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An analysis of the potential legal disjoint between International Investment Agreements and Local Content Policies

By

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ABSTRACT

Many resource-rich countries have adopted domestic policies such as local content policies (LCPs) to make sure that their nationals profit from their resources and to ensure economic development for their countries. However Despite the value that LCPs bring into the local economy, they might be in conflict with international investment agreements. The study will look at what local content entails and what international investment agreements entail. The study will look into the possible areas of conflict such as employment requirements, support schemes and local procurement and determine whether such measures are in conflict with international investment agreements. The findings of the study outline that local content policies are in breach with international investment agreements such as the General Agreement on Tariffs and Trade, Agreement on Subsidies and Countervailing Measures, the Agreement on Trade-Related Investment Measures.

LIST OF ACRONYMS

ASEAN	***Association of Southeast Asian Nations***
BIT	***Bilateral Investment Treaties***
CUP	***China Union Payment***
DCS	***Directly Competitive or Substitutable***
ECT	***Energy Charter Treaty***
EU	***European Union***
FDI	***Foreign Direct Investment***
IIA	***International Investment Agreements***
IOC	***International Oil Companies***
ECT	***Energy Charter Treaty***
EPS	***Electronic Payment Services***
EU	***European Union***
FIT	***Feed in Tariff***
GATS	***General Agreement on Trade in Services***
GATT	***General Agreement on Tariffs and Trade***
LCP	***Local Content Policy***
MNC	***Multinational Corporation***
NAFTA	***North America Free Trade Area***
NT	***National Treatment***
SCM	***Subsidies and Countervailing Measures***
SME	***Small-to-Medium Enterprises***
SLO	***social Licence to Operate***
TRIMS	***Trade Related Investment Measures***
TRIPS	***Trade Related Aspects of Intellectual Property Rights***
WTO	***World Trade Organisation***

KEYWORDS

Local Content Policies, International Investment Agreements, National Treatment, Conflict, Goods, Foreign, Companies, Nation, Oil and Gas, Sector, Economic, Development.

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CHAPTER 1: INTRODUCTION

1.1. Research Background

The petroleum sector has proven to be very lucrative for developing countries which are rich in these natural resources.[1] Many have accordingly adopted domestic policies such as local content policies (LCPs) to ensure that their nationals benefit from their resources and to ensure economic development for their countries.[2]In simple terms LCPs means that first preference in the petroleum activities must be given to the population of the host country.[3] For example, Tanzania has decided to adopt local content polices to incorporate their nationals in employment, supply chain and support schemes of the petroleum sector.[4]However, every country defines local content in their own words, depending on the particular country's aims and objectives.

LCPs require petroleum companies to employ the host country's population. Lack of skills is not an excuse; these companies are required to train their nationals and transfer knowledge and skills to them.[5] For example, Regulation 46 of South Africa Mining Charter requires the mining company to submit a plan on how they are going to advance the skills and knowledge of employees. The legislation requires that these companies must invest in learnerships and bursaries for their nationals.[6]

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[1]A, Antypas, et al, The Economic Significance of Natural Resources: Key points for Reformers in Eastern Europe Caucusus and Asia (OECD, 2011), Available at: http://www.oecd.org/env/outreach/2011_AB_Economic%20significance%20of%20NR%20in%20EECCA_ENG.pdf, (last accessed 20 November 2019), at 9.

[2]C. Nwapi, Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries, *Law and Development Review 8:1 (2015),* at 187.

[3]*Ibid.*

[4]GoT (Government of Tanzania). 2014a. Local Content Policy of Tanzania for Oil and Gas Industry. Draft one, April 2014. Dar es Salaam: Ministry of Energy and Minerals, Government of Tanzania. Available at: https://mem.go.tz/wp-content/uploads/2014/05/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf (last accessed 2 October 2019).

[5] M. Weiss, *The role of local content policies in manufacturing and mining in low- and middle-income countries,* (2016), Published by United Nations Industrial Development Organization, Available at: https://www.unido.org/sites/default/files/2017-01/UNIDO_Working_paper_Local_content_policies_FINAL_15803__0.pdf (last accessed 2 October 2019).

[6] Guidelines for Submission of a Social and Labour Plan, Available at: https://www.dmr.gov.za/Portals/0/social%20and%20labour%20plan_guideline.pdf (last accessed 2 October 2019).

Notwithstanding the fact, that LCPs give national businesses the opportunity to accesses contracts in the extractive sector. LCPs ensure that national businesses are given first preference during the competitive tender biddings. Furthermore, sole-sourcing arrangements are reached with national businesses; price matching arrangements, which give local suppliers the opportunity to equal the prices of other suppliers; splitting big contracts into smaller contracts in order to make opportunities for national business; demanding foreign suppliers to subcontract nationally or enter into partnerships with national service providers; foster technical and management training and mentoring; and linking national service providers to other service providers and agencies that encourage technological innovation and supply access to funds.7

LCPs have the capacity to promote linkages between other sectors of the economy. For example, the government of Botswana was likewise keen on cultivating the benefits of the diamond sector to enhance its precious stones, create work and make connections into the remainder of the economy and continue the precious stones' business even after the resources have been exhausted.[8]

Nonetheless, LCPs have the ability to demand petroleum companies to produce goods locally. This refers to beneficiation.[9] The South African Department of Mineral Resources defines beneficiation as: "the transformation of primary material (produced by mining and extraction process) to a more finished product which has a greater export sales value."[10] Whereby, the host government wants to ensure that once the crude oil has been extracted. It should be processed locally into a finished product.[11] For example, in 1944 *República Bolivariana de Venezuela* created a petroleum regulation that forced

[7] A. M. Esteves, *et al, Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors,* (2013), Available at: https://resourcegovernance.org/sites/default/files/Sub_Enhance_Benefits_20151125.pdf (last accessed 2 October 2019), at 18.

[8] *Idem* at 22.

[9] I. Ramdoo, *Designing Local Content Policies in Mineral-Rich Countries*, (IGF, 2018), Available at: https://www.iisd.org/sites/default/files/publications/local-content-policies-mineral-rich-countries.pdf (last accessed at 20 November 2019), at 9.

[10] Department of Mineral Resources Republic of South Africa, *Beneficiation Economics*, https://www.dmr.gov.za/mineral-policy-promotion/beneficiation-economics (last accessed 20 November 2019).

[11] L. M. Pringle, *Immunisation of the African Resource curse by way of Beneficiation*: A Study of South Africa and Mozambique's Emergent Shale Gas Sectors, Unpublished Maters thesis, University of Pretoria, (2018) , Available at: https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=beneficiation+in+petroleum++as+a+form+of+localcontent&btnG= (last accessed 2 October 2019), at 23.

petroleum companies to refine crude oil nationally.[12]This ensures that the value is added into the local economy. Because the local population will be employed in the refinery plants and local transportation will be utilised to transport the crude oil and the local markets will sell the finished product.

Despite the value that LCPs bring into the local economy, they might be in conflict with international investment agreements. Scholars and practitioners have raised concerns regarding the legality of LCPs. It is argued that LCPs are in conflict with IIAs at a bilateral level, in preferential trade or investment agreements, or at the multilateral level. LCPs require foreign companies to employ a greater number of the local population while producing the products or providing the services. This form of performance requirement is seen as discriminatory according to the national treatment principle. The national treatment principle originates from the WTO, it is a principle that seeks to prevent trading partners from discriminating against and among foreign products, services and service providers. The principle requires nations to give foreign goods, services and service providers the same treatment as national goods, services and service providers.[13] For example, Article 10.7 (1) (i) of Japan-Mongolia Free Trade Agreement (FTA) states that, "…no party must require another party or non-party with regards to their investment to employ a certain number or percentage of its domestic population."[14]

Furthermore, LCPs require members to increase capacities of domestic employees and service providers through training, skills and expertise advancement, and the transfer of knowledge and technology. Article 1106 (1) (f) of the North American Free Trade Agreement states that, ..."no member is allowed to compel any obligation in relations to the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or non-party in its jurisdiction to transfer technology, a production process or other proprietary knowledge to a national of its jurisdiction."[15]

Nonetheless, LCPs give subsidies in favour of domestic service providers or local goods. These benefits are not given to "like" foreign products and services providers. Therefore, such conduct is an apparent violation of the national treatment principle. The Subsidies and Countervailing Measures

[12]S. Tordo, *et el, Local content policies in the oil and gas sector*, (2013), Available at: http://documents.worldbank.org/curated/en/549241468326687019/pdf/Local-content-in-the-oil-and-gas-sector.pdf (last accessed 2 October 2019), at 18.
[13] World Trade Organisation, *Principles of the Trading System*, Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last accessed 20 November 2019).
[14] Article 10.7 (1) (i), Japan-Mongolia Free Trade Agreement.
[15] Article 1106 (1) (f), North American Free Trade Agreement.

(SCM) agreement is an agreement that is part of Annex 1A of the agreement that formed the WTO. The purpose of the agreement is to provide definitions of prohibited subsidies.[16] The agreement forbids the use of subsidies that give national goods an advantage or that negatively causes an impact on the interests of other WTO parties.[17] For example, In the Italian tractor case, Italian banks gave favourable subsidies to farmers who purchased locally manufactured tractors, however the same treatment was not accorded to famers who purchased foreign tractors. The panel stated that the subsidy should apply to farmers who purchased foreign tractors as well. Furthermore, it held that the subsidy is inconsistent with GATT because it has the ability to influence the buyer's choice.[18]

1.1.1. Aims of the research

The aim of the research is to determine whether local content policies such as employment requirements, support schemes and local procurement are in conflict with provisions in International Investment Agreements (IIAs).

1.1.2. Objectives of the research

In order to achieve the aim, the research is supported by respective objectives. These include determining the general nature and scope of LCPs; determining the general nature and scope of international investment agreements and discuss the extent to which local content initiatives such as employment requirements, support schemes and local procurement might be in conflict with IIAs. If so establish how these initiatives are in conflict with IIAs.

