

INVESTMENT FACILITATION FOR DEVELOPMENT: A RIGHTS PERSPECTIVE OF MULTILATERAL GOVERNANCE

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Abstract *This article problematises the proposal to include rules relating to investment facilitation for development at the multilateral level. Embedding rules on investment facilitation will bring foreign direct investment (FDI) explicitly within the scope of the World Trade Organisation (WTO) with a view to fostering “development” and enabling countries to diversify their export capacity, integrate into global value chains, and link up the digital economy. The proposal for a multilateral agreement on investment facilitation for development raises normative questions about the evolutive nature of International Investment Law (IIL) and its interconnections with other species of international law, including trade and human rights. Through a rights lens, this article challenges the normative assumption that FDI will necessarily have positive implications for development and questions the role of the WTO in relation to investment. It will be argued that the multilateral rules have internalised the logic of market fundamentalism and that the efficiency-oriented rationality of the system is blind to the relationship between trade, justice, and rights. Finally, this article calls for a more participative model of deliberation at the multilateral level to ensure that existing and new rules are sensitive to the objectives of the Sustainable Development Goals.*

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INTRODUCTION

Integrating developing countries into the global economy has long been a goal of the World Trade Organisation (WTO). As the trade and investment landscape continues to evolve, there has been a growing need to reflect on the existing regulatory frameworks to assess their suitability for promoting sustainable development. This article advances a sociologically informed analysis of the interconnections between three sub-systems of international law - international investment law (IIL), international trade law, and international human rights law to demonstrate the importance of situating the proposal for investment facilitation at the multilateral level in its social context. Problematising the interrelationship between these three sub-systems of international law, this article examines what role the WTO might have in promoting sustainable investment for sustainable development.

Investment is a valuable resource for development; however, the international investment legal order is characterised by different rules at the national, regional, and international levels.¹ Unlike other legal orders, there is no central authority governing IIL, making the creation of international treaties rather more cumbersome. Furthermore, transactions are increasingly conducted by multinational enterprises (MNEs) through global value chains, and the ‘servicification’ of the market has brought the disciplines of trade, services, and investment ever closer.² Therefore, it has been suggested that the WTO may serve as an appropriate forum to create rules that would regulate some aspects of investment. Members of the WTO, known as the Friends of Investment Facilitation for Development (FIFD),³ have proposed discussions on how the WTO could contribute to facilitating cross-border investment “with the ultimate aim of promoting more inclusive growth for

¹ For an extensive overview of international investment law and the role it plays in development, see: *The Foundations of International Investment Law: Bringing Theory into Practice* [Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds.), 2014].

² Rainer Lanz & Andreas Maurer, “Services and Global Value Chains: Some Evidence on Servicification of Manufacturing and Services Networks”, WTO Staff Working Paper, (Aug. 5, 2018, 12:09 PM), https://www.wto.org/english/res_e/reser_e/ersd201503_e.htm.

³ The original FIFD group consisted of Argentina, Brazil, China, Colombia, Hong Kong, Mexico, Nigeria, and Pakistan. It now includes Chile, Kazakhstan, Republic of Korea, and Qatar.

its Members”.⁴ The first step toward achieving this goal is to explore opportunities to create rules on investment facilitation through the multilateral framework.

Inclusive growth underpins the Sustainable Development Goals (SDGs), which set out seventeen goals and associated targets to eradicate poverty, and envisage an explicit role for the WTO in promoting *sustainable* development.⁵ Harnessing trade and investment *sustainably* is central to development as a means through which freedoms are expanded. Inclusive economic growth requires frameworks that enable every individual to access the resources needed to meet their human rights.⁶ Human dignity⁷ and human well-being are conceived of as the ends of development, and the SDGs situate people-centred development within the conceptual framework of the planetary boundaries.⁸ Sustainable development therefore means that everyone will have safe access to the resources they need to live a life they value⁹ without placing stress on the Earth’s critical systems.¹⁰

In order to make sense of the existing international regulatory regimes, and with a view to providing some policy proposals for sustainable investment, it is important to clarify the social context in which international legal norms are (re)constructed. Investment facilitation is, in part, a response to the Sustainable Development Goals (SDGs) and is part of a broader dialogue coordinated by United Nations Conference on Trade and Development (UNCTAD) to bridge the \$2.5 trillion investment gap experienced by

⁴ Joint Communication, Friends of Investment Facilitation for Development, Proposal for a WTO Informal Dialogue on Investment Facilitation for Development, (Apr. 21, 2017) (on file with WTO Documents Online).

⁵ The WTO is directly referred to in relation to five distinct goals: SDG 2 (End hunger, achieve food security and improved nutrition, and promote sustainable agriculture); SDG 3 (Ensure healthy lives and promote well-being for all at all ages); SDG 8 (Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all); SDG 10 (Reduce inequality within and among countries); SDG 14 (Conserve and sustainable use the oceans, seas and marine resources for sustainable development); and SDG 17 (Strengthen the means of implementation and revitalise the Global Partnership for Sustainable Development).

⁶ Melissa Leach, Kate Raworth & Johann Rackström, “Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity” in *World Social Science Report 2013: Changing Global Environments* 84-89 (2013).

⁷ Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (2011).

⁸ Will Steffen et al, “Planetary Boundaries: Guiding Human Development on a Changing Planet”, *Science*, Feb. 13, 2015 at 736.

⁹ Amartya Sen, *Development as Freedom* (1999).

¹⁰ See: Kate Raworth, *Doughnut Economics: Seven Ways to Think Like A 21st Century Economist* (2017), and Kate Raworth, “A Safe and Just Space for Humanity: Can We Live within the Doughnuts”, *Oxfam Discussion Papers* (Aug. 5, 2018, 1:12 AM), <https://policy-practice.oxfam.org.uk/publications/a-safe-and-just-space-for-humanity-can-we-live-within-the-doughnut-210490>.

developing countries each year.¹¹ It has also formed part of the talks under the E15 Initiative¹² established to assess policy options for the evolving system of trade and investment, coordinated by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum. The overarching goal of these international institutions has been to create a coherent, open, and transparent regulatory system of rules to facilitate *sustainable* investment at the multilateral level, such that this system supports national regulatory frameworks for FDI and promotes sustainable development.¹³ The commencement of structured discussions on investment facilitation at the WTO marks the first step toward achieving sustainable investment through the multilateral system.

This article explores the role of the WTO in supporting and promoting *sustainable* investment for *sustainable* development. It will be argued that the conception of “development” has been radically reconceived through international frameworks to focus on human development within the planetary boundaries; however, there are many international institutions, such as the WTO, that have not transformed their rationality. Rather, international economic institutions continue to effect rules that express neoclassical models of development as a measurement of efficiency. As a result, there is a socio-cultural disconnection between the different sub-systems of international law. This article proposes that the structured discussions on investment facilitation present an opportunity for participatory and deliberative reflexion on the social context in which the WTO operates. In recognising the interconnections between international economic law, international investment law, and international human rights law, it will be argued that greater socio-cultural connections between these legal frameworks are needed to ensure that a “rights sensitive” approach to trade is realised.

A SOCIOLOGICAL APPROACH TO INVESTMENT AND TRADE LAW

Sociological perspectives of law invite us to (re)conceptualise our understanding of legal regimes as spheres of social interaction.¹⁴ Situating the

¹¹ U.N. Conference on Trade and Development, “Global Action Menu for Investment Facilitation”, Report of the Investment and Enterprise Division (Sept. 16, 2016).

¹² Karl P. Sauvant, “The Evolving International Investment Law and Policy Regime: Ways Forward”, E15 Task Force on Investment Policy – Policy Options Paper (Aug. 5, 2018, 6:22 PM) <http://e15initiative.org/publications/evolving-international-investment-law-policy-regime-ways-forward/>.

¹³ *Ibid.* at 8. It will also reinforce SDG 17.5 with its target to “adopt and implement promotion regimes for least developed countries”.

