briefly concludes.

2. Typology and Impact of Domestic Investment Incentives

Before discussing how investment incentives are regulated in international trade law, it is necessary to provide analysis on their definition and typology, as well as their impact on investment location decisions.

Investment incentives have been defined by Tavares-Lehmann et al. as 'targeted measures designed to influence the size, location, impact, behaviour or sector of an investment project – be it a new project or an expansion or relocation of an existing operation'.[18] They are designed so as to afford investors, explicitly and implicitly, a rate of return to capital which goes beyond the one determined by the market,[19] and they are often provided to state-owned enterprises (SOEs).[20]

[16]Among many, see e.g., D. Collins (2021) 'Performance Requirement Prohibitions in International Investment Law', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer, 357–376; D. Olawuyi (2021) 'Local Content Policies and Their Implications for International Investment Law', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Singapore: Springer, 377–397; A. Genest (2019) *Performance Requirement Prohibitions in International Investment Law*. Leiden: Brill Nijhoff; J. Chaisse (2016) 'Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes', *Journal of World Energy Law & Business* 10(1), 269–281; Collins, supra 13, at 184–219; J. Salacuse (2013) *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*. Oxford University Press, 89–136.

[17]P. Sauvé and M. Soprana (2016) *Disciplining Investment Incentives: A Lost Cause?*, E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Sauve-and-Soprana-Final.pdf (accessed 1 May 2022), at 6.

[18]A.T. Tavares-Lehmann, L. Sachs, L. Johnson, and P. Toledano (2016) 'Introduction', in A.T. Tavares-Lehmann, P. Toledano, L. Johnson, and L. Sachs (eds.), *Rethinking Investment Incentives: Trends and Policy Options*. New York: Columbia University Press, 5. See also R. Edwards Jr. and S. Lester (1997) 'Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures', *Stanford Journal of International Law* 33, 173; Thomas, supra 5, at 1; A. Charlton (2003) 'Incentive Bidding for Mobile Investment: Economic Consequences and Potential Responses', OECD Development Centre Working Paper No. 203, Organisation for Economic Cooperation and Development, Paris, www.oecd-ilibrary.org/development/incentive-bidding-for-mobile-investment_864178271805;jsessionid=mtKEFnodfN5dvAweLtSi3Ydp.ip-10-240-5-42 (accessed 1 May 2022), 9; Collins, supra 13), at 2.

[19]E. Blanchard (2014) 'What Global Fragmentation Means for the WTO: Article XXIV, Behind-the-Border Concessions, and a New Case for WTO Limits on Investment Incentives', WTO Staff Working Papers ERSD-2014-03, World Trade Organization, Geneva, Switzerland, www.wto.org/english/res_e/reser_e/ersd201403_e.pdf (accessed 1 May 2022), 16–17.

[20]Xu QIAN, Domestic Investment Laws and State Capitalism, this special issue.

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Investment incentives can be offered at the national, regional, and local levels in a given country,[21] either unconditionally or contingent upon the investor meeting specific performance requirements.[22]

Broader definitions of investment incentives, encompassing, for instance, all the measures that directly increase the profitability of an investment have also been put forward.[23] A notably broad definition was actually included in the draft text of the Multilateral Agreement on Investment (MAI): 'The grant of a specific advantage arising from public expenditure [a financial contribution] in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment of a Contracting Party or a non-Contracting Party in its territory]'.[24] The more narrow definitions would exclude broader non-discriminatory policies and the regulatory framework of general application and thus focus solely on measures and policies targeting FDI.[25]

The most prevalent typology of investment incentives is between 'fiscal', 'financial', and 'other' (or 'regulatory') incentives; this typology was first developed in a study undertaken by the Division on Transnational Corporations and Investment of the United Nations Conference on Trade and Development (UNCTAD-DTCI).[26] Accordingly, fiscal (or tax) incentives to attract FDI include, *inter alia*, tax reductions, tax holidays, tax credits and various tax allowances, reductions in social security contributions, exemptions from import and export duties, and duty drawbacks.[27] Financial incentives include direct subsidies, preferential loans, loan guarantees, and guaranteed export credits from the government.[28] In addition, government equity participation, preferential government insurance schemes, and publicly funded venture capital participating in FDI involving high risks are also covered under the notion of financial incentives.[29] Other (regulatory) incentives offered by governments in the context of incentive competition to attract foreign firms, involve various beneficial administrative and regulatory conditions, such as the provision of infrastructure and services, preferential government contracts, oligopoly or monopoly rights, protection from import competition, preferential exchange rates, and various regulatory

[21]H. Loewendahl (2018) 'Innovations in Foreign Direct Investment Attraction', Inter-American Development Bank Technical Note N° IDB-TN-1572, Inter-American Development Bank, Washington, DC, USA, https://publications.iadb.org/publications/english/document/Innovations-in-Foreign-Direct-Investment-Attraction.pdf (accessed 1 May 2022), at 26.

[22]Edwards and Lester, supra 18, at 173; Collins, supra 13, at 28.

[23]S. Guisinger (1986) 'Do Performance Requirements and Investment Incentives Work?', *The World Economy* 9(1), 81–84.

[24]OECD (1998) 'The Multilateral Agreement on Investment: Draft Consolidated Text', DAFFE/MAI(98)7/REV1, Organisation for Economic Cooperation and Development, Paris, www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (accessed 1 May 2022), at 47.

[25]UNCTAD (2000) 'Tax Incentives and Foreign Direct Investment: A Global Survey', ASIT Advisory Studies No. 16, United Nations Conference on Trade and Development, Geneva, Switzerland, https://unctad.org/system/files/official-document/iteipcmisc3_en.pdf (accessed 1 May 2022), at 11; Tuomi, supra 12, at 1.

[26]UNCTAD-DTCI (1996) 'Incentives and Foreign Direct Investment', United Nations Conference on Trade and Development, Geneva, Switzerland, as reproduced in UNCTAD (1996) *World Investment Report 1996: Investment, Trade and International Policy Arrangements*, UNCTAD, Geneva, Switzerland, https://unctad.org/system/files/official-document/wir1996_en.pdf (accessed 1 May 2022), at 180, Table VI.4. Cf. the slightly more detailed distinction between financial incentives, fiscal incentives, subsidized services, and market privileges in a Note by the WTO Secretariat: WTO Secretariat (1998) *The Impact of Investment Incentives and Performance Requirements on International Trade*, Working Group on the Relationship between Trade and Investment, WT/WGTI/W/56 (30 September 1998), 5.

[27]UNCTAD-DTCI, supra 26, at 180; A. Easson and E. Zolt (2002) *Tax Incentives*. Washington, DC, USA: World Bank Institute, 18–19; and I.M. Valderrama (2021) 'Tax Incentives: From an Investment, Tax, and Sustainable Development Perspective', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy*. Springer: Singapore, 1–21.

[28]T. Brewer and S. Young (1997) 'Investment Incentives and the International Agenda', *World Economy* 20, 179; M. Blomström and A. Kokko (2003) 'The Economics of Foreign Direct Investment Incentives', in H. Herrmann and R. Lipsey (eds.) *Foreign Direct Investment in the Real and Financial Sector of Industrial Countries*. Cham: Springer, 37.

[29]UNCTAD (2004) 'Incentives', UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/28), United Nations Conference on Trade and Development, Geneva, Switzerland, https://unctad.org/system/files/official-document/iteiit20035_en.pdf (accessed 1 May 2022), at 5–7.

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concessions, including exemptions from labour or environmental standards.[30] The extent to which regulatory incentives affect location decisions of course depends on the sector and the particularities of the investor, while regulatory certainty is as important for location decisions as any particular regulatory standard offered.[31]

Additionally, investment incentive packages constitute an integral characteristic of special economic zones (SEZs).[32] SEZs provide various fiscal incentives (such as duty drawbacks, exemptions from import duties and customs fees, tax holidays, rebates, and exemptions), financial incentives (such as direct and indirect subsidies), and other regulatory incentives (such as enhanced physical infrastructure, streamlined administrative services, and relaxed legal and regulatory requirements).[33]

The impact of domestic investment incentives is an often-discussed topic in literature, and is inextricably linked with the broader theme of incentives-based competition for FDI.[34] Correction of domestic market failures and development policy objectives are the main motives behind investment incentives.[35] It has thus been suggested that investment incentives are not the key determinants regarding FDI decisions and their importance should not be overstated. Dunning and Lundan, distinguishing between market-seeking, resource-seeking, efficiency-seeking, and strategic asset-seeking FDI, have argued that choice of location is a multi-factor exercise, and incentives constitute but one of the factors.[36] However, a number of studies have concluded that low tax rates are conducive to inward FDI.[37] Indeed, UNCTAD has long identified host country determinants for FDI in, first, national FDI policy frameworks, second, economic determinants in host countries, and, third, business facilitation; investment incentives are but a subcategory of business facilitation.[38] In this spirit, it has been the growth of global FDI that has fueled incentives-based competition between countries in the same region that are seeking to expand 'their share' of the increased FDI flows, rather than the other way round.[39] According to Morisset and Pirnia, incentives are not a panacea to remedy a country's deficiencies: excessive

[30]Ibid; Brewer and Young, supra 28, at 179.