1.2. Research question

1.2.1. Primary research question

Are "local content policies" in contention with standards of investment in international investment agreements?

1.2.2. Secondary research question

- What is the general nature and scope of LCPs?

[16] Treaties Offices Database, *Agreement on Subsidies and Countervailing Measures*, Available at: http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=578 (last accessed 20 November 2019).
[17] Article 3, Subsidies and Countervailing Measures.
[18] Italian Discrimination Against Imported Agricultural Machinery, Report adopted on 23 October 1958 (L/833 - 7S/60).

- What is the general nature and scope of IIAs?
- What are the possible area of conflict between LCPs and IIAs?

1.3. Research Methodology

1.3.1. Methodology

The research was conducted through a desktop study. The research utilised information from sources such as journal articles, discussion papers, books, international trade agreements and national policies. Illustrative case studies are utilised throughout the study to highlight certain points of contention.

1.3.2. Research parameters

This research mainly seeks to focus on the nature and scope of the LCPs and as well as the nature and scope of IIAs, and further discuss situations in which LCPs may be in conflict with IIA's. The research will be limited to focus on LCPs initiatives such as employment requirements, support schemes and local procurement. However, there are other local content measures that might be in conflict with IIAs but due to the limited word count the research will not consider those measures.

1.4. Relevance of Research

The research contributes to a deeper understanding of the relationship between international trade agreements and local content policies. Furthermore, the aim of this research is to determine whether local content policies constitute a breach of international trade agreements. The research hopes to make a contribution to the policy framework of natural resources as a whole. Lastly, other researchers on this topic may also utilise this research in the future.

1.5. Chapter overview

There will be five chapters in this mini-dissertation. Chapter one is the basic chapter of introduction and background. In chapter two, the research will focus on the historical overview of local content, what local content entails and the possible areas of conflict between LCPs (employment requirements, support schemes and local procurement) and IIAs. In chapter three the research will focus on the historical overview of IIAs, and what IIAs entail.Chapter four will analyse the prospective areas of conflict between IIAs and LCPs through case studies. It will provide the essential evaluation of the effectiveness of both LCPs and IIAs. The findings drawn from the entire studies and suggestions will be summarised in chapter five. Furthermore, this chapter will answer the primary research question of the research.

CHAPTER 2: WHAT DOES LOCAL CONTENT ENTAIL

2.1. Introduction

Petroleum extraction is capital intensive hence most developing countries cannot afford to take on the projects by themselves.[19] These countries invite foreign investors to fund these projects.[20]However, these host countries should also benefit from these projects. Therefore, developing countries who are rich in natural resources have adopted domestic policies such as LCPs to make sure that their nationals benefit from their resources and to ensure economic advancement for their countries.[21]

The utilsation of LCPs in resource rich countries, seems to be directly motivated by the desire to avoid the phenomena referred to as the ''Dutch Disease''.[22] The phenomena originated in Netherlands during the 1960s, after the locating and exploitation of natural gas deposits in the Northern Sea, leading to an increase in the revenue of the country and an increase in the currency of the country.[23] In return this limited the competition between those trading in various sectors of the economy apart from the hydrocarbon sector.[24] Within the context of hydrocarbon production, a country would disproportionally focus on hydrocarbon sector operations and then neglect the advancement of linkages with various sectors of the economy. In turn, this will result in a decrease in exports of other sectors and then lead to de-industrialisation.

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[19] E.G. Pereira, *et al*, Local Content Policies in the Petroleum Industry: Lessons Learned, 4 *Oil & Gas, Nat. Resources & Energy J*. (2019), at 634.
[20] *Ibid*.
[21] D.S. Olawuyi, *Local Content and Procurement Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa*, (OIES, 2017), Available at: https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/11/Local-content-and-procurement-requirements-in-oil-and-gas-contracts-regional-trends-in-the-Middle-East-and-North-Africa-MEP-18.pdf (last accessed 20 November 2019) at 1.
[22] D. Kuza, *et al*, *The Oil Economy and the Resource Curse Syndrome: Can Ghana make a difference*? (FES, 2010), Available at: https://library.fes.de/pdf-files/bueros/ghana/10492.pdf (last accessed 22 November 2019), at 8.
[23] T. Gylfason, *Lessons from the Dutch Disease, Causes, Treatment and cures*, (2001), Available at: https://notendur.hi.is/~gylfason/_borders/pdf/statoil22.pdf (last accessed on 20 November 2019), at 1.
[24] W. M. Corden, Booming Sector and Dutch Disease Economics: Survey and Consolidation, Vol. 36, No. 3 *Oxford Economic Papers, New Series*, (1987), at 359.

If the resource rich countries utilise local content policies very well this could bring enormous benefits to their nations.[25]An example can be drawn from the now-developed nations. For example, the United States of America promoted its local refineries by discriminating against imported gasoline.[26]

2.2. Historical Overview of Local Content

During the 1960s, Norway made discoveries of oil. The Norwegian government had no knowledge on how the petroleum sector works.[27]The projects were capital intensive and risky and required private companies to invest in these projects. However, the government had a desire to gain the best benefits for its nationals and ensure economic development for the country.[28]During 1972 the government of Norway established a joint venture with international oil companies. This lead to the formation of Statoil a Norwegian state owned company. The government ensured that its nationals were given jobs in the hydrocarbon sector. The government ensured that the employees gain sufficient knowledge and qualifications to comply with the required standards in the hydrocarbon sector.[29]

However, as years went by the Norwegian government decided that oil operations must be taken onshore.[30] Furthermore, oil and gas exploration, development and production must be undertaken locally. This was motivated by the desire to benefit the locals and future generation.[31] The oil companies were forced to move their operation offices locally, to enhance a direct relationship amongst purchasers and local sectors.

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[25] B. Oyewole, *Overview of Local Content Regulatory Frameworks in Selected ECCAS Countries*, (UNCTAD, 2018), Available at: https://unctad.org/en/PublicationsLibrary/ditccominf2018d4_en.pdf (last accessed on 20 November 2019), at 3.

[26] BISD, 3hS/160 (17 June 1987).

[27] P. Heum, *Local Content Development; experience in oil and gas activities in Norway*, (2008), Available at:https://openaccess.nhh.no/nhhxmlui/bitstream/handle/11250/166156/A02_08.pdf?sequence=1 (last accessed 4 November 2019), at 1.

[28]A. Kinyondo, *et al*, *Local content requirements in the petroleum sector in Tanzania: A thorny road from inception to implementation?*, (CMI, 2016) , Available at: https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2475316/Local%20content%20requirements%20in%20the%20petroleum%20sector%20in%20Tanzania%3A%20%20A%20thorny%20road%20from%20inception%20to%20implementation%3F?sequence=1&isAllowed=y (last accessed 5 October 2019), at 9.

[29]C. Mathieu, *Local Content Strategies in Oil and Gas Sector: How to Maximise Benefits to Host Communities*, (IFRI, 2015), Available at: https://www.clingendaelenergy.com/inc/upload/files/IGU-2015_Local_Content_TF3_IGU_Final_May_2015.pdf (last accessed 4 November 2019) at 6.

[30]*Ibid.*

[31] S. Holden, Avoiding the Resource Curse the Case Norway, 63 *Energy Policy* (2013), at 870.

The government then formulated a supply policy.[32] The objective of the policy was to ensure that only local firms were permitted to provide services to the oil and gas sector and ensure that petroleum investments create jobs in the nation.[33] Local content requirements were incorporated into petroleum contracts. Foreign companies were required to employ local employees in petroleum operations. Furthermore, foreign companies were required to breakdown supply contracts into smaller parts in order to accommodate national firms, and to teach national businesses the conditions necessary for delivering in compliance with accepted standards.[34]

Another example is the case of Nigeria, which has relied on its petroleum sector for a significant time.[35] However, the country's local suppliers have not enjoyed any benefits from their resources.[36]Most service contracts are given to foreign companies.[37] This results in capital flight, because the products are manufactured abroad and therefore, this creates employment opportunities for foreign nationals.[38] Therefore, there is no value added into the Nigerian supply chain. The National Development Plan (1970-1975) created petroleum as a strategic national resource. The act states that ownership, control and exploitation will be bestowed upon the Federal Government (FGN, 1970).[39] As years went by the government moved towards industrialisation and nationalisation.[40] During 1971, Decree No. 18 of 1971 created and institutionalised the Nigerian National Oil Corporation (NNOC) to gain and govern the nation's interests in the joint ventures with oil companies.[41]

The government owned 80% of Shell Nigeria and 60% of other international oil companies (IOCs) conducting their operations in Nigeria including equity interest in subsidiaries of certain multinational oil

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[32] *Idem* at 10.
[33] *Ibid*.
[34] *Ibid*.
[35] J.S. Ovadia, The Nigerian "One Percent" and the Management of National Oil Wealth Through Nigerian Content, 77 *Science & Society* (2013), at 315.
[36] U. B. Ihua, Local Content Policy and SMEs Sector Promotion: The Nigerian Oil Industry Experience, 5 *International Journal of Business and Management,* (2010), at 3.
[37] *Ibid*.
[38] *Ibid.*
[39] O.I. Akpanika, Technology Transfer and the Challenges of Local Content Development in the Nigerian Oil Industry, 11 *Global Journal of Engineering Research* (2012), at 126.
[40] J.S. Ovadia, *The Role of Local Content Policies in Natural Resource-Based Development in Österreichische Entwicklungspolitik:RohstoffeundEntwicklung* (OFSE, 2015). Available at: https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Oepol/OEPOL2015_web.pdf (last accessed 21 October 2019), at 37-46.
[41] *Ibid*.

service companies.[42] The Nigerian government was highly motivated to ensure that its nationals were employed in the petroleum sector. Therefore, the government passed policies such as the Petroleum Decree No. 58 of 1969 which required foreign companies to hire 75% of the Nigerian population in managerial, professional and supervisory positions within 10 years from the award of the licence.[43]