¹⁴ Sociological theories of law are diverse and find their earliest expressions in the works of: Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1936); Emile Durkheim,

law within its social context and conceiving legal rules as an expression of the outcomes achieved between different social interactions, reveal fresh perspectives on legal phenomenon. Expanding on the view of the social constructivists in international relations theory,¹⁵ it is argued that international institutions are social actors embedded within a complex socio-cultural environment wherein their interests and motivations are shaped by social interactions. Creating closer socio-cultural connections between the legal communities of the sub-systems of international law is fundamental to a “rights-sensitive” approach toward sustainable investment through the multilateral framework.

Sociological theories have become a useful lens through which the operation and interaction of legal norms in an internationalised and “polycentric global society” can be understood.¹⁶ As international law has become increasingly fragmented,¹⁷ sub-systems of international law have emerged, operating in accordance with their own internal logic.¹⁸ We can describe each sub-system of international law as having its own legal community governed by a normative framework, through which socialisation and interactions take place. While they may share similar origins, for example, emerging from the law of state responsibility for injuries to aliens,¹⁹ there are stark differences between the international legal frameworks governing trade, investment, and human rights. Each community has its own “distinct heritage and narratives”²⁰ with legal norms expressing the views of that community as they evolve over time. Legal rules within the system of inter-

The Division of Labour in Society (1894); Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. 1 [Guenther Roth & Claus Wittich (eds.), 1978], Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society*, vol. 1 (1984).

¹⁵ See: Ted Hopf, “The Promise of Constructivism in International Relations Theory”, 23 *INTERNATIONAL SECURITY* 171, 200 (1998); Ted Hopf, “Common-Sense Constructivism and Hegemony in World Politics”, 67 *INTERNATIONAL ORGANISATION*, 317 (2013); Alexander Wendt, *Social Theory of International Politics* (1999); Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change”, 52 *INTERNATIONAL ORGANISATION*, 887-917 (1998).

¹⁶ See: Boaventura de Sousa Santos, *Toward A New Legal Common Sense: Law, Globalisation, and Emancipation* (2nd edn., 2002) and David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995).

¹⁷ Martti Koskenniemi, “The Fate of Public International Law: Between Technique and Politics”, 70 *MOD. L. REV.* 1, 4-9 (2007). See also: Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEID. J. OF INTL. LAW*, 553-579 (2002).

¹⁸ For a systems theory approach to law, see: A. Fischer-Lescano & G. Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” 25 *MICH. J. OF INTL. LAW*, 999-1046 (2004).

¹⁹ Moshe Hirsch, “The Sociology of International Investment Law” in *The Foundations of International Investment Law: Bringing Theory into Practice*, (n 1), at 149.

²⁰ *Ibid.*, at 154.

national law can be said to “*reflect and affect* societal factors and processes such as norms, socialisation, identity, and collective memory”.²¹

International law, as a social phenomenon, therefore represents the intersection of many sociological factors and processes. The rationality of each legal community within the sub-systems of international law is oriented toward the pursuit of particular objectives. For example, international economic law and international investment law share a similar strategic rationality oriented toward the promotion of economic freedoms through efficiency, predictability and stability of legal norms. Human rights law, on the other hand, is rationally oriented toward the promotion of political, social, and cultural freedoms through the optimisation of universal values or rights. Reconciling these oft conflicting rationalities presents interpretive challenges, especially when disputes arise relating to trade and human rights, and investment and human rights.

Furthermore, and unlike international economic law, which is organised around the multilateral rules of the WTO, IIL does not have a centralised authority.²² It is the “organic emergence”²³ of IIL and the evolutive nature of this discipline that marks it out from other sub-systems of international law, like the international human rights regime and international economic law. Rules of IIL find their expression in domestic law, contract law, international customary law and in a multitude of bilateral,²⁴ regional,²⁵ and multilateral treaties.²⁶ Disputes arising under these treaties may be heard in different arbitration settings with no overarching appellate system like other international and multilateral judicial frameworks.²⁷ It is this lack of a centralised regulatory authority, and the lack of a single coherent system of

²¹ Moshe Hirsch, *Invitation to the Sociology of International Law*, 1 (2015).

²² For an exceptionally comprehensive historical account of international investment law, see: *The Foundations of International Investment Law: Bringing Theory into Practice*, (n 1).

²³ Joost Pauwelyn, “Rational Design or Accidental Evolution? The Emergence of International Investment Law” in *The Foundations of International Investment Law: Bringing Theory into Practice*, (n 1), at 15.

²⁴ Bilateral Investment Treaties, commonly referred to as BITs, involve a State-to-State relationship akin to a private law contract.

²⁵ Increasingly, free trade agreements incorporate clauses relating to investment. Examples include the North American Free Trade Agreement (NAFTA) and the Comprehensive Economic and Trade Agreement (CETA).

²⁶ The Energy Charter Treaty, which has fifty-four signatories, is a multilateral treaty which entered into force in 1998. It provides a multilateral framework for energy cooperation and a significant aspect of the treaty relates to investment rules and arbitration.

²⁷ Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions” 73 *FORDHAM L. REV.* 1521-1625 (2005).

investment rules, that has led many to call for the reconceptualization of the international investment regime.

The dominant narrative is that international investment law is a “hybrid” species of law, connecting at different points with private and international law, human rights and trade law. Identifying the underlying rationales of the international investment legal order enables the (re)construction of both normative and descriptive features of this area of law. In turn, this has implications for the interpretive dimension of IIL and the purpose of international arbitration. Schill identifies three distinct paradigms of IIL – bilateralism, multilateralism, and multilateralization – and each has its own underlying rationale.²⁸ It is worthwhile to restate the key tenets of this paradigmatic approach to IIL. This will help to understand the proposal to cross-fertilise principles and rules traditional to IIL into the law of international trade.

Bilateralism is “characterised by specific reciprocity or *quid pro quo* bargains, and usually manifests itself in rules that favour the interests of the more powerful”.²⁹ This approach is exhibited through international investment agreements (IIAs). Each IIA contains an arbitration clause which sets out the rules governing disputes. With the exact figure of disputes unknown, official figures show that over 800 arbitration cases have been brought between 1987-2017 with the majority of disputes filed under the ICSID, UNCITRAL, or SCC frameworks. In the first 7 months of 2017, investors initiated 35 known disputes with approximately two-thirds of cases brought by developed country investors. The majority of disputes have been brought under bilateral IIAs with just over 60 percent of known cases filed under the ICSID framework.

On the other hand, the rationale of multilateralism does not put sovereignty and state at the centre, nor does it support such obvious power asymmetry. Rather, multilateralism “views states as embedded in an international community, stresses the primacy of international law over national interests, and presupposes that international relations are ordered on the basis of non-discriminatory principles applicable to all states.”³⁰ As such, reciprocity is more diffused. Increasingly, investment clauses have been incorporated into regional trade agreements like NAFTA and CETA, representing the multilateral rationale of investment law. However, a sharp distinction cannot be made between the bilateral and multilateral rationales

²⁸ Stephan W. Schill, “Ordering Paradigms in International Investment Law: Bilateralism–Multilateralism–Multilateralisation” in *The Foundations of International Investment Law: Bringing Theory into Practice*, (n 1), at 15.

²⁹ *Ibid.*, at 111.

³⁰ Schill, (n 28), at 115.

since “everything depends on perspective and the emphasis one chooses in describing the legal practice of IIL”.³¹ As the cartography and content of IIAs becomes increasingly complex, the multilateralization of IIL becomes more apparent, both in terms of substantive content of the agreements and investment arbitration. The negotiation of an investment facilitation agreement or an international treaty regulating the technical aspects of investment at the WTO marks a significant paradigmatic shift toward the multilateralization of international investment law.

That international investment law expresses a multilateral rationale does not mean that this legal framework is synonymous with international economic law; however, these sub-systems and legal communities do not exist in isolation from one another. Hirsch examines the socio-cultural distance between different legal communities in the international order, exploring the extent to which their rationalities converge and diverge. He finds that “the considerable socio-cultural distance between investment and human rights laws, and the deep-rooted tensions between the relevant communities...parallels the normative distance between these branches of international law”.³² So it is perhaps unsurprising that the WTO dispute settlement body and relevant investment tribunals have expressed a reluctance to interpret investment rules in light of human rights treaties.