[31]V. Fitzgerald (2002) 'Regulatory Investment Incentives', QEH Working Paper Series – QEHWPS80, Queen Elizabeth House, University of Oxford, http://workingpapers.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps80.pdf (accessed 1 May 2022), at 4–5;

[32]See generally J. Chaisse and X. Ji (2020) 'The Pervasive Problem of SEZs for International Economic Law: Tax, Investment, and Trade Issues', *World Trade Review* 19(4), 567–588; J. Chaisse and G. Dimitropoulos (2021) 'SEZs in International Economic Law: Towards Unilateral Economic Law', *Journal of International Economic Law* 24(2), 229–257; D. Zeng (2021) 'The Past, Present, and Future of Special Economic Zones and Their Impact', *Journal of International Economic Law* 24(2), 259–275.

[33]United Nations Economic and Social Commission for Asia and the Pacific (2005) *Free Trade Zones and Port Hinterland Development*. New York/Seoul: United Nations ESCAP/Korea Maritime Institute, 6–7; M. Engman, O. Onodera, and E. Pinali (2007), 'Export Processing Zones: Past and Future Role in Trade and Development', OECD Trade Policy Paper No. 53, OECD Publishing, Paris, http://dx.doi.org/10.1787/035168776831 (accessed 1 May 2022), 17; S. Shadikhodjaev (2018) *Industrial Policy and the World Trade Organization*. Cambridge: Cambridge University Press, 126–127.

[34]F. Olaoye and M. Sornarajah, Domestic Investment Laws, International Economic Law, and Economic Development, this special issue, identifying six main phases of foreign investment law and explaining how investment incentives during the Fifth Phase (2004–2014) started to explicitly recognize the importance of sustainable economic development.

[35]Charlton, supra 18, at 10.

[36]J. Dunning and S. Lundan (2008) *Multinational Enterprises and the Global Economy*, 2nd edn. Cheltenham: Edward Elgar, 617.

[37]C. Bellak and M. Leibrecht (2006) 'Effective Tax Rates as a Determinant of Foreign Direct Investment in Central and East European Countries: A Panel Analysis', in A.T. Tavares and A. Teixeira (eds.) *Multinationals, Clusters and Innovation*. London: Palgrave Macmillan, 284.

[38]UNCTAD (1998) 'World Investment Report 1998: Trends and Determinants', United Nations Conference on Trade and Development, Geneva, https://unctad.org/system/files/official-document/wir1998_en.pdf (accessed 1 May 2022), at 91, Table IVI.1. For a discussion of this classification of host country determinants for FDI, see e.g. P. Mallampally and K. Sauvant (1999) 'Foreign direct Investment in Developing Countries', *Finance and Development* 36(1), 36–37.

[39]C. Oman (2000) *Policy Competition for Foreign Direct Investment: A study of Competition among Governments to Attract FDI*. Paris: OECD, 78.

tax rates can deter inward FDI flows, while reasonable tax rates have limited, if any, positive effects.[40] It nevertheless stands true that 'incentives and performance requirements have been more readily accepted in reality than in theory'.[41] The new Asian regionalism in the context of evolving DILs and regional trade strategies verifies this: investment liberalization in major economies, such as China and Singapore, continues to be pursued through SEZs with fiscal or financial incentives schemes, as well as other (non-economic) investment incentives under DILs.[42] Moreover, the COVID-19 pandemic and Western sanctions against Russia have highlighted the continuing importance of investment incentives in the context of the global race for semiconductor FDI driven by governmental efforts worldwide to localize chip production.[43]

3. Domestic Investment Incentives and the WTO Agreements

The rise of investment incentives under DILs can indeed be seen as part of the process of 'domestication' in international economic law (IEL), the move from the international to the domestic that came, partly at least, as a response to the crisis IEL has endured in the epoch of the LIO.[44] Nevertheless, the domestication of IEL does not mean that the capacity of states to provide investment incentives is unfettered. As will be analyzed in this section, the Uruguay Round Agreements of the WTO impose notable limitations for the provision of investment incentives schemes by WTO members. This is perhaps why it has been suggested that investment incentives are 'both under- and over-regulated' by WTO law.[45] The WTO Agreement on Subsidies and Countervailing Measures (SCM) constitutes the prime example of limitations to the granting of domestic investment incentives[46] but, as will be explained below, the GATT, the TRIMS, the GATS, and the Agreement on Agriculture, are also relevant when discussing how investment incentives are regulated in international trade law.

3.1 Domestic Investment Incentives and the SCM Agreement

The discussion on the definition and typology of investment incentives in Section 2 demonstrates how and why fiscal, financial, and other regulatory incentives are often characterized as location *subsidies*. At the global level, subsidies regulation takes place in the context of the SCM Agreement. Subsidies are a highly contentious and complicated issue:[47] indeed, despite their obvious importance and utility in the pursuit of legitimate economic and social policy objectives; they have the potential to distort international trade, resulting in unfair competition and adversely affecting the domestic or export markets of the subsidizing state's trading partners.[48]

[40]J. Morisset and N. Pirnia (2000) 'How Tax Policy and Incentives Affect Foreign Direct Investment: A Review', World Bank Policy Research Working Paper 2509, World Bank, Washington, DC, https://openknowledge.worldbank.org/handle/10986/19742?locale-attribute=en (accessed 1 May 2022), at 22–23. In agreement, see e.g. A. Bénassy-Quéré, L. Fontagné, and A. Lahrèche-Révil (2005) 'How Does FDI React to Corporate Taxation?', *International Tax and Public Finance* 12(5), 598; S. Van Parys (2012/3) 'The Effectiveness of Tax Incentives in Attracting Investment: Evidence from Developing Countries', *Reflets et perspectives de la vie économique* 51, 136.

[41]WTO Secretariat, supra 26), at 8. See also WTO Document WT/WTI/M/8, 11 May 1999, paras. 31, 34; A. Mukerji (2001) 'The WTO Debate on Trade and Investment and the Development Dimension', *Journal of World Investment* 2(4), 749–750.

[42]P.L. Hsieh, New Investment Rulemaking in Asia: Between Regionalism and Domestication, this special issue.

[43]fDi Intelligence (2022), *The fDI Report 2022: Global Greenfield Investment Trends*. London: The Financial Times Ltd, 12–13.

[44]J. Chaisse and G. Dimitropoulos, Domestic Investment Laws and International Economic Law in the Liberal International Order, this special issue.

[45]Johnson, supra 13, at 283.

[46]Collins, supra 13, at 152.

[47]A. Lowenfeld (2008) *International Economic Law*, 2nd edn. Oxford: Oxford University Press, 216. See also S. Mukherjee, J. Chaisse, and D. Chakraborty (2014) 'Curtailing Subsidy Wars in Global Trade: Revisiting the Economics of World Trade Organization Law on Subsidies', Syracuse *Journal of International Law and Commerce* 42(1), 1–37.

[48]P. Van den Bossche and W. Zdouc (2013) *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd edn. Cambridge University Press, 745.

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So, while there have been important cases in WTO dispute settlement regarding domestic investment incentives, it has been argued that the SCM Agreement only impacted their regulation in a limited way; even though the SCM does not exclude subsidization of foreign companies, subsidies regulation at the WTO has always been more, or even exclusively, about addressing the trade distorting effects of subsidization of the domestic industry.[49] In this spirit, the SCM Agreement has also been characterized as a 'blunt tool' for dealing with them.[50] Nevertheless, as the analysis in this section will demonstrate, the SCM Agreement, despite its lack of *explicit* reference to investment incentives, in fact imposes notable disciplines regarding investment incentives schemes, having a 'potentially expansive reach'.[51]

To start with, the general definition of subsidies for the purposes of the SCM Agreement is included in its Article 1.1.[52] The SCM Agreement recognizes three types of subsidies: prohibited, actionable, and non-actionable subsidies (the latter have expired since 1 January 2000). As the Appellate Body has noted, '[t]he universe of subsidies is vast] so that only those identified in Article 3 of the SCM Agreement are prohibited'.[53] According to Article 3, prohibited subsidies include those contingent, *de facto* or *de jure*, upon export performance[54] or import substitution.[55] Actionable subsidies, the most common type of subsidies under the SCM Agreement, are those causing adverse effects on the commercial interests of other WTO Members within the meaning of Article 5 of the SCM Agreement. A multilateral and unilateral track are simultaneously available to WTO Members to counter prohibited and actionable subsidies.