A further illustration is the case of Angola. Angola nationalised the Portuguese firm *ANGOL de Lubrificantes e Combustíveis*, forming their national oil company *Sociedade Nacional de Combustíveis* (*Sonangol*). Foreign firms were allowed to conduct their operations in Angola only if they agreed to partner with *Sonangol* in projects. However, they were only permitted to acquire 49% ownership in any project. As the years went by Angola passed regulations that promoted the employment of locals in the petroleum sector.[44]

Both Angola and Nigeria moved towards local content policies. Norway influenced other nations to adopt LCPs. In 2002 the Norwegian Agency for Development Cooperation (NORAD) funded the first research of local content in Nigeria.[45]While Norway's Ministry of Foreign Affairs signed numerous cooperation agreements with Angola's Ministry of Petroleum which seek to empower the goals of Angola's participation in the petroleum sector.[46]In 1999 Nigeria gained its democracy. The government adopted LCPs in the petroleum sector.[47] The objective of this policy was to make certain that local businesses partake in the supply chain of the petroleum sector. Furthermore, the policy ensured that locals were employed in petroleum activities and the policy guaranteed economic development for the nation.[48]Meanwhile in Angola, IOCs could only gain access to the petroleum industry if they partnered with *Sonangol*.[49]

[42] *Ibid*.
[43] *Ibid*.
[44] J.S. Ovadia, Local Content and Natural Resource Governance: The Cases of Nigeria and Angola, 1(2) *The Extractive Industries and Society* (2014), at 16.
[45] *Idem* at 39.
[46] *Ibid*.
[47] *Ibid.*
[48] *Ibid.*
[49] Z. Teka, *Backward Linkages in the Manufacturing Sector in the Oil and Gas Value Chain in Angola,* (MMCP, 2011), Available at: http://www.prism.uct.ac.za/Papers/MMCP%20Paper%2011_0.pdf (accessed 4 November 2019), at 12.

The recent experience of local content in Angola and Nigeria currently stand as such. Angola's local content policies were taken from a 2001 technical commission monitoring collaboration among various petroleum institutions in Angola.[50] These such as, the Angolan Chamber of Commerce and Industry, the Ministry of Petroleum and *Sonangol*.[51] The regulations that recommended that certain oil operations must be undertaken strictly by Angolan companies were supported by the authority *Sonangol*'s Directorate of Production (D.PRO) and the Directorate of Economy and Concessions (DEC) have over the awarding of contracts and the Negotiations Directorate's overall coordination of local content.[52]

Through a robust and consistent legal framework Angola has managed to get IOCs to comply with local content policies. The government has further implemented tax incentives in support of local companies.[53] Angola has included local content in the financial sector as well. Passing the laws and regulations that support local financial institutions and compelling IOCs to pay taxes and local service providers with Angolan currency.[54] In Angola small medium enterprises (SMEs) are current service providers of products and services which were formerly provided by international corporations in the hydrocarbon sector.[55] This prevents the risk of capital flight, and ensures that Angolans are included in the petroleum value chain. Angola has managed to create cooperative contracts between IOCs and *Sonangol*. Angola has established a Business Support Centre (CAE)[56], which assists local businesses to win contracts. It helped 309 Angolan businesses to acquire contracts which are worth US $ 213,540,807.[57]The institution further created 4,236 jobs for Angolan nationals.[58]

The Nigerian local content was promoted during 2001 in a workshop.[59] During 2010, Nigeria implemented Nigerian Oil and Gas Industry Content Development Act (NCA).[60] The Act gave the Nigerian population an opportunity to get involved in the hydrocarbon sector.[61] The objective of the Act is to

[50] *Ibid*.
[51] *Ibid*.
[52] J.S. Ovadia, Local Content and Natural Resource Governance: The Cases of Angola and Nigeria, 1:2 *The Extractive Industries and Society,* (2014), at 16.
[53] *Idem* at 40.
[54] *Idem* at 18.
[55] *Ibid*.
[56] Ibid.
[57] *Ibid*.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid*.
[61] M.O. Erhun, The Role of the Nigerian Oil and Gas Content Act in the Promotion of Sustainable Economic Development, 5 *Developing Counrty Studies* (2015), at 114.

ensure that the hydrocarbon sector encourages linkages with various sectors of the economy in order to create greater economic opportunities for the whole nation.[62] Furthermore, the Act seeks to ensure that raw material, engineering components and employees in the Nigerian hydrocarbon sector are sourced locally.[63] The Act outlines that any party wishing to conduct any operations in the Nigerian hydrocarbon sector must promote the objectives of the Nigerian local content.[64]

According to the Act Nigerian businesses will be given first preference with regards to oil field licences if they comply with requirements set by the Minister.[65] Furthermore, the Act establishes a Fund that deals with the implementation of the Nigerian Content Monitoring development.[66] The fund gets its funding from 1% deductions made from any contracts awarded in the Nigerian hydrocarbon sector. To ensure that local content goals are met the Act established the Nigerian Content Monitoring Board which deals with the development of Nigerian local content.[67]

2.3. What local content entails

2.3.1. Defining local content

The percentage of local content during the creation of a product may be characterised in terms of the share of domestic inputs that are utilised in its manufacture, as well as the share of local proprietorship of production businesses.[68]The main objective of a local content policy is to ensure that national companies are given the necessary support in order for them to compete with international firms and to incorporate national industries in various sectors of the economy.[69] Furthermore, local content policies improve national technology development; they create employment opportunities for the locals and promote linkages with other sectors of the economy.[70]

[62] *Ibid*.
[63] *Ibid*.
[64] Nigerian Oil and Gas Industry Content Development Act, 2010, S 2.
[65] Nigerian Oil and Gas Industry Content Development Act, 2010, S 3(1).
[66] *Ibid*.
[67] Nigerian Oil and Gas Industry Content Development Act, 2010, S 103.
[68] *Supra*, note 2, at 191.
[69] *Ibid*.
[70] *Ibid.*

By adopting such policies, governments want to ensure that local communities profit more from the resource extraction activities. Estevez points out that procuring from SMEs and procuring local goods and services can bring significant social and monetary advantages to the communities.[71]

The Nigerian Oil and Gas Industry Content Development Act 2010, States that Nigerian procurement must be characterised by an amount of financial worth added to or developed within Nigerian economy through a systematic advancement of capacity and capabilities by utilisation of Nigerian citizens, raw material and services in the Nigerian hydrocarbon sector.[72] However, the act outlines that Nigerians must be granted first preference regarding employment and services in the hydrocarbon sector. Nigerian raw material must be utilised during the manufacturing process.[73]The act states that "first preference" is granted to administrations supplied within Nigeria, merchandise made in Nigeria and issues of training and occupation.[74] In order to achieve the Nigerian LCPs, the foreign business or individual must be a citizen of Nigeria, or such raw material utilised in the creation of products and businesses are sourced inside Nigeria.

In the case of Ghana, the country's *Petroleum (Local Content and Local Participation) Regulations, 2013 L.I 2204* characterises local procurement as "the quantum or level of locally manufactured materials, workforce, financing, merchandise and services rendered in the petroleum sector value chain and which can be estimated in monetary terms."[75] The statute outlines the relevance of giving 'first preference' to administration supplied within Ghana, products produced within Ghana and to consider Ghanaians in work-related matters.[76] The act does not contain a mandatory clause for preferential treatment to nationals located close to the resource.

Regulation GN 3 of the Tanzanian local content regulation characterises local content as "the added value conveyed to a host country (and regional and local territories in that country) through the

[71]A.M. Esteves, *et al*, Local content in the oil, gas and mining sector: Enhancing the benefits at the sub-national level, The Revenue Watch Institute, (2012), Available at: https://resourcegovernance.org/sites/default/files/SubnationalLocalContentDRAFT.pdf (accessed 20 April 2019), at 4.

[72] J. Ovadia, *Measurement and Implementation of Local Content in Nigeria-A Framework for Working with Stakeholders to Increase the Effectiveness of Local Content Monitoring and Development*, (2013), Available at: http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER-Measurement-and-Implementation-of-Local-Content.pdf, (last accessed 20 November 2019), at 6.

[73]Nigerian Oil and Gas Industry Content Development Act, 2010, S 106.

[74]Nigerian Oil and Gas Industry Content Development *Act,* 2010, S 10(1).

[75]Petroleum (Local Content and Local Participation) Regulations, 2013, Regulation 49.

[76]Petroleum (Local Content and Local Participation) Regulations, 2013, Regulation 9(1).

utilisation of oil and gas".[77] The mentioning of 'regional and local territories' outlines an explicit acknowledgment to focus on territories or districts where resources are obtained when LCPs are implemented.[78] This prospectively grants extractive entities, the social license to operate (SLO) and commit to the development of local communities and accomplish a 'commonly gainful and maintainable' working relationship.[79] This refers to instances where the local community accepts the company's operations. If the community does not feel like they will benefit from the project they may refuse to grant the company consent to operate. Therefore, it is important for companies to ensure that they benefit the communities where the resources are located.