Globalisation has resulted in the shift of power from the state toward non-state actors and institutions, which have assumed a more prominent role in setting the rules of society,³³ Institutions coexist in a polycentric global society and norms are being shaped by the practices of many actors, including those of multinational enterprises (MNEs) operating across international markets. Trade now takes place through increasingly complex global value chains, and MNEs therefore have a profound effect on the global economy. Global value chains have caused trade, services, and investment to become tightly intertwined,³⁴ presenting new challenges to international governance. With the global economy becoming more and more complex, institutions have assumed a central position in the global order providing a framework for efficient production, ensuring the maximization of capital and investment flows.

³¹ Schill, (n 28), at 115.

³² Hirsch, (n 19), at 156.

³³ Robert Keohane, “International Institutions: Two Approaches” 32 *INTL. STUD. QUART.*, 379-96 (1988); John G. Ruggie, *Constructing the World Polity: Essays on International Institutionalisation* (2002); Douglass C. North, *The New Institutional Economics and Third World Development*, 23 [John Harriss, Janet Hunter & Colin M. Lewis (eds.), 1995].

³⁴ Sauvart, (n 12), at 6.

Global value chains may be organised in complex ways and there may be many points at which international economic law, international investment law and human rights interconnect.³⁵ However, MNEs as actors in the global economy also have human rights responsibilities.³⁶ At a minimum, businesses must comply with domestic legislation governing social standards, including human rights and environmental protection. Historically, and in accordance with the neoclassical economic thought, it was believed that the only goal of the business was simply to increase profits and enhance economic freedoms.³⁷ Over time, this perception of business shifted toward an ethical responsibility to serve economic, social and environmental ends.³⁸ This triple-line management principle underpins modern conceptions of corporate social responsibility (CSR), and although there are many variants of what CSR actors do and should entail, it is a soft-law voluntary mechanism that “starts where the legal framework ends”³⁹ to promote sustainable business practices within the planetary boundaries. A detailed discussion of the ethical responsibilities of private actors is beyond the confines of this article and will be developed in future work. For the purposes of this article, it is sufficient to highlight the complex environment in which investment is situated.

Assessing the interrelationship between the distinct legal communities of the sub-systems of international law does raise some difficulties. An obvious challenge is that, among the spectrum of human rights there exists no fundamental “right to trade” or “right to investment”. Therefore, it cannot be argued that the strategically oriented rationality of the WTO toward economic efficiency violates such rights. However, it has been shown that multilateral rules create (unintended) consequences for human rights.⁴⁰ Framing the proposal for a multilateral agreement on investment facilitation for development presents a fresh opportunity to draft and interpret legal regimes regulating trade and investment through a rights-sensitive lens.

³⁵ Fiona Smith, “Natural Resources and Global Value Chains: What Role for the WTO?” 11 *INTL. J. OF LAW IN CONT.*, 135-152 (2015).

³⁶ John Ruggie & Tamaryn Nelson, “Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges” (Corporate Social Responsibility Initiative Working Paper No. 66 2015).

³⁷ Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”, *N.Y. Times Magazine* *York Times Magazine* (Sept. 13, 1970).

³⁸ John Elkington, “Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development” 36 *CAL. MAN. REV.* 90-100 (1994).

³⁹ Reinhard Steurer, “The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe” 43 *POLICY STUDIES* 49, 50 (2010).

⁴⁰ See: Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (2011).

A RADICAL (RE)CONCEPTUALISATION OF DEVELOPMENT

To highlight the socio-cultural distinctions between the sub-systems of international law, it is necessary to examine their normative orientations. It will be argued that the radical reconceptualization of development, informed by the human development approach, has not been paralleled in the international financial institutions and this disjuncture has created greater socio-cultural distance between the disciplines of trade and investment, and human rights.

Both investment and trade provide important resources for development and understanding the rational orientation of these regimes provides insight into how they can facilitate *sustainable* development. Promoting development in all its dimensions is a stated objective of the WTO, built into the legal infrastructure of the institution. It is worth restating that the Preamble to the Agreement Establishing the WTO recognises the interrelationship between trade liberalisation and social welfare:

“...relations in the field of trade and economic endeavour should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

Formally, at least, the legal architecture of the WTO scaffolds economic liberalisation within a particular normative frame: *sustainable development*. In other words, the multilateral trading system should strive toward the promotion of economic transactions insofar as doing so enables individuals to “lead the kind of lives they value – and have reason to value”.⁴¹

However, it is argued that the increasing rationalisation of rules and the heightened legal formalism⁴² at the WTO has unintended *anti*-development consequences. In part, this is attributable to the rational orientation of the international economic institutions which has remained unchanged since their inception. Since the early writings of Adam Smith⁴³ and David

⁴¹ Sen, (n 9), at 18.

⁴² On legal formalism, see: Morton J. Horwitz, “The Rise of Legal Formalism”, 19 THE AMER. J. OF LEG. HIST. 251-264 (1975).

⁴³ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (2012) (1776).

Ricardo,⁴⁴ who advanced the principles of absolute advantage and comparative advantage respectively, development has been closely associated with the measure of economic growth. Economic theories of development have evolved over time, shifting from the state-centric vision of classical economics⁴⁵ to one of minimal state intervention advocated by liberalism.⁴⁶ As societies have evolved, so too have theoretical approaches to development, with a significant paradigmatic shift in the 1970s toward market fundamentalism.

Underpinning market fundamentalism, and its contested counterpart *neoliberalism*, is the prioritisation of private property rights, free markets, and free trade.⁴⁷ There is a minimal role for the State with power and wealth concentrated in institutions, multinational corporations, and transnational networks.⁴⁸ Over time, the economic measure of development has become a central norm of international financial institutions and since the late 1940s, the global financial institutions, such as the World Bank and the International Monetary Fund (IMF), have used the measure of “gross domestic product” (GDP) per capita to determine the development status of every country. The World Bank classifies countries as “high-income”, “middle income”, “low-middle income” and “low-income”, depending on their measure of GDP per capita.⁴⁹ In the WTO, it is for each Member to determine their own development status, although the World Bank framework remains influential.

Economic growth is an integral part of any model of development but economic value is not the *sole* factor of development, nor should it necessarily take priority over other considerations.⁵⁰ Challenging the rational construction of economic development, and moving away from the consequentialist utilitarian theories of justice,⁵¹ Amartya Sen argues that the focus

⁴⁴ David Ricardo, *On the Principles of Political Economy and Taxation* (2004) (1817).

⁴⁵ For a comprehensive overview of classical theory, see: John Ravenhill, *Global Political Economy* (3rd edn., 2011).

⁴⁶ For an account of liberalism and multilateralism, see: Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics” 51 INTERNATIONAL ORGANISATION 513, 566 (1997).

⁴⁷ David Harvey, *A Brief History of Neoliberalism 2* (2005).

⁴⁸ Andrew Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order* (2011).

⁴⁹ Interestingly, the WTO does not provide a classificatory framework and instead allows each country to determine its own development status.

⁵⁰ See: Clair Gammage, “North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreement” (2017).

⁵¹ Utilitarianism conceptualizes development as a measure of maximizing utility. Developed primarily through the works of Jeremy Bentham and John Stuart Mill, classical utilitarianism is a theory of distributive justice where the state is warranted for maximizing human “well-being”. When the balance of pleasure over pain is as great as it can be, this is maximizing social utility. Utilitarianism deals with the sum total rather than the distribution

of development should be on human capabilities to achieve a life that each individual values and, in order to do so, the means to realising substantive freedom must be established.⁵² The capabilities approach, sometimes referred to as the human development approach, is not reflective of one single view, but encompasses a school of thought that is premised on two normative claims. The first claim asserts the moral importance of the freedom to achieve well-being while the second claim relates to the *opportunities* available for an individual to achieve well-being.