The Appellate Body has also noted that various provisions of the SCM Agreement include a territorial element; in particular, Articles 1.1(a)(1), 2.1, 8.2(b), 10, 25, and 28, all signify that the SCM Agreement covers subsidies granted within the territory of granting WTO Members to producers within the territory of granting WTO Members.[56] In other words, emphasis is placed on the *locus* of the subsidized activity, and does not exclude beneficiaries who are foreign-owned or controlled. As a result, the territorial element of various provisions of the SCM Agreement does not mean that incentives for inward FDI fall outside its scope. Moreover, the SCM Agreement does not prohibit granting subsidies for the relocation of investment from one WTO Member to another. This is in contradistinction to the Canadian Free Trade Agreement (CFTA), which explicitly prohibits incentives that are *de facto* or *de jure* contingent on, and directly result in, the relocation of an enterprise from one Canadian province to another.[57]

[49]Collins, supra 13, at 155.

[50]Thomas, supra 5, at 152–153.

[51]Johnson, supra 13, at 270.

[52]Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations*, WT/DS108/AB/R, adopted 20 March 2000, para. 93.

[53]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, para. 47.

[54]Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, para. 111.

[55]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 166; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 123.

[56]Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017 (hereinafter Appellate Body Report, *US –Tax Incentives (2017)*), para. 5.15, footnote 53. Still, one should note the discourse regarding whether foreign (or transnational subsidies) fall under the scope of the SCM Agreement: see e.g. V. Crochet and V. Hegde (2020) 'China's "Going Global" Policy: Transnational Production Subsidies Under the WTO SCM Agreement', *Journal of International Economic Law* 23(4), 841–863; G. Horlick (2013) 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures', *Global Trade and Customs Journal* 8(9), 278.

[57]Canadian Free Trade Agreement (CFTA), www.cfta-alec.ca/wp-content/uploads/2021/09/CFTA-Consolidated-Version-September-24-2021.pdf (accessed 1 May 2022), Chapter 3, Part E. The CFTA is intergovernmental agreement between the federal government of Canada and the Canadian provinces and territories to reduce and eliminate trade and investment barriers within Canada. Article 320 of the CFTA provides an exception for cases where 'the incentive was provided to offset the

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Article 1.1 of the SCM Agreement provides for three cumulative requirements for a subsidy to exist, namely the existence of a financial contribution, carried out by a government or public body, conferring benefit to the recipient, using the distinction between mandatory/discretionary measures.[58] Admittedly, the very nature and rationale of investment incentives is obviously to provide the recipient a benefit, i.e. more favourable terms than those otherwise available on the market.[59] Still, as shown in *Canada–Renewable Energy*, WTO Members are in principle entitled to create new markets and incentivize them by providing production subsidies and this would not be considered as conferring a benefit[60] expressive of a 'unilateral economic law' whereby states can freely create new markets via investment incentives schemes.[61]

Article 1.1 (a) (1) of the SCM Agreement provides an exhaustive list of the types of transactions that constitute financial contributions.[62] Items (i)–(iv) of Article 1.1(a)(1) of the SCM Agreement refer to the transfer of economic resources ('something of value – either money, goods, or services') from a government or a private entity explicitly delegated with such a function.[63] Hence, fiscal incentives, such as corporate income-tax rate reductions and tax holidays, and financial incentives, such as subsidized loans, loan guarantees, export credits, and publicly funded venture capital participation in high-risk investments, would then easily satisfy the financial contribution requirement. The case of other regulatory incentives appears to be more nuanced: for instance, measures providing investors with special treatment with respect to foreign exchange are likely to entail a direct transfer of funds or government revenue foregone, while subsidized dedicated infrastructure would qualify as provision of goods or services other than general infrastructure by the government. For infrastructure to be 'general', it is necessary that it is not too particular and specific to a beneficiary.[64] There could, of course, be types of investment incentives escaping the subsidy definition of Article 1.1 of the SCM Agreement: regulatory incentives, such as advantages relating to foreign exchange, or provision of general infrastructure, are potential examples.[65]

Notably, footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement provides that specific investment incentives in the form of exemptions or remissions shall not be deemed to be a subsidy. In particular, Article 1.1(a)(1)(ii), footnote 1, the relevant paragraphs of Annexes I, II, and III to the SCM Agreement and the Ad Note to Article XVI of GATT 1994, must all be read

possibility for relocation of the existing operation outside Canada and the relocation was imminent, well known, and under active consideration'.

[58]On the mandatory/discretionary distinction and its potential pitfalls, see H. Jung and J. Suh (2016) 'Preventing Systematic Circumvention of the SCM Agreement: Beyond the Mandatory/Discretionary Distinction', *World Trade Review* 15(3), 475–493.

[59]Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, para. 9.112.

[60]Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R/WT/DS426/AB/R, adopted 24 May 2013 (hereinafter Appellate Body Reports, *Canada – Renewable Energy/Feed-In Tariff Program (2013)*), paras. 5.197, 5.227; R. Pal (2014) 'Has the Appellate Body's Decision in Canada – Renewable Energy/Canada – Feed-in Tariff Program Opened the Door for Production Subsidies?', *Journal of International Economic Law* 17(1), 134–136; L. Rubini (2015) '"The wide and the narrow gate": Benchmarking in the SCM Agreement after the Canada–Renewable Energy/FIT Ruling', *World Trade Review* 14 (2), 221–224.

[61]S. Shadikhodjaev (2021) 'The WTO Agreement on Subsidies and Countervailing Measures and Unilateralism of Special Economic Zones', *Journal of International Economic Law* 24(2), 397.

[62]Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R (Panel Report, *US – Large Civil Aircraft (2nd Complaint) (2012)*), para. 7.955.

[63]Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, para. 8.73.

[64]R. Zedalis (2007) 'Subcentral Governmental Investment Incentives – Assessing Their Lawfulness under the GATT and the SCM Agreement', *Journal of World Investment &Trade* 8(1), 85, 103.

[65]Collins, supra 13, at 161.

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harmoniously.[66] In *India–Export Related Measures* examined a series of incentive schemes offering tax and customs duties reductions, deductions, or exemptions.[67] India argued that the exemption from customs duties and the exemption from central excise duties met the conditions of footnote 1 to Article 1.1(a)(1)(ii). The Panel identified two groups of investment incentives that are not to be deemed to a subsidy according to footnote 1: first, incentives in the form of exemptions of exported products from the duties or taxes borne by like products when destined for domestic consumption; second, remission of such duties or taxes in amounts not in excess of those which have accrued.[68] Moreover, the Panel in *India–Sugar and Sugarcane*, addressing India's incentives programs for the production of sugarcane and sugar, held that footnote 1, in conjunction with Annex II, requires that imported inputs, qualifying for remission under an incentives scheme, must be 'used in the production process' of, and must be 'physically present' in the exported product.[69] Therefore, investment incentives schemes providing for exemptions and remissions of duties and indirect taxes on *capital goods* used in the production process of the exported product would not fall within the scope footnote 1 to Article 1.1(a)(1)(ii).[70]

Article 1.2 of the SCM Agreement provides that only those subsidies that are 'specific' would fall under its scope. By virtue of Article 2.3 of the SCM Agreement, prohibited subsidies are automatically deemed to be specific,[71] and hence specificity must be proven in the case of actionable subsidies, the most likely category within which investment incentives would fall.[72] Thus, investment incentives, which are contingent upon export performance or local content, are prohibited subsidies and are consequently specific. For investment incentives, such as the import duty exemption and the Canadian Value Added (CVA) requirements in *Canada–Autos*, to constitute prohibited subsidies under the SCM Agreement, it is necessary to prove, first, that they constitute subsidies under Article 1 of the SCM Agreement, and, second, that they are either *de facto* and *de jure* tied to actual or anticipated exportation,[73] or that the use of domestic goods were a condition, a requirement, *de facto* or *de jure*, for receiving the subsidy.[74] For instance, in *India–Export Related Measures* the fiscal incentive schemes at issue were found to constitute prohibited export subsidies;[75] in *Brazil–Taxation*, the fiscal incentives for the information and communication technology (ICT) and automotive sectors in Brazil were found to contain a requirement to use domestic components and subassemblies for information technology goods, in breach of Article 3.1(b) of the SCM Agreement.[76] The *US –Tax Incentives* dispute is equally instructive: the Appellate Body clarified that investment incentives intended to increase the supply of the subsidized domestic goods in the relevant market (thus increasing the downstream use of these goods and adversely affecting imports) are not prohibited, unless they are contingent to actual

[66]Appellate Body Report, *European Union –Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018, para. 5.105.