2.3.2. The essential elements of local content

The key elements which are included in most local content policies include the following:

- Ownership: Foreign firms are forced to collaborate with national companies or to open equity to national companies, so that they can acquire licences. The motivation behind ownership requirements is to protect sectors of national interest from being monopolised by foreign companies. The other factor is to assist the advancement of ''national champion'' through the transfer of skills, knowledge and technology.[80] For example, Norway passed laws that set targets and sunset clauses for quantitative regulations. Foreign firms were given mandates to afford national companies first preference relating to matters of procurement if the company was competitive in terms of prices, quality and delivery. This measure resulted in the formation of a national champion, Statoil.[81]
- Maximisation of local procurement and preferences given: Mining and petroleum codes and exploitation agreements give first preference to local firms with regards to matters of services in hydrocarbon operations. These provisions encourage the utilisation of local firms in services

[77] Local Content Regulations GN 3 of 2018.
[78] *Supra*, note 2, at 200.
[79] *Ibid.*
[80] I. Ramdoo, *Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?* , (ICTSD, 2015), Available at: file:///C:/Users/pc/Downloads/UnpackingLocalContentRequirementsintheExtractiveSector-WhatImplicationsfortheGlobalTradeandInvestmentFrameworks-1%20(1).pdf (last accessed 5 October 2019), at 2.
[81] *Idem* at 5.

such as construction, supply or procurement contracts.[82] This may be viewed a method to make the supply chain national in circumstances where varying technologies and inputs are required or used.[83]For example, in Norway, Section 53 and 54 of the Royal Declaration of 1972 requires foreign companies to give first preference to local products if they are competitive in price and quality.[84]

- Beneficiation: The raw materials must be transformed locally through forward linkages. The motivation for this is to ensure that value is retained in the host nation. This enhances economic advancement in a nation because linkages are created with other sectors of the economy.[85]

- Local employment: Petroleum projects demand a huge number of manpower with various qualifications and skills in various stages of the value chain of the project. The foreign company must provide a well-structured plan on how it will improve the skills and knowledge of employees and suppliers, through training, skills and expertise advancement and transfer of knowledge and technology.[86] This assists the host country to enhance and develop skills of the domestic employees and assists in attempts to further gender equality and social inclusion. For example, in Nigeria, 1 percent of the total value of contracts awarded in the upstream sector goes to a Content Development Fund to support training and business support services.[87] However, this preference in favour of locals can be limited. They can only be given first preference in positions that do not require any qualifications.[88]

- Joint ventures, host nations obligate foreign firms to form partnerships with their nations, to make sure that sectors of national importance are not monopolised by foreign firms. This further, ensures that foreign firms pass their skills, technology and knowledge to national firms. Lastly joint ventures foster for the formation of national champions in a sector therefore allowing the nation to benefit from the experience and strengths of a foreign firm. For example, In Angola *Sonangol* the State National Oil Company (NOC) is the custodian of Angola's oil sector

[82] T. Lauriol, *et al*, *Oil, Gas and Mining Law in Africa*, (Juta, 2018), at 394.
[83]*Ibid.*
[84]B. C Asiago, Rules of Engagement: A Review of Regulatory Instruments Designed to Promote and Secure Local Content Requirements in the Oil and Gas Sector, *Environmental and Energy, University of Eastern Finland,* (2017), at 15.
[85]*Supra,* note 10.
[86]*Ibid.*
[87]*Idem* at 5.
[88]*Supra*, note 82, at 392.

and the sole owner of mineral rights. Any company that wishes to participate in the Angolan mineral resources must partner with *Sonangol*.[89]

2.4. Possible areas of conflicts with IIAs

Local content policies are mandatory by nature; they force foreign companies to give first preference to local business with regards to goods, service contracts and employment and various activities, including technology transfer or research and development take place in the nation where petroleum activities are undertaken. These policies further restrict foreign companies to export a certain percentage of finished products, and place minimum equity participation positions to be filled by the host nation's nationals. These policies have an adverse impact on trade agreements that countries have agreed upon on a bilateral level, in preferential trade or investment agreements, or at the multilateral level at the World Trade Organisation because they seek to impose a numerical target upon other nations.[90]

The trade-related investment measures (TRIMs) agreement is an agreement that outlines measures that have the ability to distort trade and place restrictions on trade. The main goal of the agreement is to encourage free trade. The TRIMS agreement forbids nations from utilising performance requirements that apply to trade in products.[91] Local content policies have the ability to distort trade, countries utilising local content measure benefit at the expense of other nations. Economically local content requirements place a burden on foreign companies, For example, local content requirements that obligate a foreign company to purchase its raw materials or components nationally have a negative effect on foreign companies. Because foreign companies are obligated to purchase raw materials or components locally at a high price and at a low quality, despite the fact that there are other foreign suppliers offering the same raw materials or components at a better price and higher quality. Therefore, foreign companies will not make any profits.[92]

Further illustration can be drawn from export requirements that obligate foreign companies to move their production facilities locally. Such measures have proven to be economically costly for foreign

[89] *Supra*, note 49.

[90] I. Ramdoo*, Local Content Policies in Minerals-Exporting Counties,* (OECD, 2017), Available at:http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2016)3/PART1/FINAL&docLanguage=En (last accessed 5 October 2019), at 12.

[91] A.B. Zampetti, *et al*, *Elimination of TRIMS: The Experience of Selected Developing Countries*, (UNCTAD, 2007), Available at: https://unctad.org/en/Docs/iteiia20076_en.pdf, (last accessed 21 November 2019), at 2.

[92] C.W. Schwarz, Trade Related Investment Measures (TRIMs): Scrutiny in the GATT and Implications for Socialist Countries, 11 *Hastings Int'l & Comp.L. Rev*. 55 (1987), at 60.

companies because they are forced to move their plants from countries whereby production costs are cheap into the host country whereby production costs are high.[93]

GATT is an agreement that was formed after World War II, the goal of the agreement is to encourage stability and promote growth through international trade.[94] GATT is founded upon the principle of non-discrimination. GATT further forbids the utilisation of local content requirements, and states that foreign goods should receive the similar treatment as local goods. Furthermore, Subsidies and countervailing measures (SCM) forbids WTO members from giving subsidies (relating to export performance and use of domestic products) to national companies.[95]

2.4.1. Employment requirements

Employment of local population refers to measures which are utilised to force investors/investments to hire a certain percentage of the local population, while creating the products or providing services. For example, in accordance with Bolivian Hydrocarbon Law, a company may not appoint foreign nationals that are greater than 15% of the total share of employment.[96] Furthermore, companies that enter into contract with the National Oil Company must submit an employment plan demonstrating its preferential method of hiring workforce, buying of products and services and training methods for the national oil company's employees.[97] This form of performance requirement is seen as discriminatory according to the national treatment principle. Article 10.7 (1) (i) of Japan-Mongolia free trade agreement (FTA) states that, "...no party must require another party or non-party with regards to their investment to employ a certain number or percentage of its domestic population."[98]

Employment goes in line with requirements to increase capacities of domestic employees and service providers through training, skills and expertise advancement, and the transfer of knowledge and technology.[99] For example, South Africa requires firms to invest 5% of their yearly payroll to human resource advancement. Firms must implement plans to foster for capabilities. Demonstration can be drawn from Anglo America who has created a Community Fund to foster for training and skills

[93] *Idem* 69.
[94] *Idem* at 65.
[95] *Ibid.*
[96] Article 15, Hydrocarbons Law.
[97] No. 3058, Bolivian Hydrocarbons Law, 2005.
[98] Article 10.7 (1) (i), Japan-Mongolia Free Trade Agreement.
[99] *Idem* at 2.

advancement for local businessmen and SMEs.[100] Article 1106 (1) (f) states that, "...no member is allowed to compel any obligation in relations to the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or non-party in its jurisdiction to transfer technology, a production process or other proprietary knowledge to a national of its jurisdiction."[101]

2.4.2. Support schemes

Supportive policies refer to measures that are adopted to assist domestic firms or local goods but these benefits are not passed to "like" foreign-owned firms and goods. For example, the US policy imposed tax rates which were discriminating on imported petroleum, including internal taxes imposed on specific-foreign goods which were not imposed on "like" national goods.[102] The SCM agreement forbids the use of subsidies that give national goods an advantage or that negatively causes an impact on the interests of other WTO parties.[103] GATS on the other hand forbids subsidies which are granted to nationally owned service providers, but not foreign service providers, it further forbids subsidies granted to nationally incorporated companies that are not granted to service companies located abroad offering services in the nation.[104]IIAs non-discrimination clause forbids governments from offering subsidies or other supportive schemes to nationally owned firms and failing to transfer such subsidies to foreign-owned firms.[105]

2.4.3. Local procurement

Local procurement refers to a mandatory obligation to source certain types or a certain percentage of total spending on products and services from national suppliers.[106] For example, Nigeria's local content Act of 2010 states that various categories of activities must be sourced nationally.[107] The local content

[100]I. Ramdoo, *Local content policies in mineral-rich countries: An overview*, (ecdpm, 2016), Available at https://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-193-Local-Content-Policies-Mineral-Rich-Countries-2016.pdf (last accessed 9 October 2019), at 4.

[101]Article 1106 (1) (f), North American Free Trade Agreement.
[102]BISD, 3hS/160 (17 June 1987).
[103]*Idem* at 28.
[104]*Ibid.*
[105]*Ibid.*
[106]*Ibid.*
[107]*Idem* at 5.

requirements for certain products and services are set between 80% and 100%. Article XI of GATT provides for the general elimination of quantitative restrictions and forbids requirement levels for local procurement. Because, such quotas place an embargo on services and products imported.[108]

2.5. Conclusion

Local content policies are seen as economic advancement policies in the resource-rich countries, beyond royalties and taxes. The resource-rich governments and their population view LCPs as a beneficial policy because it ensures that the benefits of mineral resources are distributed fairly among the population and in all sectors of the economy. The policy seeks to enhance the domestic economy by creating jobs for the local population. Where they are lacking in skills and knowledge, the policy has implemented programmes for training the local workforce to ensure that they are fully equipped for the petroleum operations.

LCPs have integrated the local businesses into the economy they have given them an opportunity to compete with the international firms. This is achieved through granting first preference to local businesses who are involved in petroleum contracts. By further, giving local suppliers the opportunity to match the prices of other foreign suppliers, by giving local businesses the opportunity to be sub-contractors in petroleum contracts, through promoting joint venture contracts between foreign service providers and local service provider. Some resource-rich countries have utilised LCPs to force foreign firms to partner with the government through the lifecycle of the project.

However, despite the positives the LCPs bring into the domestic economy. It is argued that they can create a disjoint with IIAs. The LCPs violate the principle of national treatment. The principle aims to promote equal treatment between "like" foreign services and products. However, local content give first preference to domestic products and services and discriminate against "like" foreign services and products. Therefore, defeating the objectives of the national treatment principle.