Bridging the schools of ethics and economics, Amartya Sen conceives of freedom as both the principal means and the principal end of development.⁵³ Development is conceptualized as “a process of expanding the real freedoms that people enjoy”⁵⁴ with economic growth perceived as a “means” towards the realisation of those substantive freedoms. Contesting the instrumentalist view that places emphasis on contractual obligations and property rights, this approach proposes that the rule of law may be considered to be both a *means* to development but also a *justified end* of development. Departing from Sen’s conceptualisation of capabilities, Nussbaum challenges the idea that promoting freedom is a “coherent political project” since some freedoms may limit other freedoms.⁵⁵ For example, achieving gender justice will inherently limit the freedom of men. Instead, she advances an approach that is more concerned with articulating a political realm which protects ten “central capabilities” of an individual which she identifies as *central* to the concept of ‘human dignity’.⁵⁶ It is not the purpose of this article to attempt to restate the distinctions between the works of these excellent scholars, nor

at the micro-level and therefore, arguably, it does not respect rights of everyone, but just the majority. For Rawls, development is rooted in social contract and requires the redistribution of “primary goods” in accordance with the “difference principle” to ensure that the least advantaged in society are looked after. Under a Rawlsian framework, individual liberty is given lexical priority over equality but nevertheless, redistribution of assets is a key part of a functioning society. His theory is procedural in nature, concerned with the processes necessary to promote a more equitable distribution of wealth within society. But, much like the libertarian school, Rawls’ theory of justice fails to address the consequences that flow from his procedural approach.

⁵² Agency plays a central role in Sen’s concept of development, with his “capability approach” offering an alternative to neoclassical economic thought. A theory of welfare economics, Sen’s approach is rooted in the idea that each individual has the capability – or opportunities – to achieve the type of life that they value. See: Martha C. Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice”, 9 *FEMINIST ECONOMICS*, 33-59 (2003).

⁵³ For Sen, there are five types of distinct, but interrelated, freedoms that advance the capabilities of a person: political freedom, economic facilities, social opportunities, transparency guarantees, and protective security. Sen, (n 9).

⁵⁴ Sen, (n 9), at 3.

⁵⁵ Nussbaum, (n 7), at 71.

⁵⁶ For some capabilities theorists, evaluating the intrinsic value of freedom is itself an important inquiry; however, this article is disinterested with such an endeavour.

can I seek to do justice to the richness of their theoretical offerings. Instead, this article uses a “thin” conception of the capabilities approach as a theoretical frame through which our understanding of the interconnections between the international legal frameworks relating to investment, trade, and human rights can be radically inverted.

More specifically, this article is interested in adopting a sociologically informed approach to question how the multilateral system through its proposals on investment facilitation can enhance freedoms. The capabilities approach complements the understanding of sustainable development as “development that meets the needs of the present while safeguarding Earth’s life-support system, on which the welfare of current and future generations depends”⁵⁷ This definition consolidates the human-centred approach presented in the Rio Declaration⁵⁸ and is informed by the natural science conception of securing social welfare within the “planetary boundaries”.⁵⁹ However, it is not simply enough to state that the rules governing investment and trade *should* promote sustainable development. Using this conceptual framework, and when thinking of sustainable investment for sustainable development, the responsibilities on investors is to act in a manner that promotes sustainability in its three forms: environmental, social, and economic.

INVESTMENT FACILITATION FOR SUSTAINABLE DEVELOPMENT

At the WTO level, the Joint Statement on Investment Facilitation for Development⁶⁰ is rooted in the (neo)liberal assumption that embedding rules relating to investment facilitation at the multilateral level will promote development in all its aspects: environmental, social, and economic. While investment facilitation is distinct from investment promotion, they are both integral aspects of investment policy. The interface between law and policy is evidenced in the Policy Framework for Investment⁶¹ issued by the Organisation for Economic Co-operation and Development (OECD), which defines the concept of investment policy in broad terms:

⁵⁷ David Griggs et al, “Policy: Sustainable Development Goals for People and Planet” 495 NATURE 305-307 (March 2013).

⁵⁸ Report of the World Commission on Environment and Development: Our Common Future, U.N. Doc. A/42/427 (1987).

⁵⁹ Johan Rockström et al, “A Safe Operating Space for Humanity”, 461 NATURE 472-475 (September 2009).

⁶⁰ World Trade Organisation, Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN(17)/59 (Dec. 13, 2017).

⁶¹ Organisation for Economic Co-operation and Development [OECD], Policy Framework for Investment: User’s Toolkit, 2015 edition (June 4, 2015).

“It refers not only to laws, regulations and policies relating to the admission of investors, the rules once established and the protection of their property, but also to the goals and expectations concerning the contribution of investment to sustainable development, such as those outlined in the national development plans.”⁶²

Buttressing the OECD Policy Framework for Investment (“OECD Report”) is the objective of mobilising private investment for “sustainable and inclusive development”⁶³ in a manner that contributes to both economic and social well-being. Sustainable investment facilitation has been defined as “creating more favourable national conditions for higher sustainable FDI flows to meet the investment needs of the future”.⁶⁴ With a focus on the private sector, the OECD Report “promotes transparency and appropriate roles and responsibilities for governments, business, civil society and others with a stake in promoting development and poverty reduction and builds on shared values of democratic society and respect for human rights”.⁶⁵ While there remains a role for the state in providing an appropriate public governance framework through which investment flows are facilitated, the OECD Report highlights the increasing significance of non-state actors in shaping investment practices at the global level, thereby reinforcing the importance of fostering closer socio-cultural connections between legal communities. As such, institutions at the international and multilateral levels, such as the OECD, UNCTAD, and the WTO, must assume a more proactive and cooperative role in establishing global norms and standards to ensure the objectives underscoring investment can be realised.

At the multilateral level, investment facilitation is not explicitly defined but it *excludes* rules relating to market access, investment protection, and Investor-State Dispute Settlement (ISDS). To promote sustainable investment and to enable developing countries to overcome development challenges, the Organisation for Economic Cooperation and Development (OECD) has developed a ‘Global Action Menu for Investment Facilitation’⁶⁶ which specifies ten ‘action lines’ for investment facilitation. These action lines can be broadly conceived as relating to three discrete aspects of FDI: information and transparency, administrative procedures, institutional cooperation and capacity building.

⁶² *Ibid.* at 23.

⁶³ Policy Framework, (n 61), at 13.

⁶⁴ Sauvart, (n 12), at 8.

⁶⁵ Policy Framework, (n 61), at 11.

⁶⁶ Global Action Menu, (n 11).

Information and Transparency

There is an assumption that formalising rules at the multilateral level will improve accessibility and transparency of information to create an efficient and predictable environment for facilitating investment. This assumption is closely related to the ideology of international financial institutions such as the World Bank, which have long advocated the promotion of ‘good governance’.⁶⁷ The Asian financial crisis in the late 1990s has propelled a shift in literature to focus on the relationship between transparency and the stability of financial markets. A useful definition of transparency that highlights the interconnections between the investment as an economic concern and rights for the purposes of this article identifies the characteristics of transparency as:

“the increased flow of timely and reliable economic, social, and political information about investors’ use of loans; the creditworthiness of borrowers; government’s provisions of public services, such as education, public health, and infrastructure; monetary and fiscal policy; and the activities of international institutions. Alternatively, a lack of transparency may exist if access to information is denied, if the information given is irrelevant to the issue at hand, or if the information is misrepresented, inaccurate, or untimely”.⁶⁸

Transparency, or the lack thereof, has been shown to have systemic consequences for the stability of financial markets and significant implications for FDI flows. It has been shown that openness and information sharing not only enable participative decision-making processes, but also improve the accountability of governments.⁶⁹ However, it does not necessarily follow that implementing regulations will lead to greater transparency. Closely related to Action Line 1, is the call for more effective participative processes and a multi-stakeholder approach to promote sustainability standards in investment practices (Action Line 4).