[67]Panel Report, *India–Export Related Measures*, WT/DS541/R and Add.1, circulated to WTO Members on 31 October 2019 [appealed – the Division suspended its work on 10 December 2019] (hereinafter Panel Report, *India–Export-Related Measures (2019)*), paras. 7.131–7.164.

[68]Panel Report, *India–Export-Related Measures (2019)*, para. 7.169.

[69]Panel Reports, *India – Measures Concerning Sugar and Sugarcane*, WT/DS579/R and Add.1 *(Brazil)*, WT/DS580/R and Add.1 *(Australia)*, WT/DS581/R and Add.1 *(Guatemala)*, circulated to WTO Members on 14 December 2021 [appealed – the Division suspended its work on 10 December 2019] (hereinafter Panel Reports, *India–Sugar and Sugarcane (2021)*), paras. 7.282–7.291.

[70]R. Torres (2007) 'Free Zones and the WTO Agreement on Subsidies and Countervailing Measures', *Global Trade and Customs Journal* 2(5), 221.

[71]Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, para. 14.155.

[72]Subrahmanyam, supra 13, at 330, 334.

[73]Appellate Body Report, *Canada–Autos (2000)*, para. 107.

[74]Ibid., para. 126.

[75]Panel Report, *India–Export-Related Measures (2019)*, paras. 7.473–7.551.

[76]Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/Rand Add.1/WT/DS497/AB/R and Add.1, para. 6.25.

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or anticipated exportation or the use of domestic goods.[77] But according to the Appellate Body's analysis, investment incentives contingent on the *locus* of economic activity, but not on the use of domestic goods, since an explicit local content requirement would be necessary to prove *de facto* contingency.[78] In addition, according to the second paragraph of item (k) of the Illustrative List of Export Subsidies of the SCM Agreement, investment incentives in the form of official export credit support through Export Credit Agencies (ECAs), if conforming with the 1979 OECD Arrangement on Officially Supported Export Credits, would then not be considered as prohibited export subsidies.[79]

If investment incentives are to be classified as actionable subsidies,[80] then a first key, threshold, issue regards specificity. The question to answer regarding specificity is 'whether access to a subsidy is limited to a particular class of recipients'.[81] Accordingly, under Article 2.1(a) of the SCM Agreement, an investment incentive constituting a subsidy would be deemed specific if access to it is explicitly limited to a certain enterprise or a certain industry or a certain group of enterprises or industries within the jurisdiction of the granting authority.[82] Still, Article 2.1(b), combined with footnote to Art. 2.1, provides that if the eligibility or amount of the investment incentive is governed by objective, neutral, and clear criteria or conditions which do not favour certain enterprises over others, this would preclude an affirmative conclusion of specificity.[83] This is verified by the second sentence of Article 2.2 of the SCM Agreement which provides that applicable tax rates by federal or regional governments are not deemed to be a specific subsidy if made generally available. An investment incentive would be deemed to be a specific subsidy if it is limited to certain enterprises within the granting authority's jurisdiction, as well as when offered to all enterprises but only within a specific region.[84] Thus, regional tax incentives by the federal government, or tax incentives by the regional government, which are not generally available within its region, shall be deemed to be specific.[85]

[77]Appellate Body Report, *US –Tax Incentives* (2017), para. 5.15. Note also that fiscal incentives in the form of duty drawback schemes where remission does not exceed the duty paid on the inputs used in the exported goods, or in the form of a zero MFN import tariff on the inputs used in the exported goods, would not constitute prohibited export subsidies: see A. Gnutzmann-Mkrtchyan and I. Van Damme (2020) 'Expired Measures, Excess Duty Drawbacks and Causation: The Appellate Body Report in EU–PET (Pakistan)', *World Trade Review* 19(2), 241.

[78]K. Buzard and P. Delimatsis (2019) 'Subsidies and Investment Promotion Reaching New Heights in the Aviation Sector: The US–Tax Incentives Dispute', *World Trade Review* 18(2), 340–341, 349–350.

[79]The OECD Arrangement is a non-binding, gentlemen's agreement between the EU, the US, Canada, Japan, Korea, Norway, Switzerland, Australia, New Zealand, and Turkey, regulating officially supported export credits. See OECD, *Arrangement on Officially Supported Export Credits, Arrangement on Officially Supported Export Credits*, as revised in January 2022, TAD/PG(2022)1; K. Dawar (2020) 'Official Export Credit Support: Competition and Compliance Issues', *Journal of World Trade* 54(3), 373–395.

[80]For financial incentives this is highly likely: see e.g. J.S. Mah and D. Tamulaitis (2000) 'Investment Incentives in the Central and Eastern European Transition Economies', *Journal of World Investment* 1(1), 232. Cf. L. Johnson (2016) 'Regulation of Investment Incentives: Instruments at an International/Supranational Level', in A.T. Tavares-Lehmann, P. Toledano, L. Johnson, and L. Sachs (eds.), *Rethinking Investment Incentives: Trends and Policy Options*. New York: Columbia University Press, 271–273, noting how the regulation of actionable subsidies under the SCM Agreement could do more in limiting 'wasteful or costly incentives'.

[81]Appellate Body Report, *United States –Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January2015, para. 4.169.

[82]Still note that most fiscal incentives are unlikely to constitute actionable subsidies, since they would probably lack specificity: Mah and Tamulaitis, supra 80, at 232.

[83]Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R (hereinafter Panel Report, *US–Upland Cotton (2005)*), paras. 7.1139, 7.1140, 7.1142-7.1143.

[84]D. Coppens (2014) *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*. Cambridge University Press, at 114.

[85]B. Evtimov (2008) 'Article 2 SCMA', in R. Wolfrum, P.-T. Stoll, and M. Koebele (eds.) *WTO – Trade Remedies*. Leiden: Martinus Nijhoff Publishers, 468.

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For investment incentives to qualify as actionable subsidies, not only must they be deemed to be specific, but they should also cause 'adverse effects' under Article 5 of the SCM Agreement,[86] i.e. injury to the domestic industry of another WTO Member due to the investment incentive, based on positive evidence and an objective examination of the various injury elements as required by Article 15 the SCM Agreement;[87] or, nullification or impairment of benefits under GATT 1994 from the use of the investment incentive;[88] or, serious prejudice to the interests of another WTO Member caused by the detrimental impact of an investment incentive on the production and/or trade of other WTO Members in a given product, in terms of volumes and prices and flows of such trade.[89] With respect to serious prejudice, it should be noted that, even if an investment location incentive entails a considerable amount of ad valorem subsidization or a considerable subsidization of startups, these alone do not *automatically* lead to a finding that the subsidy at issue causes serious prejudice.[90] On the other hand, investment incentives regarding R&D could cause serious prejudice in terms of the so-called 'technology effects', i.e. by improving the subsidized product so that it has a 'head start' in the race for technological innovation.[91]

In the case of prohibited subsidies in the form of investment incentives contingent upon export performance or local content, Article 4.7 of the SCM Agreement establishes the obligation of the subsidizing WTO Member to 'withdraw' the prohibited subsidies 'without delay'.[92] While the standard time period for withdrawal appears to be 90 days from the adoption of the report,[93] in *India–Export Related Measures* a 30-day extension was granted for incentives necessitating a parliamentary amendment procedure,[94] while in *India–Sugar and Sugarcane* the time period for withdrawal was 120 days, taking into account the effect of the COVID-19 pandemic on the functioning of India's governmental authorities.[95]

Moreover, the obligation to withdraw prohibited subsidies remains unaffected by any and all existing obligations under domestic law pertaining to the incentives scheme a WTO Member offered. In *Brazil Aircraft (21.5 – Canada)*, the investment incentives of Brazil took the form of interest rate equalization payments related to the export of regional aircraft under the

[86]Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R,WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R,WT/DS234/AB/R (Panel Report, *US–Offset Act (Byrd Amendment) (2003)*), para. 7.106.

[87]Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R (hereinafter Panel Report, *EC–Aircraft (2011)*), para. 7.2080.

[88]Panel Report, *US–Offset Act (Byrd Amendment) (2003)*, para. 7.119.

[89]Panel Report, *US–Upland Cotton (2005)*, para. 7.1392.