[108] Tarrifs, Quotas and other trade restrictions, Available at: https://inflateyourmind.com/microeconomics/unit-10-microeconomics/section-3-tariffs-quotas-and-other-trade-restrictions/ (21 October 2019).

CHAPTER 3: INTERNATIONAL INVESTMENT TREATIES

3.1. Introduction

Resource-rich countries are motivated to gain economic advancement for their countries by any means necessary. A primary contributor, in this regard, is by attracting foreign direct investment (FDI). These countries foster FDI through domestic legislation and international agreements.[109]These mechanisms are utilised to reduce the risks placed on FDI, they offer foreign investors a fair and equitable treatment and legal protection for their investments and are constantly passing measures to guarantee the proper functioning of markets. Resource-rich nations become members of IIAs whether at bilateral, regional, interregional or multilateral levels they hope that such agreements can assist in attracting FDI.[110]However, IIAs place a restriction on other policies that governments seek to implement in order to further their economic advancement goals.[111]

3.2. Historical overview

After world war II the perspective of the customary ways of FDI and polices changed. Host countries had goals to capture their domestic economies after decolonisation; they believed that the state should be the custodian of economic activities not foreign companies.[112] Socialist countries excluded FDI in their countries. Meanwhile, developing countries were motivated to regain control over their natural resources from foreign companies. Furthermore, a burden of limitations were placed on foreign firms, entry into developing countries was made tough. The aim for excluding FDI was to ensure that the host nation was in control of sectors of national interest. The permitting of such investments were conditional on certain requirements, to ensure that benefits of these sectors are kept within the value chain of the local economy and were benefiting the host nations investors and nationals in all sectors of the economy.[113]

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[109] K.P. Sauvant, *et al*, *United Nations Conference on Trade and Development, International Investment Agreements: Flexibility for Development*, (UNCTAD, 2000), Available at: https://unctad.org/en/Docs/psiteiitd18.en.pdf (accessed 6 October 2019), at 11.
[110] *Ibid*.
[111] *Ibid*.
[112] K.P. Sauvant, *et al, Trends in International Investment Agreements: An Overview, (*UNCTAD, 1999), Available at: https://unctad.org/en/Docs/iteiit13_en.pdf (last accessed 5 October 2019), at 1.
[113] *Ibid*.

3.2.1. The legal situation up to the Second World War

Public international law was the cornerstone that dealt with issues of allocation of jurisdiction among countries.[114] FDI issues were concerned with the relationship among the host country and foreign investors, these issues were treated like matters of national law.[115] International law dealt with such issues in exceptional circumstances regarding the treatment of the foreigner's property by the host country, rules related to international duties of countries for acts that contravene international law, and the exercise of diplomatic protection by the country of the foreigners nationality.

During the nineteenth century countries did not bother placing control and restriction on private capital transactions.[116] However, during the twentieth century, multilateral attempts to resolve the investment conflicts established the Drago-Porter Convention 1907 for the recovery of public debts.[117] The aim of this Convention was to limit countries from using intimidation to recover debts.[118] During the mid-twentieth century, nationalisation became the new order of the day - countries such as Mexico and nations in Central and Eastern Europe were driven by the desire to nationalise the entire economy or natural resources.[119] When nationalisation took place there were no effective legal frameworks to deal with such issues as is illustrated by the case of Mexico and the United States.[120] The Mexican government nationalised the land and petroleum holding of the United States arguing that they have a sovereign right to control their natural resources. The United States argued that they were entitled to a fair compensation.[121]

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[114] *Idem* 13.
[115] *Ibid*.
[116] *Ibid*.
[117] A. Newcombe, *et al, Law and Practice of Investment Treaties: Standards of Treatment,* (Kluwer law International Publishing, 2009), Available at: https://books.google.co.za/books?id=4fuB9-0_D9kC&pg=PA10&lpg=PA10&dq=Drago-Porter+Convention+1907&source=bl&ots=puxaSQQR5U&sig=ACfU3U11b744nDIAzre6ZNhl4q5X5N_7tA&hl=st&sa=X&ved=2ahUKEwjc_IOv2__lAhVwRBUIHdD7B9U4ChDoATAAegQICRAB#v=onepage&q=Drago-Porter%20Convention%201907&f=false (last accessed 10 November), at 9.
[118] *Idem at 10.*
[119] *Idem* at 15.
[120] *Ibid*.
[121] *Ibid*.

3.2.2. Developments since 1945

After the Second World War steps were taken to implement international principles relating to FDI during the Havana Charter of 1948.[122] The objective of the charter was to guarantee the creation of an International Trade Organisation for the post-war economy, which mainly dealt with international trade (the original General Agreement on Tariffs and Trade (GATT) was founded upon its trade provisions).[123]The charter incorporated important provisions that dealt with investment and competition. The initial proposal of the United States to safeguard the interests of the investor did not get the approval during the last stages of the negotiations because the developing countries raised their concerns about the proposal.[124] The Charter never came into operation. Regional initiatives such as the Economic Agreement of Bogota of 1948 failed as well.

Nationalisation of important sectors took place during the first two years after the war, this adversely impacted on both foreign and domestic companies. Decolonisation took place and countries formerly affected by colonisation made it a priority to take property owned by foreigners.[125] The nationalisation was mainly aimed at taking over the natural resources sector, an illustration can be drawn from Mexico, the president of Mexico nationalised oil fields previously owned by United States of America and Anglo Dutch corporations.[126] After the independence of developing countries they realised that they need FDI in their nations in order to grow their economies. During 1962 Resolution 1803 (XVII) of the United States General Assembly was adopted to settle the disputes of permanent sovereignty over natural resources.[127] The resolution acknowledged the rights of people and countries to enjoy control over their natural resources, and the right to enjoy control over the investments from such resources and nationalise them. However, the resolution further acknowledges that proper compensation must be paid to the foreign nationals whenever their property is being expropriated.[128]

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[122] K.J. Vandevelde, A Brief History of International Investment Agreements, 12 *University of California Davis* (2005), at 162.
[123] *Idem* at 16.
[124] S. Young, *et al*, *Multilateral rules on FDI: Do we need them? Will we get them? A Developing Country Perspective*, (UNTAD, 2004), Available at: https://unctad.org/en/docs/iteiit20043a1_en.pdf (last accessed 22 November2019) at 2.
[125] *Ibid.*
[126] S. Andreasson, Varieties of Resource Nationalism in Sub-Saharan Africa's Energy and Minerals Markets, The *Extractive Industries and Society* (2015), at 1.
[127] *Idem* at 18.
[128] *Ibid.*

During 1957 developed and developing countries joined the European Economic Community. The organisation had the objectives to create regional economic integration. During the 1960s a new era of negotiating bilateral investment promotion and protection agreements commenced.[129]These treaties were successful in nature. However, developing countries rejected them on the multinational level.

After the establishment of the Organisation of the Petroleum Exporting Countries (OPEC), energy conflicts became worse in the world of investment and FDI.[130] For example, in the event that oil prices went down and OPEC did not meet its expected goals. The organisation would achieve its desired goals through export levies, supply cuts or a combination of both.[131] Some nations raised concerns about the restrictions placed on petroleum resources arguing that these measures are quantitative restrictions which violate Article XI:1 of GATT. A conference on International Economic Cooperation was held in Paris during 1975 and 1977.[132] The concerns on petroleum, trade and financing were negotiated during this conference.

There was a debate concerning transnational companies (TNCs). Some saw them as benefiting the host nation, through the transfer of technology and knowledge. Some viewed them as being monopolistic because their goal was to deprive opportunities from the domestic firms. Structures were put in place to monitor the access and operations of TNCs to ensure that they meet the goals set by governments to grow the host nation's economy and benefit the population of the host nation.[133] During 1970 Decision 24 of the Andean Pact was adopted.[134] The adoption was motivated by the desire to screen the procedures and other methods on FDI and on technology transfer.[135] The screening procedures included tax incentives and measures to draw in FDI as well as monitor FDI. During 1976, a

[129]*Idem* at 21.

[130] Council on Foreign Relations, *OPEC in a Changing World*, Available at: https://www.cfr.org/backgrounder/opec-changing-world (last accessed 22 November 2019).

[131] M.G. Desta, The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements, 37:3 *Journal of World Trade* (2003), at 533.

[132] The Paris Conference on International Economic Co-operation, (ODI, 1976) Available at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6602.pdf (last accessed 21 November 2019), at 1-4.

[133]*Ibid.*

[134] A. Preziosi, The Andean Pact's Foreign Investment Code Decision 220: An Agreement to Disagree, 20 *U. Miami Inter-Am. L. Rev (1989*), at 650.

[135]*Ibid*.

Declaration on Investment and Multinational Enterprise was adopted in order to provide TNCs with guidelines on how they must conduct themselves in the host country.[136]

3.2.3. Developments since 1945-1995

The GATT agreement was drafted in Geneva with the purpose of bringing down trade boundaries and levies between member nations. However, the agreement was not intended to be a permanent trade framework but, a backup agreement to help until the international trade organisation (ITO) was set up. The GATT agreement operated properly, however the agreement was substituted with the WTO. A draft for the WTO was drafted and officially supported at the Ministerial Conference held in Marrakesh during July 1994. Under the conditions of the claimed "last act" signed there, the GATT was substituted by the WTO on 1st January 1995.[137]

3.3. What do international investment agreements entail

3.3.1. Aims and objectives of international investment agreements

The ultimate goal of IIAs is to provide foreign investors in a host nation with special international law rights and remedies which safeguard their investment in the host nation. The investor's rights typically include:[138]

- The obligation to give foreign investors national treatment which they afford to national investors in the host nation.
- The obligation to give the most favoured nation treatment to foreign investors. However, that same treatment given to the foreign investor in the host nation who is protected by the treaty must be passed on to local investors as well.
- Fair and equitable treatments, which includes protecting the investor's interests.
- Protecting investors against expropriation without compensation.