Transparency and the accessibility of information can enhance freedoms and capabilities. In 1999, Joseph Stiglitz argued that there exists a basic “right to know” what governments are doing in democratic societies and

⁶⁷ For a historical account of the “good governance” approach of the Bretton Woods institutions, see: Ngaire Woods, “The Challenge of Good Governance for the IMF and the World Bank Themselves”, 28 *WORLD DEVELOPMENT* 823-841 (2000).

⁶⁸ Tara Vishwanath & Daniel Kaufman, “Toward Transparency: New Approaches and Their Application to Financial Markets”, 16 *THE WORLD BANK RESEARCH OBSERVER*, 41-57 (2001).

⁶⁹ David Kucera & Marco Principi, “Rights, Governance, and Foreign Direct Investment: An Industry Level Assessment” 31 *INTL. REV. OF APPL. ECON.* 468-494 (2017).

that there should be a “strong presumption in favour of transparency and openness”.⁷⁰ Openness, he argues, is “an essential part of public governance”. The extent to which information constitutes a public good is an important aspect of the rights-based approach to trade and investment law and there may be strong arguments advanced in favour of multilateralising investment facilitation. Recognising the “dynamic links between investment, trade, and development”, WTO Members argue that the formalisation of rules at the multilateral level will lead to the creation of a more “transparent, efficient, and predictable environment for facilitating cross-border investment”.⁷¹ However, those rules must be accessible if they are to enhance freedoms and capabilities.

Simplifying Administrative procedures

As the “nuts and bolts” of investment, and much like trade facilitation, there is a growing need to simplify administrative procedures at the national, regional, and international levels. Enhancing the predictability and consistency in the application of investment policies (Action Line 2) is a fundamental part of creating greater coherence in international investment law. Simplifying procedures, providing timely administrative advice, and fostering international cooperation and coordination are some ways in which the administrative procedures can be made more efficient and effective (Action Lines 3 and 7). Another step toward greater coherence is the proposal to establish monitoring and review mechanisms (Action Line 6) and designate a domestic lead agency or focal point to address issues relating to investment, including disputes, at the national level (Action Line 5).

International Cooperation and Capacity Building

Promoting international cooperation to improve investment promotion is conceived of as complementary to investment facilitation (Action Line 10). Capacity building in developing countries, through the provision of support and technical assistance (Action Line 8) and enhancing the effectiveness of investment promotion agencies (Action Line 9), should reverse the current decline in FDI inflows to some developing countries. Similar efforts are being made in trade, with capacity building forming a key element of Trade for Aid and so-called ‘North-South’ regional trade agreements with a development

⁷⁰ Joseph E. Stiglitz, Sr. Vice President and Chief Economist, World Bank, Oxford Amnesty Lecture, “On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life” (Jan. 27, 1999).

⁷¹ Joint Ministerial Statement, (n 60).

component.⁷² Through these channels, resources are directed to low income countries that may be economically isolated to improve connectivity with the global economy.⁷³

The Global Action Menu⁷⁴ provides a useful conceptual framework that further delineates the fine distinctions between investment facilitation and investment promotion and will be invaluable to the WTO Members in their structured discussions. However, in assessing how the investment regime can become more sustainable it is necessary to examine what incentivises and motivates investors to invest in a host country.

ECONOMIC AND SOCIO-CULTURAL DETERMINANTS OF FDI

There are many determinants of FDI and establishing the motivation and incentives behind investment flows to different countries is important to better understand the role of the WTO in promoting sustainable investment. Assessing the political environment that is most likely to attract FDI has been the subject of inquiry since the mid-1970s, and early evidence suggested that the ability to enact efficiency-enhancing policies, most commonly associated with autocratic regimes in developing countries, has a positive effect on FDI flows.⁷⁵ In part, the attractiveness of autocratic regimes was closely linked to corruptive practices, with governments more likely to disregard the legitimate concerns of business and offer financial incentives for investing in the country.⁷⁶ For example, between 1998-1999, Angola – which had a politically hostile and volatile environment in this period — received the highest FDI inflows of any country in Sub-Saharan Africa.⁷⁷ Asiedu attributes this trend to the return of investment in natural resources, in this case petro-

⁷² For example, the European Union has negotiated Economic Partnership Agreements (EPAs) with countries in the African, Caribbean, and Pacific regions and as part of the trade framework the EU has committed to an amount of development assistance to enhance capacity building through its European Development Fund (EDF).

⁷³ Ingo Borchert et al, “Services Trade Protection and Economic Isolation” 40 *THE WORLD ECON.* 632-657 (2015).

⁷⁴ Global Action Menu, (n 11).

⁷⁵ Guillermo O’Donnell, “Reflections on the Patterns of Change in the Bureaucratic – Authoritarian State”, 13 *LAT. AM. RES. REV.* 3-38 (1978); S.P. Huntington & J.I. Dominguez, “Political Development”, in *Handbook of Political Science* [Fred I. Greenstein & Nelson W. Polsby (eds.), 1975] cited in Antonis Adams & F. Filippaios, “Foreign Direct Investment and Civil Liberties: A New Perspective” 23 *EUR. J. OF POL. ECON* 1038-1052 (2007).

⁷⁶ Quan Li & Adam Resnick, “Reversals of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries” 57 *INTL. ORG.* 175, 211 (2003).

⁷⁷ Elizabeth Asiedu, “On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?” 30 *WORLD DEVELOPMENT* 113 (2002).

leum, being so profitable that it makes the risk of investment worthwhile. She also identified an “Africa-effect” in the period of 1990s to early 2000s, suggesting that “the inability of countries in sub-Saharan Africa to attract FDI may be partly blamed on the fact that these countries are located in a continent that happens to have a bad reputation”.⁷⁸ However, FDI inflows to Sub-Saharan Africa have grown nearly six-fold from 2000-2012, from approximately USD6.3 billion to USD35 billion,⁷⁹ signalling a shift in the political economy of investment.

Furthermore, it has been suggested that the lack of democracy is favourable because it typically signals the suppression of important rights, such as labour standards, freedom of association, and freedom of expression to challenge government policies.⁸⁰ Autocratic governments that protect investors from organised labour forces, which may apply pressure for better working conditions and higher wages, may be more appealing to investors since their labour costs will effectively be lower.⁸¹ Furthermore, the *lack* of adequate property rights protection may make access to a host country more viable for an investor. For example, Smith and Haberli have shown that weak rights protection has enabled the acquisition of land by large-scale agri-processing foreign investors which has resulted in the (forced) displacement of indigenous groups.⁸² In turn, a loss of the right to land can create other vulnerabilities in relation to socio-economic rights, for example access to potable water and access to food. Land rights often represent a site where other rights connect.

However, the implication of these earlier studies, that democracy is counterintuitive to attracting FDI, has been rebutted by more recent studies⁸³ and there is evidence to suggest that the relationship between political orientation and investment flows is statistically insignificant.⁸⁴ Similarly, the

⁷⁸ *Ibid.*

⁷⁹ World Bank Group [WBG], “Foreign Direct Investment Flows into Sub-Saharan Africa” (Aug. 7, 2018, 7:22 PM) <http://documents.worldbank.org/curated/en/505071468203651135/Foreign-direct-investment-flows-into-Sub-Saharan-Africa>.

⁸⁰ William Greider, *One World, Ready or Not: The Manic Logic of Global Capitalism* (1998) cited in Benhua Yang, “Autocracy, Democracy, and FDI Inflows to the Developing Countries” 21 INTL. ECON. J. 420 (2007).

⁸¹ For a historically rich and early study which illustrates the implication of political orientation of government on FDI, see: Donnell, (n 75).

⁸² Christian Häberli & Fiona Smith, “Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid Land Grab” 77 MOD. L. REV. 189-222 (2014).

⁸³ Adams and Filippaios, (n 75); Yang, (n 80).