[90]Under Article 6.1(a) and Annex IV(4) of the SCM Agreement, such possibility existed until the end of 1999. These provisions establish a presumption of serious prejudice where the total ad valorem subsidization of a product exceeds 5% and when the overall rate of subsidization of start-ups exceeds 15% of the total funds invested (including situations where production has not begun), but WTO Members declined to extend their applicability beyond 31 December 1999. See F. Piérola (2008) 'Article 6 SCMA', in R. Wolfrum, P.-T. Stoll, and M. Koebele (eds.), *WTO – Trade Remedies*. Leiden: Martinus Nijhoff Publishers, 506–510. But even if lapsed, Article 6.1(a) and Annex IV(4) of the SCM Agreement 'may nevertheless still provide relevant guidance for understanding the original architecture of the [SCM] Agreement': Panel Report, *US–Upland Cotton (2005)*, footnote 1292 to para. 7.1172.

[91]For this argument, see M. Kennedy (2020) 'The Adverse Effects of Technological Innovation under WTO Subsidy Rules', *World Trade Review* 19(4), 511–530.

[92]Unlike Article 4.7 of the SCM Agreement, Article 7.8 establishes an obligation 'of a continuous nature' for WTO members granting or maintaining investment incentives constituting actionable subsidies to either remove the adverse effects or withdraw them, extending beyond subsidies granted in the past, e.g. also covering recurring annual payments: Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008,DSR 2008:III, paras. 236–238.

[93]See e.g. Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, para. 8.4; Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, para. 8.5.

[94]Panel Report, *India–Export-Related Measures (2019)*, para. 9.16.

[95]Panel Report, *India–Sugar and Sugarcane (2021)*, paras. 7.329–7.334.

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PROEX regime. Brazil continued to make payments after the expiration of the implementation period under the PROEX programme, arguing that these payments constituted binding contractual obligations under Brazilian law and were made before the date by which it was required to withdraw the subsidy. The Appellate Body reiterated that any private contractual obligations would not be relevant in assessing whether Brazil failed to implement the DSB's recommendation and did indeed find that Brazil failed to do so.[96] Similarly, the Appellate Body in *US–FSC (Article 21.5 – EC)*, the Appellate found that 'contractual obligations which private parties may have assumed inter se in reliance on laws conferring prohibited export subsidies' do not affect the obligation to withdraw prohibited subsidies without delay.[97]

Finally, it should be recalled that the duty to withdraw a prohibited subsidy under Article 4.7 of the SCM Agreement has been interpreted by the Panel in *Australia–Automotive Leather II (Article 21.5 – US)* as not denoting exclusively 'prospective effect', but rather as encompassing repayment of any portion of a prohibited subsidy, i.e. with retroactive effect.[98] Characteristically, the Panel appears to have been rather unimpressed by the prospect of the repayment of a subsidy interfering with private rights and resulting in domestic legal claims.[99] The repercussions for investment incentives in the form of prohibited subsidies are thus substantial. Notwithstanding any private rights created for investors by the provision of incentives from the government, the obligation to withdraw the subsidy under Article 4.7 of the SCM Agreement remains strong. This essentially means not only 'prospective withdrawal' (i.e., ceasing the incentive scheme *pro futuro*), but also 'retrospective withdrawal' in the form of repayment of any portion of the prohibited subsidy already provided. As a result, granting authorities would find themselves between a rock and a hard place: complying with the obligation to withdraw the investment incentive constituting a prohibited subsidy under Article 4.7 would likely lead to domestic claims by the incentives' recipients.

Finally, Article 27 of the SCM Agreement provides for special and differential treatment in respect of all export subsidies for developing country WTO Members, 'whatever form they take'.[100] Thus, investment incentives in the form of export subsidies are not today prohibited for WTO Members designated by the United Nations (UN) as least-developed countries (LDCs),[101] and a group of low-income developing countries referred to in Annex VII(b) of the SCM Agreement whose GNP per capita had not reached $1,000 per annum in 1994. The so-called 'graduation' from Annex VII(b) takes place when a developing WTO member reaches the $1,000 per annum GNP per capita threshold in constant 1990 dollars for three consecutive years.[102] The special and differential (S&D) treatment of developing countries with respect to

[96]Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45.

[97]Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, para. 230.

[98]Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000 (hereinafter Panel Report, *Australia–Automotive Leather II (Article 21.5 – US) (2000)*), para. 6.22. See M. Matsushita, T. Schoenbaum, P. Mavroidis, and M. Hahn (2015) *The World Trade Organization: Law, Practice, and Policy*, 3rd edn. Oxford University Press, 356, noting that 'the Appellate Body nor other Panels have distanced themselves from that position'. Arguing against retrospective withdrawal, see G. Goh and A. Ziegler (2003) 'Retrospective Remedies in the WTO after Automotive Leather', *Journal of International Economic Law* 6(3), 879–921.

[99]Panel Report, *Australia–Automotive Leather II (Article 21.5 – US) (2000)*, para. 6.23.

[100]Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, para. 7.179.

[101]As of 15 January 2022, 46 countries are included in the UN list of LDCs, based on the indicators of per capita income, human assets, and economic vulnerability. The list is reviewed every three years by the UN Economic and Social Council.

[102]WTO, Ministerial Conference, Decision of 14 November 2001, WT/MIN(01)/17, para. 10.1. For developing countries that do not fall under Annex VII, Article 27.2(b) of the SCM Agreement provides that the prohibition of subsidies contingent upon export performance under Article 3.1(a) does not apply 'for a period of eight years from the date of entry into force of the WTO Agreement', i.e. from 1 January 1995 to 1 January 2003. Cf. D. Coppens (2013) 'How special is the Special and Differential Treatment under the SCM Agreement? A Legal and Normative Analysis of WTO Subsidy Disciplines on

investment incentives that constitute actionable subsidies is less obvious: Articles 27.10 and 27.13 of the SCM Agreement provide S&D treatment merely for those specific investment incentives which fall below *de minimis* thresholds, or pertain to privatization programmes.[103] Combined with Article 25 of the SCM Agreement, which obliges WTO Members to regularly notify specific subsidies, it appears that developing countries face a dual challenge when implementing investment incentives schemes to attract inward FDI, for instance export credit support:[104] on top of having to comply with the substantive limitations set by the SCM Agreement even when it comes to R&D incentives necessary to advance legitimate policy objectives, they must also meet the robust procedural requirement to notify investment incentives that are specific subsidies granted or maintained within their territories. There does exist a 'public goods defence',[105] or 'explicit policy considerations',[106] in the SCM Agreement; moreover, Article XX GATT 1994 defence, even assuming it were or became legally available, would not be efficient in preserving policy space for decision-makers in sensitive sectors, such as renewable energy incentives schemes.[107]

3.2 Domestic Investment Incentives and the GATT 1994

The relevance of GATT 1994 with respect to investment incentives has been analyzed by reference to the market-seeking motivations for FDI, which 'continues to predominate in manufacturing', spanning through the automobiles, chemicals, information technology industries where investment incentives are predominant.[108] This has been early evidenced in *Indonesia–Autos*[109] which pertained to Indonesia's 1993 Programme and 1996 National Car Programme constituting fiscal incentives packages aimed at boosting the Indonesian automotive industry.

In particular, the sales tax exemptions and the customs duty exemptions of the investment incentives scheme in *Indonesia–Autos* were found to be inconsistent with the most-favoured-nation MFN obligation of Article I:1 of the GATT 1994.[110] Indeed, in order to establish the inconsistency of an investment incentive with Article I:1, it would be necessary to

Developing Countries', *World Trade Review* 12(1), 100, noting the legitimate concern by graduating Annex VII developing countries that they will have to withdraw export subsidies immediately upon graduation. In *India–Export Related Measures* and *India–Sugar and Sugarcane*, India indeed argued that it is excluded from the prohibition of Article 3.1(a), since the eight-year period of Article 27.2(b) should be interpreted as having started when India graduated from Annex VII(b) in 2017. Both Panels discarded India's interpretation, finding no basis for departing from the ordinary meaning of the text of Article 27.2 (b). See Panel Report, *India–Export-Related Measures (2019)*, paras. 7.39–7.74; Panel Reports, *India–Sugar and Sugarcane (2021)*, paras. 7.309–7.322.

[103]V. Avgoustidi and S. Ballschmiede (2008) 'Article 27 SCMA', R. Wolfrum, P.-T. Stoll, and M. Koebele (eds.), *WTO-Trade Remedies*. Leiden: Martinus Nijhoff Publishers, 724; R. Krämer and M. Krajewski (2011) 'State Aid (Subsidies) in International Trade Law', E. Szyszczak (ed.), *Research Handbook on European State Aid Law*. Cheltenham: Edward Elgar, 419.