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[136] Organisation for Economic Co-operation and Development*, Declaration on International Investment and Multinational Enterprises*, 2011, Available at: https://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf (last accessed 22 November 2019), at 11.

[137] B. W. Wilkinson, *General Agreement on Tarrifs and Trade*, (The Canadian Encyclopedia, 2006), Available at: https://www.thecanadianencyclopedia.ca/en/article/general-agreement-on-tariffs-and-trade (last accessed 22 November 2019), at 1.

[138] H. Mann, *Agreements, Business and Human Rights: Key Issues and Opportunities*, (iisd, 2008), Available at: https://www.business-humanrights.org/sites/default/files/reports-and-materials/IISD-Ruggie-Feb-2008.pdf (last accessed 10 October 2019), at 3.

3.3.2. Types of international investment agreements

3.3.2.1. Bilateral Agreements

Bilateral investment treaties (BITs) were established to create a legal framework of the rules regulating the treatment of foreign property and property of owners.[139] These rules seek to safeguard foreign investors against any forms of nationalisation and expropriation. However, if such nationalisation or expropriation takes place the foreign investors must be given a fair compensation. BITs provide foreign investors with the opportunity to take their profits and other investment funds back to their countries of origin; they afford them the right to most-favoured treatment and national treatment and further provide nations with a dispute resolving mechanism for countries and investors to resolve their trade issues. The goal of such agreements is to reduce the restrictions placed on access of foreign investments in the host nations. This will be achieved through a process whereby members will allow foreign investors to create or obtain investments on equal terms and conditions as national investors.

3.3.2.2. Regional Agreements

Regional investment agreements are independent in regional trade and economic integration agreements. These regional agreements include:

- The European Union. The European Union (EU) is a custom union that promotes economic and political integration. The EU nationals have a right of establishment in all the EU nations and they have offered members an opportunity to freely move capital without any restrictions. The EU countries have removed any trade barriers against member countries in order to grant members fair investment opportunities. The EU promotes the principle of free movement of labour within its borders.[140] Furthermore the, EUs elaborative framework allows it to create and implement new laws at an international stage without getting consent from its member nations. This creates a balance between private rights and public products in circumstances where other international mechanisms cannot reach. The EU has established regulations on the environment and sustainable advancement that is utilised as a

[139] K. Von Moltke*, et al,* Towards A Southern Agenda on in International Investment: Discussion Paper on the Role of the International Investment Agreements, Available at: https://www.iisd.org/sites/default/files/publications/investment_sai.pdf (last accessed 22 November 2019), at 5.
[140] *Idem* at 8.

guideline for advancement of the EU and its member nations, as well as an investment among them.[141]

- North American Free Trade Agreement (NAFTA*)*. The United States, Canada and Mexico were one of the first countries to conclude a treaty covering trade and investments at the same time. NAFTA does not foster for a customs or monetary union or other political and economic integration. NAFTA is more of a customary bilateral agreement procedure which has no secretariat or institutional home. NAFTA is governed by a Free Trade Commission, which runs as a forum for the three trade ministers.[142] The regulations that govern NAFTA are founded on four principles of national treatment with regards to the establishment, acquisition, expansion, management conduct, operation, and sale or other disposition of the investment.[143]

The Most-favoured nation treatment for foreign investors. When there is an issue among the national standard and the MFN standard the favourable treatment must be given to NAFTA members.[144] Minimum international standards of fair and equitable treatment to the investment[145]Furthermore, Minimum international standards of fair and equitable treatment to investment prohibitions on attaching to investments a broad range of requirements and adding conditions on the receipt of an advantage relating to an investment in certain requirements.[146] Furthermore, chapter 11 of NAFTA contains a dispute settlement mechanism between the investor and the host nation regarding expropriation and compensation, right to fair and equitable treatment and national treatment.[147]

- Mercosur. Mercosur is a custom union framework and the institutional structure originates from the EU. However, its methods are similar to those of customary trade agreements. Mercosur treaty is created by means of protocols that need consent from member states. Furthermore, Article 1 of the agreement promotes the liberisation of products and services and factors of production among nations by eliminating any

[141] *Ibid.*
[142] *Idem* at 9.
[143] Art. 1102, NAFTA.
[144] Art.1103, NAFTA.
[145] Art. 1105, NAFTA.
[146] Art. 1106, NATFA.
[147] A.D. Gantz, *Addressing Dispute Resolution Institutions in a NAFTA Renegotiation*, 2018, Available at: https://www.bakerinstitute.org/media/files/files/fa4d9adf/mex-pub-nafta-040218-1.pdf (last accessed 22 November 2019), at 9.

custom obligations and non-tariff restrictions on the liberisation of products and any other measures.[148]

- ASEAN. The Association of South-East Asian Nations (ASEAN) agreement was established as a protective mechanism to protect countries that were in danger of the impacts of the Vietnam conflict. The agreement does not directly give investor rights and it does not have a dispute resolving mechanism for the state and the investor. It creates duties for the member countries to establish demands for investments. The agreement promotes national treatment and most-favoured nation treatment. The agreement promotes investment enhancing measures to be followed by each member country with methods to enhance cooperation. Further, the agreement promotes measures that deal with payment of balances.[149]

- Energy Charter Treaty. The Energy Charter Treaty (ECT) was concluded during 1994 to establish a framework for investment in the energy sector.[150]The ECT applies GATT regulations to non-WTO parties.[151] The ECT created investment systems for two stages of investment: such as the pre-investment system or "soft law" in the access stage and the post-investment system or "hard law" for investments made. The ECT wishes to govern the access phase softy therefore members have taken obligations to establish a stable, equitable, favourable, and transparent conditions to cater for investors and other members, including an obligation to give their investment fair and equitable treatment.[152] Members have undertaken to give foreign investments the same treatment as they give to their own investors and limit exceptions in order to set aside existing restrictions.[153] The ECT enforces "hard law" commitments through international arbitration.

[148]Asunción Agreement, 1991.
[149]*Idem* at 11.
[150]*Ibid.*
[151] A. Jimenez-Guerra, *The World Trade Organization and Oil,* (Oxford Institute for Energy Studies, 2001), Available at: https://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/SP12-TheWorldTradeOrganizationandOil-AJimenezGuerra-2001.pdf (last accessed at 7 October 2019), at 46.
[152] Article 10, ECT.
[153] *Idem* at 47.

3.3.2.3. Multilateral Agreements

There are only two multilateral investment agreements under the World Trade Organisation (WTO), these such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Investment Measures (TRIMs). [154] They follow an indirect method to address the issues of investment. There are limited rules of investment aimed at the promoting the most-favoured nation treatment and various stages of transparency for services that are fostered for through domestic presence in the foreign nation under the GATS.

WTO members have their own-listed conditions which foreign service providers must comply with in order for them to gain access into the host countries' market. The TRIMs agreement, deals with problems relating to trade in goods produced or utilised through an investment.[155] Both these multilateral agreements aim to ensure that its members promote the national treatment for trade in goods and services and refrain from utilising quantitative conditions on imports or exports.

3.4. Conclusion

IIAs were created after World War II mainly after the era of colonisation. Resource-rich countries were on a journey to regain their independence and the first step they took towards their political independence was to regain economic power. Measures including, expropriation of mineral resources from foreign firms, regaining all economic sectors that were of national interest and by placing a burden of limitations on foreign firms so that they would not have access to their markets were utilised to regain economic power. However, these methods created disputes between foreign investors and host nations in international trade.

International investment agreements were established to create good relations between nations. However, the purpose for such agreements was to bring down trade barriers between nations and to ensure growth for FDI across international borders and to protect the investors national interests through protecting their products, investment and population from discriminatory measures created by the host nations.[156]

IIAs seek to promote non-discrimination; through the incorporation of national and most favoured treatment both these principles forbid discrimination against foreign-owned or foreign-

[154] *Idem* 13.
[155] *Ibid*.
[156] DiMascio, Pauwelyn, 2008 at 5.

based companies.[157] Furthermore, IIAs seek to prevent discrimination among "like" service providers, "like" investors and "like" products. Nevertheless, IIAs are dedicated to open the host nation's market to foreign inventors and ensure that they are given the same terms and conditions as national investors. Furthermore, IIAs provide investors with fair and equitable treatment that protects them from any arbitrary, discriminatory or abusive conduct by host nation.

[157] *Idem* at 20.

CHAPTER 4 –POSSIBLE AREAS OF CONFLICT BETWEEN LCPS AND IIAS

1.1. Introduction

LCPs are aimed at enhancing the supply of local products and services and increasing employment for the local population. LCPs mainly obligate producers to procure certain components of its input or labour force from the local economy. Their purpose is to ensure economic development for the local economy. However, LCPs have the ability to distort trade; they are designed to favour the national goods, services, service providers and the local workforce. Therefore such conduct is seen as discriminatory in international trade. However, despite their good intentions to foster for economic development for the local economy LCPs are in conflict with trade and investment treaties at multilateral level, notably in the World Trade Organisation.

1.2. Possible areas for conflict between LCP and IITs

1.2.1. Labour requirements

By requiring foreign firms to employ local employees host nations are automatically discriminating against foreign employees, and the services which they provide. Labour mobility provision protects the workers' rights to access the labour markets of other economies.[158] The GATs market access obligation under Article XVI is dedicated to prevent quantitative import restrictions, the regulation states that members cannot limit the quantity of natural persons supplying service. Therefore, local content requirements on labour restrict services offered by foreign employees because they are prevented from offering their services in countries that have placed restrictions on market access.

In the case of United States – Measures affecting the cross-border supply of gambling and betting services.[159] Antigua argued that the U.S. anti-racketeering laws had an adverse impact on Antiguan residents because, the laws prohibited the Antiguan gambling and betting internet service providers from offering their services to U.S. customers on a cross-border-basis. The U.S argued that they never submitted any gambling commitments to the WTO. Both the WTO panel and appellate body ruled

[158] Q. Delpech, *et al*, *Labour Market Concerns and Trade Agreements: The Case of Employment Policy Provisions*, (2014), Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_237711.pdf (last accessed 9 October 2019), at 5.