⁸⁴ Ricardo Hausmann & Eduardo Fernandez-Arias, “The New Wave of Capital Inflows: Sea Change or Just Another Title?” (Inter-American Development Bank, Working Paper No. 417, 2000); John R. Oneal, “The Affinities of Foreign Investors for Authoritarian Regimes”, 47 POLIT RES, 565-588 (1994) cited in Tomasz P. Wisniewski & Saima K.

extent to which democratic governance attracts FDI has been debated in the literature, with some advocates finding that:

“Political competition may be viewed as a requisite of an investment-friendly environment and a mechanism through which abuses of power are restrained...[This] implies that democratic processes are critical for a country’s international reputation...International investors also appear to have a high regard for decisiveness in political decision-making. A situation in which the party of the executive has control over all houses with law-making powers appears to be the favoured scenario.”⁸⁵

That democratic governance should attract FDI is based on the liberal assumption that rights protection – and, more specifically, property rights protection – is assumed to be stronger in democratic states.⁸⁶ Similarly, democratic governments typically exhibit higher levels of openness, making bribery and corruption less likely.⁸⁷ Furthermore, democratic governance is typically associated with stronger property rights protection and reduces the risk of expropriation of their investment.⁸⁸ Even in democratic governments, the political orientation of the leading group can have a significant bearing on the type of investment that is attracted, with evidence indicating that “pro-labour governments prefer foreign investments that increase employment, while pro-capital governments encourage capital imports that substitute for labour.”⁸⁹ Following this logic, the type of investments encouraged by centrist governments is less predictable. However, FDI has a “tendency to flow more abundantly into countries with a long tradition of democracy”⁹⁰ and to countries that have exhibited political stability.⁹¹

In terms of economic determinants for FDI, some studies have shown that there is no statistically significant relationship between Gross Domestic

Pathan, “Political Environment and Foreign Direct Investment: Evidence from OECD Countries”, 36 *EUR. J. OF POL. ECON.* 13-23 (2014).

⁸⁵ Wisniewski and Pathan, (n 84).

⁸⁶ Li and Resnick, (n 76). However, democracy is not always synonymous with stronger property rights protection.

⁸⁷ Nathan M. Jensen, “Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment”, 57 *INTL. ORG.* 487-516 (2003).

⁸⁸ Elizabeth Asiedu & Donald Lien, “Democracy, Foreign Direct Investments, and Natural Resources”, 84 *J. OF INTL. ECON.* 99-111 (2011).

⁸⁹ Wisniewski and Pathan, (n 84), at 17, drawing on the findings of the study by Pablo M. Pinto & Santiago M. Pinto, “The Politics of Investment Partisanship and the Sectoral Allocation of Foreign Direct Investment”, 20 *Econ. Polit.* 216-254 (2008).

⁹⁰ *Ibid.*, at 21.

⁹¹ Yang, (n 80).

Product (GDP) and FDI.⁹² This suggests that the neoclassical model of development as a measure of GDP is not an important factor for investment flows. However, the presence of commodities and natural resources can be an important determinant of FDI.⁹³ Furthermore, international investment agreements (IIAs), which enhance economic freedoms, can add number of components to policy and institutional determinants of FDI flows.⁹⁴ For example, it has been shown that that good infrastructure and market openness “increases the productivity of investments, and therefore stimulates FDI flows.”⁹⁵ To assert that economic freedom has little to no bearing on furthering investment flows would be fallacious.

Another determinant that is worthy of discussion is compliance with international legal rules. It has been shown that obligations under international trade and investment obligations can have an adverse effect on human rights protection. For example, compliance with the Trade Related Aspect of Property Rights (TRIPs) Agreement has been shown in some contexts to have a detrimental impact on the right to health and access to medicines.⁹⁶ Similarly, agricultural support programmes – some of which are legitimate under the Agreement on Agriculture – have been shown to distort international markets which in turn exacerbate existing vulnerabilities in developing countries.⁹⁷ Indeed, the extent to which the commitment to human rights in the multilateral trade system is genuine, or merely a specious commitment expressing a new form of protectionism, has long been debated.⁹⁸ More

⁹² Yang, (n 80), at 431.

⁹³ Mariya Aleksynska & Olena Havrylchuk, “FDI from the South: The Role of Institutional Distance and Natural Resources”, 29 *Eur. J. of POL. ECON.* 38-53 (2013); Adres Rodríguez-Pose & Gilles Cols, “The Determinants of Foreign Direct Investment in Sub-Saharan Africa: What Role for Governance?” 9 *REG. SC. POLL AND PRACT.* 66 (2017); Sambit Bhattacharyya & Roland Hodler, *Natural Resources, Democracy, and Corruption*, 54 *EUR. ECON. REV.* 608-621 (2010).

⁹⁴ U.N. Conference on Trade and Development, “The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries”, UNCTAD Series Paper (2009).

⁹⁵ Asiedu, (n 77), 111.

⁹⁶ Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (2008); Simon Walker, “The Implications of TRIPS: Ethics, Health, and Human Rights”, 2 *J. OF HEALTH DEV.* 109-114 (2001).

⁹⁷ Clive Potter & Mark Tilzey, “Agricultural Multifunctionality, Environmental Sustainability and the WTO: Resistance or Accommodation to the Neoliberal Project for Agriculture?”, 38 *GEOFORUM*, 1290-1303 (2007); Mark Ritchie & Kristin Dawkins, “WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food”, 9 *Min. J. of Glob. Trade*, 9-39 (2000).

⁹⁸ Tobias Leeg, “Negotiating Sustainable Trade: Explaining the Difference in Social Standards in US and EU Preferential Trade Agreements”, *CONT. POL.* 1-20 (2018); Susan A. Aaronson & Jaime M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (2008); Amit Dasgupta, “Labour Standards and the WTO: A New Form of Protectionism”, 1 *S. ASIA ECON. JOURNAL*, 11-129 (2000).

recently, this commitment has been questioned in relation to the “greening” of the economy as countries seek to adopt “green” carbon tariffs⁹⁹ and “green” energy subsidies¹⁰⁰ to stimulate both FDI and trade in an environmentally-friendly way.

The preceding analysis has shown that socio-cultural factors may play a significant role in attracting FDI although the motivations and incentives of investors are likely to vary from region to region. Overall, there is a lack of consensus among scholars as to the relationship between political orientation, political freedom, and FDI. However, as noted by Wisniewski and Pathan, the findings can be sensitive to the particular sample selection and modelling approach and identifying the link between political environment and FDI flows can give mixed results.¹⁰¹ Similarly, there are discrepancies between the socio-cultural factors that influence investments to OECD and non-OECD countries. Perceptions of investors, and quantifying what socio-cultural factors are the most significant in measuring risk, is difficult to ascertain but there are likely to be different considerations for different regions and countries.

FDI is an increasingly important source of funding for development but attracting and benefitting from FDI varies from country to country. Historically, developing countries have struggled to access capital markets and have relied on investment in the forms of FDI and official loans.¹⁰² As commitments under official development assistance from key partners declines, the significance of FDI for developing countries will increase. While FDI remains the largest and most constant source of finance for developing countries and least developed countries (LDCs), recent statistics from the UNCTAD¹⁰³ have signalled a decrease of approximately 14 percent in FDI to developing countries in 2016.¹⁰⁴ Projected results in FDI flows to developing countries in 2017 are expected to be uneven – developing countries in Asia and Africa are likely to see an increase in FDI while countries Latin American and Caribbean region are likely to witness a decline in FDI. On

⁹⁹ See: Paul-Erik Veel, “Carbon Tariffs and the WTO: An Evaluation of Feasible Policies”, 12 J. OF. INTL. ECON. LAW, 749-800 (2009).

¹⁰⁰ See: Luca Rubini, “Ain’t Wastin’ Time No More: Subsidies for Renewable Energy, the SCM Agreement, Policy Space, and Law Reform”, 15 J. OF. INTL. ECON. LAW, 525-579 (2012).

¹⁰¹ Wisniewski and Pathan, (n 84), at 14.

¹⁰² Asiedu, (n 77).

¹⁰³ U.N. Conference on Trade and Development, “World Investment Report 2017: Investment and the Digital Economy”, UNCTAD/WIR/2017 (June 2017).