[104]See on this issue the analysis in D. Coppens (2009) 'How Much Credit for Export Credit Support Under the SCM Agreement?', *Journal of International Economic Law* 12(1), 63–113.

[105]A. Cosbey and P. Mavroidis (2014) 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO', *Journal of International Economic Law* 17(1), 36–37.

[106]S. Charnovitz and C. Fischer (2015) 'Canada – Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies', *World Trade Review* 14(2), 206.

[107]L. Espa and G. Marín Durán (2018) 'Renewable Energy Subsidies and WTO Law: Time to Rethink the Case for Reform Beyond Canada – Renewable Energy/Fit Program', *Journal of International Economic Law* 21(3), 649–665; S. Shadikhodjaev (2015) 'Renewable Energy and Government Support: Time to "Green" the SCM Agreement?', *World Trade Review* 14(3), 503–505.

[108]P. Sauvé (2001) 'Scaling Back Ambitions on Investment Rule-Making at the WTO', *Journal of World Investment* 2(3), 532.

[109]Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4 (hereinafter Panel Report, *Indonesia–Autos (1998)*).

[110]Panel Report, *Indonesia–Autos (1998)*, paras. 14.147.

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prove that it constitutes a measure which *de facto or de jure* discriminates among like products originating in or destined for different countries, with respect to 'customs duties and charges of any kind imposed on or in connection with importation or exportation'.[111]

Moreover, the sales tax benefits in *Indonesia–Autos* were also found to violate both the first and second sentences of Article III:2 of the GATT 1994 on national treatment regarding internal taxation, since imported motor vehicles were taxed in excess of domestic like, or directly competitive or substitutable, products.[112] Thus, a fiscal incentive provided for domestic products, but not for like imported products, could breach the first sentence of Art. III:2 of the GATT 1994;[113] similarly, if directly competitive or substitutable, imported products are taxed in excess of domestic products 'so as to afford protection to domestic production' the fiscal incentive would again be inconsistent with Article III:2.[114]

While Article III:2 of the GATT 1994 prohibits tax discrimination between imported and domestic like products, Article III:4 prohibits regulatory discrimination between imported and like domestic products.[115] In *US–Renewable Energy*, a series of financial incentives for renewable energy programs, granted and/or maintained under the DILs of several States of the United States and contingent upon the use of domestic over imported goods, were found to be inconsistent with Article III:4 of the GATT 1994.[116] The Panel found that the measures at issue provided financial incentives only for the use of domestic products, but not for the use of imported products – hence distinguishing on the basis of origin. This illustrates how investment incentives in the form of DILs that affect the internal sale, offering for sale, purchase, transportation, distribution or use of products may accord less favourable treatment to imported products and hence modify the conditions of competition.[117]

Article III:8 of the GATT 1994 deserves special mention when discussing investment incentives. Article III:8(a) provides that the national treatment obligation does not apply to government procurement: this constitutes 'a derogation limiting the scope of the national treatment obligation'[118] – the term 'procurement' referring to 'the process pursuant to which a government acquires products'.[119] The Appellate Body in *Canada–Renewable Energy* found that domestic content requirements attached to the feed-in tariff (FIT) incentive scheme for certain wind and solar photovoltaic electricity generation projects of the Province of Ontario were outside the scope of Article III:8(a). Ergo, Article III:8(a) as a derogation 'becomes relevant' only in cases of discrimination under Article III between domestic and foreign products stemming from 'laws, regulations, or requirements governing procurement by governmental agencies of products purchased'.[120] On this basis, the Appellate Body reasoned that, since the product purchased (electricity) was not in a competitive relationship with the product of foreign origin allegedly being discriminated against (electricity generation equipment), the FIT Programme

[111]Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 (hereinafter Appellate Body Report, *Canada–Autos (2000)*), para. 78; Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R/WT/DS401/AB/R, adopted 18 June 2014, para. 5.86.

[112]Panel Report, *Indonesia–Autos (1998)*, paras. 14.110–14.115.

[113]Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, pp. 22–23.

[114]Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 24.

[115]Panel Report, *Brazil–Taxation (2019)*, para. 7.33.

[116]Panel Report, *United States – Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R and Add.1, circulated to WTO Members on 27 June 2019 [appealed– the Division suspended its work on 10 December 2019], paras. 7.339–7.354.

[117]Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 133.

[118]Appellate Body Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*, para. 5.56.

[119]Ibid., para. 5.59.

[120]Ibid., para. 5.63.

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and related FIT and micro FIT contracts fell outside the scope of Article III:8(a) and was thus inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.[121]

Article III:8(b) of the GATT 1994 provides that the payment of subsidies exclusively to domestic producers, and not to foreign ones, does not breach the national treatment obligation of Article III, but may still constitute a prohibited import substitution subsidy under Article 3.1(b) of the SCM Agreement.[122] Thus, while Article III:8(a) is a derogation, Article III:8(b) has a different scope of application and merely provides that the national treatment obligation does not prohibit limiting subsidization only to domestic producers to the exclusion of foreign ones.[123] Nevertheless, Article III:8(b) of the GATT 1994 should not be read as obliging a WTO Member to offer an investment incentive to 'firms worldwide'; rather, an investment incentive would indeed violate both Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement if it includes a 'buy-national' requirement,[124] but not if it merely incentivizes engaging in domestic production activities.[125] Similarly, only non-discriminatory fiscal incentives would fall under Article III:8(b) GATT 1994.[126]

To the extent that Article XI:1 of the GATT 1994 provides that not only quotas, import or export licenses, but also 'other measures' may *de facto*, or *de jure* have the effect of prohibiting or limiting the importation or the exportation or sale for export of a product,[127] investment incentives could also come under the provision's scope. Still, only those investment incentives which *affect* the opportunities for importation or exportation would violate Article XI.[128] In this vein, the Panel in *EU–Energy Package* found that an investment (regulatory) incentive in the form of an infrastructure exemption measure, included in the EU's regulation of the natural gas sector and the development of natural gas infrastructure, was inconsistent with Article XI:1 of the GATT 1994.[129] In particular, Article 36 of the Directive 2009/73/EC[130] provides that specific categories of infrastructure can be exempted from otherwise generally applicable rules of the EU rules regarding unbundling, third-party access to transmission and distribution systems, LNG etc; this exemption was inter alia conditioned upon showing that 'the investment must enhance competition in gas supply and enhance security of supply' or that 'the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted'. The Panel found that the exemption decision regarding the Ostsee-Pipeline-

[121]Appellate Body Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*, paras. 5.78–5.79. Cf. A. Davies (2015) 'The GATT Article III:8(a) Procurement Derogation and Canada – Renewable Energy', *Journal of International Economic Law* 18(3), 549, criticizing the Appellate Body's finding that Article III:4 applies to domestic content requirements in the context of government procurement, since this would lead to the 'multilateralization' of obligations otherwise established under the plurilateral WTO Agreement on Government Procurement.

[122]Appellate Body Report, *US –Tax Incentives (2017)*, para. 516.

[123]Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1/WT/DS497/R, Add.1 and Corr.1, adopted 11January 2019, as modified by Appellate Body Reports WT/DS472/AB/R/WT/DS497/AB/R (hereinafter Panel Report, *Brazil–Taxation (2019)*), para. 7.84.

[124]Cf. M. Daly (1998) 'Investment Incentives and the Multilateral Agreement on Investment', *Journal of World Trade* 32, 13–14.

[125]Panel Report, *EC –Aircraft (2011)*, para. 6.785.

[126]E. Ornelas and L. Puccio (2020) 'Reopening Pandora's Box in Search of a WTO-Compatible Industrial Policy? The Brazil Taxation Dispute', *World Trade Review* 19(2), 249–266.

[127]Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, para. 11.17; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, para. 7.15; Panel Report, *European Union and Its Member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members on 10 August 2018 [appealed – the Division suspended its work on 10 December 2019] (hereinafter Panel Report, *EU–Energy Package (2018)*), para. 7.243.

[128]Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1/WT/DS444/R and Add.1/WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R/WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R/WT/DS444/AB/R/WT/DS445/AB/R, para. 6.458.

[129]Panel Report, *EU–Energy Package (2018)*, para. 7.1003.

[130]Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance) OJ L 211, 14.8.2009, pp. 94–136.