[159] WT/DS285/AB/R.

against the U.S. concluding that the U.S. gambling service sector is bound to adhere with WTO laws which include both market access and national treatment obligations without exemption and that the U.S. regulations that imposed an embargo on internet gambling and betting services were in conflict with the WTO market access obligation.

Further illustration can be drawn from China - regulations related to electronic payment services.[160] Chinese government has taken an initiative to come up with measures for China Union Pay (CUP) to control Electronic Payment Services (EPS) for the payment in China's national currency, Renminbi (RMB) in China.[161] The U.S. requested consultations with China. The U.S. argued that China's measures are in conflict with the WTO market access obligation under GATS. A panel was formed and the U.S. argued that China prohibits foreign suppliers of EPS to create their own in the processing infrastructure and network in China or to process payment transactions in China denominated in local currency (RMB).[162]

Therefore, foreign suppliers of EPS are forced to make payments through China's controlled payment network by concluding joint ventures with Chinese companies. The U.S. is convinced that China is acting in conflict with their WTO market access obligation all payment and money transmission services including credit, charge and debit cards to foreign financial companies in foreign and national currency. The panel held that China are in conflict with the market access obligation, because they limited the number of service providers and made CUP the main service provider.[163]

1.2.2. Support Schemes

The TRIMs agreement is an instrument that is dedicated to regulate any investment, measures affecting LCPs which may have a trade-distorting impact, because they were implemented to favour the utilisation of local goods over foreign goods and therefore, have a negative impact on trade.[164] The agreement may have serious implications for industrial policies that are created to enhance the growth of local companies or local goods, or to prevent the impacts of foreign competition in order to protect the domestic industrial capabilities and promote linkages and value addition.

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[160] DS413.

[161] World Trade Organisation, *China-Certain Measures affecting Electronic Payment Services*, Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm (last accessed 22 November 2019).

[162] *Ibid.*

[163] R. Block, Market Access and National Treatment in China-Electronic Payment Services: An illustration of the Structural Interpretative Problem in GATS, 14 *Chicago Journal of International Law* (2014), at 658.

[164] Interpretation given in the panel decision Indonesia – Autos.

GATT Article III states that internal tax or other regulatory measures must give the same treatment to all products or services once they have accessed the market.[165] Furthermore, in support of GATT Article III, Article 2.1 of TBT agreement is established upon the principle of non-discrimination duty which incorporates the most-favoured nation treatment and national treatment, which requires parties not to discriminate among goods imported from various WTO members.[166] Both the regulations forbid industrial policies from treating foreign goods or services less favourably than local goods or services. In addition Article 5.1.1 of the TBT agreement states that members must apply conformity assessment procedures which grant foreign suppliers of "like" foreign products the same treatment which they give to products of other nations or national products.[167] Furthermore, Article 3 of the Agreement on Subsidies and Countervailing Measures forbids the utilisation of subsidies that are conditioned for the utilisation of national goods over imported goods.[168]

Article II of the General Agreement on Trade in Services states that, members must accord the MFN treatment that is to give services and service providers of other members favourable treatment which they give to their services and service providers of any other nation.[169] In addition GATS Article XVII states that members must give foreign services and service providers with regards to all measures impacting the supply of services, favourable treatment that they give to their "like" services and service providers of their own nation.[170]

In the Malt Beverages case[171] Mississippi implemented taxes that were based on the types of grape utilised to produce the wine. Mississippi imposed lower taxes on wine produced from the kind of grapes which are accustomed to warm conditions, and such grapes were grown by vintners located in Mississippi. The panel held that the taxes were utilised to safeguard the interests of the domestic wine producers and that foreign and domestic wine must be treated in a similar manner.[172]

The appellate body was presented with a Japanese regulation taxing domestic manufactured alcoholic beverage Sochu favourably than western alcoholic beverages. Japan contended that the Sochu

[165] Article III, GATT, 1994.
[166] Article 2.1, Technical Barriers to Trade.
[167] Article 5.1.1, Technical Barriers to Trade.
[168] Article 3, Agreement on Subsidies and Countervailing Measures.
[169] Article II, General Agreement on Trade in Services.
[170] Article XVII, General Agreement on Trade in Services.
[171] United States-Measures Affecting Alcoholic and Malt Beverages.
[172] R. E. Hudec, GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, 32:3, *Int'lL.* (1998), at 627.

was not alike or Directly Competitive or Substitutable (DCS) relationship to the imported drinks and that Article III in this way does not have any significant application in this matter. The panel and appellate body discovered that all arrangements of the items concerned were DCS and one sets (Vodka and Sochu) comparative items. They further discovered that japans conduct is infringing Article III.[173]

Japan launched a petition against Canada asserting that Ontario's wind and solar Feed in tariff (FIT) projects are discriminatory in nature and unjust against imported goods by providing local content and was a forbidden subsidy, breached the national treatment standard of the GATT and contravened the TRIMS arrangements. However, Canada argued that its FIT is a type of national acquisition aimed at ensuring cheap renewable energy in Ontario and therefore, not liable to WTO treaties. The AB ruled that the FIT project of Ontario was incompatible with Canada's global trade commitments, such as that the local content prerequisites provided preferential treatment for goods manufactured in Ontario and contravened the national treatment prerequisite of TRIMS arrangements and Article III of the GATT.[174]

In the case of China — Measures affecting trading rights and distribution services for certain publications and audio-visual entertainment products.[175] After becoming a member of the WTO China agreed that it would set aside its measures relating to import and distribution of publications (books, newspapers, etc.) and audio-visual products (CDs and DVD, etc.) by foreign firms to comply with the WTO obligations. However, China still restricts operations in those sectors to domestic Chinese owned companies or companies which the majority investment is Chinese capital.[176]

During April 2007, U.S. filled a complaint against the intellectual property rights systems relating to import and distribution restrictions to Chinese copyright (DS362), and requested a consultation with the Chinese government regarding the WTO agreement, however the parties did not reach an agreement.[177]

The panel was formed and held that the China was in violation of the national treatment obligation under GATS, because foreign owned firms located in China were prohibited from the distribution of imported publications. Furthermore, foreign owned firms were prohibited from doing any master distribution, discriminatory minimum capitalisation requirements and operating period restrictions

[173] WTO Doc. WT/DS8, 10, 11/AB/R of 4 October 1996.
[174]WT/DS412/19 WT/DS426/19.
[175] DS363.
[176]Chapter: 12 Trade in Services, Available at: https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_14.pdf (last accessed 22 November 2019), at 572.
[177] *Ibid*.

placed only on foreign-owned firms when engaging in the wholesale of publications. Furthermore, foreign-owned firms were prohibited from partaking in the distribution of audio-visual products.[178]

1.2.3. Local procurement

European Union law promotes the obligation of non-discrimination, which is incorporated in Article 6 of the EU treaty,[179] and further prohibits the utilisation of quantitative restrictions and measures which create a barrier directly or indirectly in the international trade community.[180] In addition, GATT Article XI forbids quantitative restrictions against imports. Because, these restrictions have the power to destroy the entry of foreign goods and services enjoyed by consumers and consuming industries in the importing nation. Through enhancing prices and reducing the wide range of choice the economic opportunities for these groups are then impaired.[181]

Local procurement requirements are utilised as policies that foster for economic advancement. However, these policies are in conflict with the regulations of trade. They impose an embargo on imports, by dictating foreign firms to source their goods and services locally. Therefore, foreign products and services are not given access into the domestic market.

In Thailand restrictions on importation of and internal taxes on cigarettes (Thai Cigarettes)[182]the government of Thailand implemented an embargo on imported cigarettes. The United States of America launched a complaint against the embargo claiming that the embargo is against Article XI of the GATT.[183] Thailand raised a defence that the embargo is justified under Article XX (b), and is necessary to safeguard its population from dangerous substances utilised to produce these imported cigarettes and

[178] World Trade Organisation, *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last accessed 22 November 2019).

[179] Treaty Establishing the European Economic Community, as amended by the Treaty of European Union (the Maastricht Treaty), art. 6, 1992 O.J. (C224) 1.

[180] J.J Barcelo III, Product Standards to Protect the Local Environment—the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement, 27: 3 *Cornell International Law Journal,* (1994), at 759.

[181] Quantitative Restrictions, Available at: https://www.meti.go.jp/english/report/data/2015WTO/02_03_01.pdf (last accessed 31 October 2019).

[182] Thailand restrictions on importation of and internal taxes on cigarettes, adopted Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991).

[183] B. Neuling, The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate, 22:1 *L.A. Int'l & Comp. L.,* (1999), at 18.

to limit the utilisation of cigarettes in Thailand.[184]However, the panel held that the ban is not consistent with Article XX.[185]

In the case of United States (U.S) restrictions on imports of tuna from Mexico (Tuna Dolphin)[186]will be utilised to further demonstrate the embargo imposed on imports. Tuna-Dolphin originated from the violations of the regulations of the 1972 U.S. Marine Mammal Protection Act (MMPA)[187]. The MMPA demands fishermen conducting their operations in U.S waters to utilise various measures in order to decrease accidental killing of marine mammals such as dolphins.[188]

Furthermore, the MMPA demands the U.S government to impose an embargo on imports of commercial fish captured with fishing techniques that lead to the accidental killing of marine mammals in excess of U.S. standards. During 1988 an environmental NGO filled a complaint against Mexico, claiming that their fishermen were killing dolphins in violation of the MMPA. A federal judge held that Mexico did not comply with the MMPA law and imposed an embargo on tuna imports from the United States.[189]Mexico argued that this embargo is in conflict with GATT Article XI and is not justifiable under GATT Article XX. The panel held the objective of the embargo was to persuade Mexico to change their policies with regards to how they capture fish.