¹⁰⁴ *Ibid.* The Report states that FDI flows to developing countries across the world suffered in 2016 with FDI flows decreasing from the previous year by 15 percent in Asia, 3 percent in Africa, and 14 percent in Latin America and the Caribbean.

the other hand, developed countries now have 59 percent share of global FDI flows, with 2016 marking an increase in overall investment trend in these economies. With talks on investment facilitation soon to commence, assessing the role of the WTO in promoting sustainable investment practices is key.

INTERNATIONAL TRADE AND INTERNATIONAL INVESTMENT: A RIGHTS PERSPECTIVE

Analysing international investment through a sociologically informed lens has illustrated the myriad of economic, social, and political determinants of FDI to developing countries. It has been shown that there can be a strong interrelationship between FDI and rights. What is the proper role of the WTO in creating rules governing investment for sustainable and inclusive growth? As an institution through which 164 Members negotiate their external trade relations, there are concerns to be raised about the effects of multilateral policies for rights protection and sustainable development.

The governance frameworks of the multilateral and international financial institutions and their effects on social welfare have been the subject of debate for some time. The now infamous protests at the Seattle Ministerial Conference in 1999 symbolised the growing concern about the role of institutions in the global economy and their effects for social welfare.¹⁰⁵ Highlighting the inescapable interconnections between trade and labour standards, human rights, and the environment, the protest challenged the emerging “constitutionalism” at the multilateral level, which was ideologically rooted in corporate domination. Following the anti-globalisation protests at Seattle there was a flurry of literature from eminent scholars debating the role of the WTO, and its dispute settlement body (DSB), in promoting and safeguarding human rights.¹⁰⁶ It is not the purpose of this article to restate the debate in detail, but it is important to reflect on the evolutive

¹⁰⁵ Stephen Gill, “Toward A Postmodern Prince? The Battle of Seattle as A Moment in the New Politics of Globalisation”, 29 *J. OF INTL. STUD.* 131-140 (2000).

¹⁰⁶ Ernst Ulrich Petersmann, “The WTO Constitution and Human Rights”, 3 *J. OF INTL. ECON. LAW*, 19-25 (2000) and E.U. Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organisations: Lessons from European Integration”, 13 *EUR. J. OF INTL. LAW* 621 (2002); Gabrielle Marceau, “WTO Dispute Settlement and Human Rights”, 13 *EUR. J. OF INTL. LAW*, 753-814 (2002); Robert Howse, “Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann”, 13 *EUR. J. OF INTL. LAW*, 651-659 (2002); Philip Alston, “Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann”, 13 *EUR. J. OF INTL. LAW*, 815-844 (2002).

nature of the relationship between trade governance and rights protection to assess what role, if any, the WTO might play in relation to investment facilitation.

Ernst-Ulrich Petersmann was one of the first scholars to engage with the human rights and international trade debate and proposed that the rationality of both regimes are based on the same values: individual freedom and responsibility, non-discrimination, rule of law, natural justice, promotion of social welfare through peaceful cooperation, and parliamentary approval of national and international rules.¹⁰⁷ He advanced three constitutional claims in support of what his critics call the “merger and acquisition”¹⁰⁸ of human rights by trade law. First, he proposed that, since trade law and human rights law share the same normative values, the enforcement mechanisms of the WTO may provide a more optimal means through which freedom and non-discrimination can be protected.¹⁰⁹ Second, he proposed that the dispute settlement system of the WTO protects freedom and non-discrimination beyond that of any other international institution as its rules “promotes rule of law more effectively than any other world-wide treaty”.¹¹⁰ The final argument advocates for a shift from ‘negative’ to ‘positive’ integration of rights into the constitution of the WTO to ensure that sufficient safeguards are in place to prevent abuse of rights by governments. This final claim was premised on his belief that the multilateral system would benefit from additional constitutional safeguards to protect individuals as the mandate of the WTO expands to cover rules on services, investment, intellectual property, and the environment.¹¹¹

Petersmann’s account of the relationship between trade and human rights is rooted in a Hayekian perspective of rights that supports liberalism. This approach is antithetical to the argument advanced in this article and runs counter to the idea that closer socio-cultural connections can be fostered through international cooperation. Although the WTO legal texts do not make explicit reference to human rights, such an approach to understanding the multilateral trade rules obscures the undeniable relationship between trade rules and other human rights or capabilities. It should also be recalled that, while the WTO does not confer rights on individuals, one of “the primary objectives of the WTO as a whole is to produce certain market

¹⁰⁷ Petersmann, (n 106).

¹⁰⁸ Alston, (n 106).

¹⁰⁹ Petersmann, (n 106), at 20.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

conditions which would allow...individual activity to flourish.”¹¹² If individual activity is to flourish, to expand freedoms and promote human dignity, the conceptualisation of rights at the multilateral level needs to be radically reconceived.

Petersmann’s contribution to the literature has been both prolific and controversial. From a human rights perspective, the very notion that rights should form part of the WTO constitution is deeply troubling. Each sub-system of international law has its own distinct legal community, steeped in its own history and experienced in its own discipline of interpretation. The WTO should adjudicate on rights no more than the International Court of Justice (ICJ) should adjudicate on trade matters. Embedding human rights into the interpretation of international trade rules carries with it many dangers and this article does not suggest that the existing WTO dispute settlement system is equipped to arbitrate on matters relating to rights violations. To suggest that would engender the creation of a new constitutionalism at the WTO and one that is likely to depart from the true spirit of the international human rights treaties. Alston cautions against Petersmann’s reductivist and Hayekian account of trade and human rights, arguing:

“...rights arising out of WTO agreements are not, and should not be considered to be, analogous to human rights. Their purpose is fundamentally different. Human rights are recognised for all on the basis of the inherent dignity of all persons. Trade-related rights are granted to individuals for instrumental reasons. Individuals are seen as objects rather than holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, but not as political actors in the full sense and nor as the holders of a comprehensive and balanced set of individual rights. There is nothing per se wrong with such instrumentalism but it should not be confused with a human rights approach.”¹¹³

While a full “merger and acquisition” of human rights by trade law must be rejected, for the very reasons set out by Alston, a rights-sensitive approach to trade is needed if the multilateral rules are to promote sustainable development in all its dimensions. Indeed, to embed the libertarian rights framework explicitly into the WTO will represent a distorted vision of human rights, with the traditional conception of human rights nothing more than a “mirage”.¹¹⁴ However, rejecting the idea of the Appellate Body

¹¹² Report of the Panel, “United States – Sections 301-310 of the Trade Act 1974”, ¶ 7.72-7.73, WT/DS152/R (Dec. 22, 1999).

¹¹³ Alston, (n 106), at 826.

¹¹⁴ *Ibid.*

as a “trustee” of human rights does not mean that the framework of rights should be entirely absent from the interpretive dimension of the dispute settlement system.

The WTO does not exist in “clinical isolation from public international law”¹¹⁵ and while Members are bound by their international law obligations, they cannot enforce these obligations before the WTO’s dispute settlement body (DSB). Furthermore, the DSB is not a general court with unlimited jurisdiction, but is an arbitration setting constrained to interpret the rules of the WTO agreements in light of the applicable law between States.¹¹⁶ However, WTO rules have been drafted to provide flexibility in the interpretation of norms but the rules are “not so rigid or inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world.”¹¹⁷ Interpreting WTO rules in accordance with the principle of good faith, as evidenced in the approach of the DSB in matters relating to Article XX GATT, will “most often avoid conflicts of obligations between human rights and WTO law”.¹¹⁸ But is the *avoidance* of conflicts enough?

WAYS FORWARD?

Writing on the sociology of international investment law, Hirsch advances the argument that “greater socio-cultural distance between the involved social settings and groups decreases the prospects for mutual incorporation of legal rules developed in the other legal sphere.”¹¹⁹ In other words, enabling social interactions between different legal communities coexisting in the system of international law and fostering a better understanding of their interconnections is essential to the construction of legal rules that will facilitate *sustainable* investment for *sustainable* development. How can social

¹¹⁵ Marceau, (n 106).