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Anbindungsleitung (OPAL pipeline) under Article 36 of the Directive, limited the transport capacities that Gazprom (and related companies) may together book on the OPAL pipeline in any given year and thus restrict market access for importers of Russian natural gas in contravention of Article XI:1 of the GATT 1994.[131]

Finally, in *India–Solar Cells*, India used domestic content requirements (DCR measures) to incentivize the domestic production of solar power generation equipment, and the measures were eventually found to have violated Article III:4 of the GATT and Article 2.1 of the TRIMs Agreement. India invoked the general exception of Article XX(j) of the GATT 1994 arguing that its lack of domestic manufacturing capacity of solar cells and modules amounted to 'a situation of local and general short supply', so that the DCR measures related to the acquisition of such products for the purposes of Article XX(j). The Appellate Body found that 'a situation of local and general short supply' that would justify India's investment incentives required an assessment of not only *domestic* availability of supply, but also availability from *international* sources.[132] India also argued that, under the general exception of Article XX(d), the DCR measures were measures to secure compliance with GATT-compliant 'laws or regulations', namely its domestic instruments for ecologically sustainable growth, energy security, and climate change mitigation, as well as international instruments, including the 1992 UN Framework Convention on Climate Change and Rio Declaration on Environment and Development. The Appellate Body was again not convinced that the said domestic and international instruments were 'laws or regulations' for the purposes of Article XX(d), since India failed to demonstrate a sufficient degree of normativity and specificity under its domestic legal system.[133] It thus appears that while investment incentives found to violate the provisions of the GATT 1994 may, in principle, be justified under Article XX, the latter establishes a demanding legal test difficult to be met, as revealed in *India–Solar Cells*.[134]

3.3 Domestic Investment Incentives and the TRIMs Agreement

The TRIMs Agreement is the only multilateral agreement on government-imposed investment restrictions.[135] Nevertheless, it has been posited that the TRIMs Agreement 'does not add any new disciplines on investment incentives'.[136] The TRIMs Agreement is regarded more as regulating performance requirements on any investment, rather than regulating investment incentives.[137] Be that as it may, even if not covering all investment incentives,[138] the relevance of

[131]Panel Report, *EU–Energy Package (2018)*, paras. 7.980–7.1002.

[132]Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R and Add.1, adopted 14 October 2016 (hereinafter Appellate Body Report, *India –Solar Cells(2016)*), paras. 5.68–69.

[133]According to the Appellate Body, focus should be had on the overall characteristics of the relevant instruments on a case-by-case basis, including the instrument's degree of normativity, i.e. whether it establishes a binding rule within the domestic legal system, the degree of specificity, the enforceability and the adoption or recognition of the said rule by competent domestic authorities, the form and title given to instruments containing the rule, and the prescribed penalties or sanctions. See Appellate Body Report, *India –Solar Cells(2016)*, para. 5.113.

[134]See D. Nelson and L. Puccio (2021) 'Nihil novi sub sole: The Need for Rethinking WTO and Green Subsidies in Light of United States – Renewable Energy', *World Trade Review* 20(4), 496–497. For a discussion on WTO general exceptions, see L. Bartels (2015) 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction', *American Journal of International Law* 109(1), 95–125.

[135]J. Chaisse (2012) 'The Regulation of Trade-Distorting Restrictions in Foreign Investment Law', *European Yearbook of International Economic Law* 3, 159–189.

[136]Subrahmanyam, supra 13, at 331. On the parallel applicability of GATT 1994 and the TRIMs Agreement, see Panel Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU (Ecuador)/WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras)/WT/DS27/R/MEX (Mexico)/WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, paras. 7.161–7.163.

[137]Thomas, supra 5, at 141.

[138]Johnson, supra 13, at 278.

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the TRIMs Agreement for the control of trade-distorting investment incentives should not be underestimated.

Article 1 of the TRIMs Agreement limits its scope of application to trade-related investment measures (TRIMs) with respect to trade in goods only. TRIMs can be positive (i.e. investment incentives) or negative (i.e. performance requirements).[139] Article 2 prohibits the application of TRIMs which are inconsistent with the national treatment obligation of Article III of the GATT 1994 and the obligation of general elimination of quantitative restrictions of Article XI:1 of the GATT 1994, while the Annex to the TRIMs Agreement includes an *illustrative*[140] list of measures (local content rules, import-export balancing rules, and foreign exchange balancing rules) inconsistent with the said provisions of the GATT 1994. If the requirements of the Illustrative List are met, there is no need for a separate examination of consistency under Article III or Article XI:1,[141] since the Illustrative List is a 'decisive determinant of consistency' with GATT 1994.[142] The Illustrative List includes measures that are mandatory, as well as measures 'with which compliance is necessary to obtain an 'advantage'. The term 'advantage' in the Illustrative List to the TRIMs Agreement is broader than the more specific term 'benefit' under the SCM Agreement which builds upon the existence of a financial contribution or income or price support', and necessitates a comparison in the marketplace.[143] Therefore, the potential list of investment incentives covered under the TRIMs Agreement is indeed broader than the one under the SCM Agreement.[144]

In *Indonesia–Autos*, the Panel found that the fiscal incentives under Indonesia's 1993 Programme and 1996 National Car Programme[145] constituted trade-related investment measures (TRIMs) falling under Item 1(a) of the Illustrative List: first, because the TRIMs Agreement includes, but is not limited to, measures taken specifically in regard to *foreign* investment;[146] second, because the measures at issue had 'investment objectives and investment features and .... refer to investment programmes .... aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia';[147] third, because it is irrelevant whether the government concerned regarded the measures as investment programmes or whether they have been enacted by an investment agency;[148] and, fourth, because the measures established local content requirements detrimental to imported products and hence 'trade-related'.[149]

Similarly, in *Canada–Renewable Energy* the Panel found that the investment incentives at issue (the FIT Programme, and the FIT and micro FIT Contracts) were TRIMs, since, first, they were 'investment measures' aimed at encouraging investment in renewable energy technologies, and, second, they 'related to trade in goods' since they essentially established a domestic content requirement.[150] In addition, the DCR measures in *India–Solar Cell*s, based on their official

[139]K. Kennedy (2003) 'A WTO Agreement on Investment: A Solution in Search of a Problem', *University of Pennsylvania Journal of International Economic Law* 24(1), 77, 136.

[140]Appellate Body Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*, para. 7.22.

[141]Appellate Body Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*, para. 5.103.

[142]Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R (hereinafter Panel Report, *India–Solar Cells (2016)*), para. 7.53.

[143]Appellate Body Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*, paras. 5.208–5.209.

[144]Daly, supra 125, at 16–17.

[145]Under these incentive schemes, tax and customs duty benefits were available for those complying with a domestic content requirement.

[146]Panel Report, *Indonesia–Autos (1998),* para. 14.73.

[147]Panel Report, *Indonesia–Autos (1998),* para. 14.80.

[148]Ibid., para. 14.81.

[149]Ibid., paras. 14.82–14.83.

[150]Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada –Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1/WT/DS426/R and Add.1, adopted 24 May 2013, as modified

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supporting documentation, were deemed to be 'investment measures' that were also 'trade-related' since they manifestly favoured the use of domestic over imported products and therefore affected trade.[151] Finally, in *Brazil–Taxation*, the Panel found that the fiscal incentives programmes for the information and communication technology sector were trade-related investment measures within the meaning of the TRIMs Agreement, because they aimed at promoting investment and affected the sale and purchase of imported products, including the inputs used in the production of incentivized finished and intermediate products.[152]

Accordingly, the range of investment incentives potentially falling within the scope of the TRIMs Agreement is quite broad, and WTO members should design their local-content investment incentives mindful of the limitations posed by the TRIMs Agreement for industrial policy measures.[153] Under Article 3 of the TRIMs Agreement, all exceptions available under GATT 1994 are applicable to its disciplines, including Article XX. Nevertheless, it would still be difficult for an investment incentive incompatible with the TRIMs Agreement to meet the demanding test of Article XX of the GATT 1994, as was evidenced in *India–Solar Cells*.[154]

3.4 Domestic Investment Incentives and the GATS

The GATS lacks disciplines regarding the provision of subsidies to service suppliers.[155] The lack of services subsidies regulation is reflected in Article XV of the GATS which provides for future negotiations to develop multilateral disciplines on subsidies in trade in services – negotiations begun on 30 March 1995 in the Working Party on GATS Rules, established by the Council for Trade in Services. Still, the GATS may eventually affect investment incentives: FDI under GATS Mode 3 (commercial presence) for the supply of services could well be the target of investment incentives. In principle, investment incentives which qualify as measures affecting trade in services in the meaning of Article I:1 of the GATS would be subject to the MFN obligation of Article II (in any services sector falling under the Agreement)[156] as well as the national treatment obligation of Article XVII (in the services sectors and modes of supply listed in each WTO Member's schedule of commitments, notwithstanding any limitations attached therein).[157] Additionally, Article III GATS on transparency, Article VIII GATS on monopolies and exclusive suppliers, Article IX GATS on business practices, and Article XVI GATS on market access provide certain disciplines for services subsidies,[158] and thus for investment incentives affecting trade in services.