In the case of Shrimp-Turtle[190]the U.S imposed regulations that were aimed at safeguarding the world's endangered sea turtle population. Under the Endangered Species Act of 1973[191] shrimp fishermen conducting their operations in U.S waters were obligated to utilise measures that exclude turtles in their trawling nets when fishing in locations where there is a population of sea turtle. By taking

[184]*Ibid.*
[185]*Ibid.*
[186] United States-Restrictions on Imports of Tuna, Aug. 16, 1991, GAIT B.I.S.D. (39th Supp.) at 155 (1993) (not adopted).
[187] 16 U.S.C. section 1371, (1994).
[188]*Idem* at 20.
[189]*Ibid.*
[190] World Trade Organisation: United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct.12, 1998, 38 I.L.M. 118 (1999), World Trade Organisation: United States-Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 19, 1998, 37 I.L.M 832 (1998).
[191] 16 U.S.C. section 1531 (1994).

such precautions fishermen are allowing shrimp to move towards the back of the net while sea turtles are freed out of the net.[192]

During 1989 the U.S government implemented section 609 of Public Law 101-162,177[193] whereby the U.S government negotiated bilateral and multilateral agreements for the safeguard of sea turtles. Section 609 further forbids the importation of shrimp harvested with techniques that endanger the sea turtle population, unless the president annually certifies that the importing nation has adopted the measures regulating the incidental capturing of sea turtles during harvesting that is similar to that of the United States, the average percentage of the incidental capturing by measures of the harvesting countries is similar to the average percentage of incidental capturing of seas turtles by U.S measures during harvesting.[194]

During 1991 and 1993 the U.S issued guidelines to pass section 609. However, section 609 was applying to nations in the Caribbean and the Western Atlantic. During 1995 the U.S Court of International Trade (CIT) held that the U.S. government must forbid the importation of shrimp harvested anywhere around the world where commercial fishing techniques have the ability to harm sea turtles were utilised.[195] Furthermore, all shrimp imported into the U.S. must be accompanied by a Shrimp Exporter's Declaration Form. The form must state that the shrimp was harvested under circumstances that are friendly to sea turtles and that the shrimp was harvested in waters of a nation that is compliant with section 609.[196]

India, Pakistan, Malaysia, and Thailand launched a petition against section 609. These nations argued that the import restriction was in conflict with GATT Article XI. The WTO Dispute Panel agreed that section 609 is a violation of GATT Article XI, because it bans imports of shrimp or shrimp goods from nations that do not comply with section 609.[197]

1.3. Conclusion

[192] These are turtle excluder devices (TEDs). TEDs is a grid trapdoor installed in a trawling net that allows shrimp to pass while freeing sea turtles that were caught unintentionally back into the ocean.

[193] Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (1989) (codified at 16 U.S.C. section 1537 (1994).

[194] *Ibid.*

[195] ("1991 Guidelines") for assessing the comparability of foreign regulatory programmes with the US programme.

[196] ("1996 Guidelines") for assessing the comparability of foreign regulatory programmes with the US programme.

[197] B. Neuling, The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate, *22 Loy. L.A. Int'l &Comp. L. Rev*. 1 (1999), at 31.

Article III of the GATT is a national treatment principle which requires nations not to discriminate between products from domestic sectors and imports. Article 2.1 of TBT agreement is established upon the principle of non-discrimination which incorporates the most favoured nation treatment and national treatment, which requires parties not to discriminate among goods imported from various WTO members. Furthermore, Article 5.1.1 of the TBT agreement states that members must apply conformity assessment procedures which grant foreign suppliers of foreign products the same treatment which they give to products of other nations or national products. GATS Article XVII states that members must give foreign services and service providers with respect to all measures impacting the supply of service, favourable treatment they give to their services and service providers of their own nation. Furthermore, Article 3 of the Agreement on Subsidies and Countervailing Measures forbids the utilisation of subsidies that are conditioned for the utilisation of national goods over imported goods.

Article XI prohibits the utilisation of quantitative restrictions such as quotas and governs the use of non-automatic licencing methods. The TRIMs agreement forbids the utilisation of performance requirements on investments for goods. GATs market access obligation under Article XVI is dedicated to prevent quantitative import restrictions, the regulation states that members cannot limit the, the quantity of natural persons supplying services. In summary all these above mentioned agreements seek to protect the foreign investors against any discriminating measures employed by the host nation.

CHAPTER 5 –SUMMARY

5.1. Summary

Local content policies are seen as economic advancement policies in the resource-rich countries, beyond royalties and taxes. The resource rich governments and their population view LCPs as a beneficial policy because it ensures that the benefits of mineral resources are distributed fairly among the population and in all sectors of the economy. The policy seeks to enhance the domestic economy by creating jobs for the local population. Where they are lacking in skills and knowledge, the policy has implemented programmes for training the local workforce to ensure that they are fully equipped for the petroleum operations.

LCPs have integrated the local businesses into the economy they have given them an opportunity to compete with the international firms. This is achieved through granting first preference to local businesses who are involved in petroleum contracts. By further, giving local suppliers the opportunity to match the prices of other foreign suppliers, by giving local businesses the opportunity to be sub-contractors in petroleum contracts, through promoting joint venture contracts between foreign suppliers and local suppliers. Some resource-rich countries have used LCPs to force foreign firms to partner with the government through the lifecycle of the project.

However, despite the positives the LCPs bring into the domestic economy. It is argued that they can create a disjoint with IIAs. The LCPs violate the principle of national treatment principle. The principle aims to promote equal treatment between like foreign services and products. However, local content give first preference to domestic products and services therefore, discriminating against “like” foreign services and products.

IIAs were created after World War II mainly after the era of colonisation. Resource-rich countries were on a journey to regain their independence and the first step they took towards their political independence was to regain economic power. Measures including, expropriation of mineral resources from foreign firms, regaining all economic sectors that were of national interest and by placing a burden of limitations on foreign firms so that they would not have access to their markets were utilised to gain economic power. However, these methods created disputes between foreign investors and host nations in international trade.

International investment agreements were established to create good relations between nations. However, the purpose for such agreements was to bring down trade barriers between nations and to ensure growth for FDI across international borders and to protect the investors national interests through protecting their products, investment and population from discriminatory measures created by the host nations.[198]

IIAs seek to promote non-discrimination; through the incorporation of national and most favoured treatment both these principles forbid discrimination against foreign-owned or foreign-based companies.[199] Furthermore, IIAs seek to prevent discrimination among "like" service providers, "like" investors and "like" products. Nevertheless, IIAs are dedicated to open the host nation's market to foreign inventors and ensure that they are given the same terms and conditions as national investors. Furthermore, IIAs provide investors with fair and equitable treatment that protects them from any arbitrary, discriminatory or abusive conduct by host nation.

Article III of the GATT is a national treatment principle which requires nations not to discriminate between products from domestic sectors and imports. Article 2.1 of TBT agreement is established upon the principle of non-discrimination which incorporates the most favoured nation treatment and national treatment, which requires parties not to discriminate among goods imported from various WTO members. Furthermore, Article 5.1.1 of the TBT agreement states that members must apply conformity assessment procedures which grant foreign suppliers of foreign products the same treatment which they give to products of other nations or national products. GATS Article XVII states that members must give foreign services and service providers with respect to all measures impacting the supply of service, favourable treatment they give to their services and service providers of their own nation. Furthermore, Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM) forbids the utilisation of subsidies that are conditioned for the utilisation of national goods over imported goods.

Article XI prohibits the utilisation of quantitative restrictions such as quotas and governs the utilisation of non-automatic licencing methods. The TRIMs agreement forbids the utilisation of performance requirements on investments for goods. GATs market access obligation under Article XVI is dedicated to prevent quantitative import restrictions, the regulation states that members cannot limit the quantity of natural persons supplying services.

[198] DiMascio, Pauwelyn, 2008 at 5.
[199] *Idem* at 20.

5.2. Are "Local Content Policies" in contention with standards of investment and trade agreements?

Local content policies are in conflict with international investment agreements. These such as the General Agreement on Tariffs and Trade, the Agreement on Trade-Related Investment Measures and the Agreement on Subsidies and Countervailing Measures. All these agreements support the principle of "national treatment" that requires WTO member countries to give equal treatment to foreign products, services and service providers as they give to their national products, services and service providers.

In this study we have determined that employment requirements are in conflict with Article XVI of the GATS. These requirements place a restriction on the number of local employees a foreign company must employ in the host nation, therefore denying foreign nationals the opportunity to access their markets. This requirement only caters for local employees and discriminates against foreign employees offering their services. Furthermore, this requirement dictates how a foreign company should run its operations by requiring them to employ a certain percentage of its employees in managerial positions. The requirement is in conflict with Article 10.7 (1) (i) of Japan-Mongolia free trade agreement (FTA) which states that, "...no party must require another party or non-party with regards to their investment to employ a certain number or percentage of its domestic population."

Support scheme measures utilised by host nations are in conflict with TRIMS agreement as they are implemented to favour local goods over foreign goods. Furthermore, support schemes are in violation of Article III of GATT, Article 2.1 of TBT and Article 5.1.1 of the TBT, all these agreements states that foreign products must be given the same treatment as local products once they have accessed the local markets. Once more, these measures are in conflict with Article 3 of the SCM agreement that forbids the utilisation of subsidies that are conditioned for the utilisation of national goods over imported goods. Support schemes are further in conflict with GATS Article XVII which states that members must give foreign services and service providers with regards to all measures impacting the supply of service, favourable treatment they give to the services and service providers of their own nation.

Local procurement requirements are in violation with GATT Article XI which forbids the utilisation of quantitative restrictions against imports. They impose an embargo on imports, by dictating foreign firms to source their goods and services locally. Therefore, foreign products and services are not given access into the domestic market. Furthermore, these measures are in conflict with Article 6 of the EU treaty

which prohibits the utilisation of quantitative restrictions and measures which create a barrier directly or indirectly in the international trade community.

In sum, the study has proven that local content policies are in conflict with international investment agreements as they have the ability to distort trade and the ability to cause conflicts between nations.

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