¹¹⁶ *Ibid.* For differing views on the jurisdiction of the WTO dispute settlement system see: Rupert Reece, Alexis Massot & Marie-Helene Bartoli, “Searching for the Applicable Law in WTO Litigation, Investment and Commercial Arbitration”, in *WTO Litigation, Investment Arbitration, and Commercial Arbitration* [Jorge Huerta-Goldman, Antoine Romanetti & Franz Stirnimann, (eds.), 2013]; Jeffrey Dunoff, “Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law”, 17 *EUR. J. OF INTL. LAW*, 647-675 (2006); Joel Trachtman, “The Domain of WTO Dispute Resolution”, 40 *HARV. INTL. LAW JOURNAL*, 333-378 (1999); Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?”, 85 *AM. J. OF INTL. LAW*, 535-578 (2001); and, Gabrielle Marceau, “A Call for Coherence in International Law”, 33 *J. OF WORLD TRADE LAW*, 87-152 (1999).

¹¹⁷ Report of the Appellate Body, “Japan – Taxes on Alcoholic Beverages”, 31, WT/DS10/AB/R (4 October 1996).

¹¹⁸ G. Marceau, (n 115), at 791.

¹¹⁹ Hirsch, (n 19), at 152.

interactions between these legal communities be enhanced to facilitate sustainable investment practices?

In general, developing countries and LDCs currently have been shown to have a weak capacity for attracting high quality FDI and the E15 Initiative has proposed three paradigms to build capacity in these states through investment measures. The first two paradigms involve embedding investment within existing legal frameworks currently related to trade, either through the Aid for Trade programme or the Trade Facilitation Agreement. The third paradigm, which envisages a Sustainable Investment Facilitation Understanding, is a mechanism focused entirely on the technical rules that support “practical actions to encourage the flow of sustainable investment to developing countries, and in particular the least developed among them, with a view to contributing to their economic growth and sustainable development”.¹²⁰ The support programme envisages cooperation with host countries and MNEs to improve both the transparency and accessibility of information of measures in place relating to investment law. Nevertheless, if the FDI determinants are not favourable then the proposed Investment Facilitation agreement is going to have little effect for countries most in need of development resources.¹²¹

The proposal for investment facilitation championed by the Friends of Investment Facilitation for Development has been contested by some Members, such as India, on the basis that this is a step too far, and too soon, for an institution like the WTO that is currently experiencing a legitimacy crisis.¹²² The most recent Ministerial Conference in Buenos Aires (2017) yielded little progress in agricultural governance¹²³ and the negotiating impasse in the Doha Round has yet to be overcome. That investment falls outside the original ambit of the WTO is a historical truth, but the servicification of the economy has brought investment within the scope of the rules governing trade liberalisation.

Contesting the proposal for Investment Facilitation creates a discursive space at the WTO through which Members can challenge and shape the normative frameworks regulating trade. Forms of resistance can serve an important purpose in challenging the legitimacy of decisions and can serve

¹²⁰ Sauvart, (n 12), at 25.

¹²¹ Sauvart, (n 12), at 27.

¹²² Chakravarthi Raghavan, “Investment Facilitation Proposals and India’s Objections”, 638 *THIRD WORLD ECONOMICS* 3-5 (April 2017).

¹²³ WTO MC11 talks collapse! Celebrating the Failure of the WTO Negotiations in Argentina, *La Via Campesina* (Dec. 26, 2017), <https://viacampesina.org/en/wto-mc11-talks-collapse-celebrating-failure-wto-negotiation-argentina/>.

as a ‘checks and balance’ of decision-making. However, with only half the WTO membership engaging in structured discussions on investment facilitation there is a danger that the normative framework will lack legitimacy. Any decision to push ahead with an Investment Facilitation Agreement of some description will not be the product of a genuinely participative or deliberative process.

Participative and deliberative environments draw together the legal communities and promote a better understanding of the normative convergences and divergences between the sub-systems of international law. This could be achieved through a variety of means, such as, the creation of platforms to facilitate international cooperation among institutions. For example, greater cooperation between the WTO and the Food and Agriculture Organisation (FAO) could be fostered to extend their interconnection beyond the existing remit which is rather limited. Incorporating deliberative discussions on the intersection between multilateral trade rules and rights relating to agricultural trade, such as the right to food, right to water, and the right to land will reinforce SDG 2.6 which envisages a role for the WTO to “correct and prevent trade restrictions and distortions in world agricultural markets”.

Furthermore, drawing on the expertise of other actors for discussion of trade matters in the committees would better facilitate a “rights-sensitive” approach to the construction and interpretation of trade rules. The WTO has already taken modest steps toward a more inclusive approach to the interpretation of treaty rules. Article V.2 of the Marrakesh Agreement provides the legal basis for “effective cooperation” between the WTO and other non-government organisations “concerned with matters related to those of the WTO”. Cooperation with NGOs is seen as a way to increase the transparency of the WTO, although civil society is not directly involved in the work of the WTO or its meetings.¹²⁴ NGOs have submitted position papers on trade matters¹²⁵ and the Appellate Body has welcomed the submission of *amicus curiae* briefs in relation to a number of so-called ‘public interest clauses’ of the WTO agreements.¹²⁶ However, the existing framework

¹²⁴ Article V.2 Marrakesh Agreement was clarified in the mandate (WT/L/162): Guidelines for Arrangements on Relations with Non-Governmental Organisations, WTO Decision Adopted by the General Council on July 18, 1996.

¹²⁵ For a full list of the NGO position papers submitted to the WTO, see: NGO Position Papers (Aug. 7, 2018, 9:30 PM) https://www.wto.org/english/forums_e/ngo_e/pospap_e.htm.

¹²⁶ Neither the Dispute Settlement Understanding nor the Working Procedures for Appellate Review address the matter of *amicus curiae* briefs in specific detail. For a full list of the *amicus curiae* briefs received by the Dispute Settlement Body, see: Repertory of the Appellate Body Reports: Amicus Curiae Briefs (Aug. 7, 2018, 9:30 PM), https://www.wto.org/english/tratop_e/dispu_e/repertory_e/a2_e.htm.

places considerable constraints on the participation of non-state actors in the WTO.

CONCLUSION

This article has problematised the interrelationship between the three sub-systems of international law – international trade, international investment, and human rights – to assess the potential role of the WTO in promoting sustainable investment for sustainable development. While the concept of “development” has been radically reconceived through international frameworks to centre on human development within the planetary boundaries, the WTO continues to effect rules that express neoclassical models of development as a measurement of efficiency. The (neo)liberal economic logic of the multilateral rules of trade have in turn have acted as an external constraint to the realisation of sustainable development. Through a socio-logically informed lens this article has highlighted the need for a “rights-sensitive” approach to trade and investment. Legal reforms can be used as a “development strategy”¹²⁷ but only to the extent that they are framed in a way that promotes sustainable development.

Before principles and rules of international investment law are multilateralised at the WTO level, clarification is needed on the interrelationship between the various sub-systems of international law. Beyond the international law level, sustainable practices need to be embedded at the contractual level to ensure that private investors act responsibly and this will require a broad consensus to be reached on what ethical standards should apply to private investors. Furthermore, national governments need to consider how domestic legislation can afford constitutional safeguards to rights.

Investment facilitation *for* development is the first step toward the reimagination of international investment law. However, and to avoid further fragmentation of the international legal order, the legal communities of the sub-systems of international law need to create closer socio-cultural connections so that a better understanding of their normative relationships can be fostered. A participative and multi-stakeholder approach to the negotiation of the proposed Investment Facilitation Agreement will lend legitimacy to the negotiations and, in doing so, a “rights-sensitive” approach to investment facilitation at the multilateral level is more likely to emerge.

¹²⁷ Michael J. Trebilcock & Mariana Mota Prado, *Advanced Introduction to Law and Development*, 47 (2014).