For instance, in the *China–VAT on ICs* dispute, eventually settled through a mutually agreed solution,[159] the United States had initially requested consultations regarding China's investment incentive in the form of a preferential value-added tax (VAT) for domestically produced or designed integrated circuits (IC), favoring domestic IC fabricators and designers.[160] The United States challenged the fiscal incentive as incompatible with Articles I and III of the GATT 1994, as well as Article XVII of the GATS. With respect to Article XVII of the GATS in particular, it appears that the challenge of the United States pertained to discrimination

by Appellate Body Reports WT/DS412/AB/R/WT/DS426/AB/R (hereinafter Panel Reports, *Canada–Renewable Energy/Feed-In Tariff Program (2013)*), paras. 7.108–7.112.

[151]Panel Report, *India–Solar Cells (2016)*, paras. 7.60–7.63.

[152]Panel Report, *Brazil–Taxation (2019)*, para. 7.360.

[153]Johnson, supra 13, at 278.

[154]Appellate Body Report, *India –Solar Cells (2016)*, paras. 6.4–6.6.

[155]Panel Report, *US–Large Civil Aircraft (2nd Complaint) (2012)*, para. 7.968.

[156]Unless there any MFN exemptions scheduled, see in this respect the analysis in R. Adlung (2007) 'Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story', *Journal of International Economic Law* 10(2), 235, 248–250.

[157]Subrahmanyam, supra 13, at 331; Daly, supra 125, at 17.

[158]P. Sauvé and M. Soprana (2018) 'Disciplining Service Sector Subsidies: Where Do We Stand and Where Can We Realistically Go', *Journal of International Economic Law* 21(3), 599, 608, 613–614.

[159]WTO Document WT/DS309/8, G/L/675/Add.2S/, L/160/Add.2., 6 October 2005.

[160]WTO Document WT/DS309/1, G/L/675, S/L/160, 23 March 2004.

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under the VAT rebate programme against 'foreign IC designers' offering IC designing services via Modes 1 and 2, potentially considered as a subset of 'engineering services' for which China had undertaken specific commitments in its GATS schedule.[161] Moreover, while the Software Technology Park incentive scheme in *India–Export Related Measures* was related with the export of technology and services, it was not challenged perhaps due to the lack of services subsidies rules in the GATS and the potential ineffectiveness of GATS general disciplines regarding the control of investment incentives.[162]

Overall, the GATS is in principle relevant in regulating investment incentive schemes to the extent that they affect trade in services. GATS non-discrimination disciplines would particularly prohibit the provision of investment incentives if contingent on the use of services by specific foreign suppliers (in any services sector and mode of supply) or domestic service suppliers (in the scheduled services sectors and modes of supply, subject to the limitations inserted).[163] The GATS general exceptions in Article XIV, would in principle be applicable so as to justify measures necessary to protect public morals or human, animal, or plant life or health, maintain public order, and enforce GATS-compliant domestic legislation, albeit required to meet a legal test similar to the stringent one of Article XX of GATT 1994.[164] But where no commitments have been undertaken, or where limitations appear in the schedules, GATS rules do not prohibit the provision of investment incentives for services, even if discriminatory or arbitrary.[165]

3.5 Domestic Investment Incentives and the Agreement on Agriculture

The rise of inward FDI in the agricultural sector can be attributed to its a key role in reducing poverty and enhancing food security investing in developing countries.[166] In the WTO context, control of investment incentives specific to the agricultural sector would be governed by the Agreement on Agriculture and the SCM Agreement, the former prevailing in the event of conflict.[167]

Articles 6, 7, and Annexes 2 to 4 of the Agreement on Agriculture refer to 'domestic support', with Article 6, para. 2 using the term 'investment subsidies which are generally available to agriculture'. The Agreement categorizes domestic support measures in accordance with their distorting effect into 'amber box' measures subject to limits (significant trade-distorting effect – Article 6), 'blue box' measures (i.e. direct payments under production-limiting programmes – Article 6 para. 5), and 'green box' measures (government-funded support, with no, or minimal trade-distorting effect – Annex 2 of the Agriculture Agreement). Domestic support

[161]C. Wang (2005) 'A Defenseless Policy: An Analysis of China's Integrated Circuit Industry Tax Rebate Programs under WTO Laws', *North Carolina Journal of International Law and Commercial Regulation* 30(3), 625, 665–672.

[162]S. Dhingra and T. Meyer (2021) 'Leveling the Playing Field: Industrial Policy and Export-Contingent Subsidies in India–Export Related Measures', *World Trade Review* 20(s4), 617–619.

[163]Johnson, supra 13, at 282.

[164]For the relevance of Article XX GATT jurisprudence in Article XIV GATS analysis, see Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para. 291.

[165]Delimatsis, supra 15, at 292.

[166]See e.g. G. Santangelo (2018) 'The Impact of FDI in Land in Agriculture in Developing Countries on Host Country Food Security', *Journal of World Business* 53(1), 75–84; P. Liu (2014) 'Impacts of Foreign Agricultural Investment in Developing Countries: Evidence from Case Studies', FAO Commodity and Trade Policy Research Working Paper 47, FAO, Rome, Italy, www.fao.org/3/a-i3900e.pdf (accessed 1 May 2022).

[167]According to Article 21.1 of the Agreement on Agriculture, its provisions prevail over the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement, including the SCM Agreement. This means that an export subsidy for agricultural products would be prohibited under both the Agreement on Agriculture and the SCM Agreement, and that the order of analysis would begin with the former. Further see L. Bartels (2016) 'The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System', *Journal of World Trade* 50, 7–20; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted18 December 2001, para. 123.

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measures could fall under the category of other (regulatory) incentives to attract FDI. In this context, India's incentives programs for the production of sugarcane and sugar in *India–Sugar and Sugarcane* were found to constitute 'market price support' under paragraph 1 of Annex 3 of the Agreement on Agriculture, even though it was private entities (sugar mills), rather than the central and state governments, that purchased or paid sugarcane in the administered prices. Hence, regulatory investment incentives that set a price for agricultural products (e.g., a mandatory minimum price scheme) would constitute market price support under paragraph 1 of Annex 3, even if the government does not purchase or pay for them.[168]

Articles 3, 8, 9, and 10 of the Agreement on Agriculture set the conditions for the permissibility of export-inducing subsidies for the agricultural products specified in Section II of Part IV of WTO Members' GATT Schedules, subject to reduction commitments.[169] If reduction commitment levels are reached in accordance with Article 9 para. 1 of the Agreement of Agriculture, the respective agricultural export subsidies are prohibited.[170] Under Article 3.3, export subsidies within the meaning of Article 9.1 on *unscheduled* agricultural products are prohibited. In *India–Sugar and Sugarcane*, export subsidies for sugar were also at issue. The Panel, applying the legal standard of export contingency under Article 3.1(a) of the SCM Agreement, found that the financial incentives (direct subsidies) to sugar mills constituted prohibited export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture, since India's Schedule did not contain export subsidy reduction commitments with respect to sugar.[171]

In view of the above, it appears that *India–Sugar and Sugarcane* dispels any doubts regarding the pertinence of the Agreement on Agriculture for investment incentives by virtue of its design to accommodate the progressive regression of subsidization in agricultural products.[172] Policy-makers should be well aware of the disciplines of the Agreement on Agriculture when designing investment incentive schemes in the agricultural sector.

4. Conclusion

DILs, an expression of unilateral economic law, habitually provide investment incentives, which, as central as they may appear to be for domestic economic growth and development, may still distort international trade. Many question whether international trade law currently offers a system of effective multilateral control of trade-distorting investment incentives. This article explained how international trade law, itself central to the LIO, provides basic disciplines, limiting the capacity of states to design and implement incentives to influence investment location decisions, which should not be underestimated. This analysis operates as a reminder that, in the context of the ongoing de-globalization of IEL, the rise of DILs providing investment incentives is not insulated from international law and governments must adapt their industrial policies to their WTO obligations. Incentives for inward FDI by governments will likely continue to be widespread and increase; but it is also likely that challenges of investment incentives will also increase in WTO adjudication.

[168]Panel Reports, *India–Sugar and Sugarcane (2021)*, para. 7.52.

[169]Agricultural export subsidies have been further limited through the Nairobi WTO Ministerial Decision on Export Competition of 19 December 2015 (WT/MIN(15)/45—WT/L/980).

[170]Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations*, WT/DS108/AB/R, adopted 20 March 2000, para. 152.

[171]Panel Reports, *India–Sugar and Sugarcane (2021)*, para. 7.304.

[172]Daly, supra 125, at 16.

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