Legal Assessment of the Kuwaiti Foreign Direct Investment Rules in Light of the WTO Rules

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Abstract

This article represents a legal assessment of the Kuwaiti rules and requirements of foreign direct investment (FDI) in light of the WTO principles of international investment. This paper highlights the importance of FDI for Kuwait as a modern approach for economic development and diversification, explains the international legal framework of FDI in the scope of the WTO, and describes the main categories of restrictions for FDI in Kuwait. The discussion highlights the main contradictions between the Kuwaiti FDI rules and the WTO related obligations that could later become grounds for legal challenges against Kuwait before the WTO.

Keywords: foreign direct investment, TRIMs Agreement, GATT, kuwaiti foreign investment rules, WTO, foreign investment.

1. Introduction

This article aims to examine the level of conformity between Kuwaiti law and the WTO agreements concerning international foreign direct investment. Essentially, the conformity between countries' national rules and the WTO agreements is necessary to avoid the violation of the WTO obligations and to prevent any legal challenge by any member of the WTO.

Foreign investment is one of the major examples of applying the principles of a globalized economy world-wide through multi and bilateral agreements between countries. On a national level countries can rely on foreign investment as a key generator of economic recovery and to improve national industries by encouraging the flow of international capital to the national market. For the foreign investors, who bring their capital to the host countries several reasons entice them to do so such as gaining more returns on their investments in more profitable markets, diversifying the locations of their investments, and sometimes avoiding different types of investment barriers that exist in their national markets.

According to the investment policy hub of UNCTAD, until 2019, the number of bilateral investment treaties (BITs) around the world are 2902 from which 2342 treaties are in force, additionally, the number of treaties with investment provisions (TIOs) are 390 and the treaties in force are merely 319(1). Essentially, the main conditions for investment agreements have to be developed and applied according to the concepts of a globalized economy(2).

Overall, all the potential benefits for host countries from FDI include a combination of advanced technology, better management, improving production procedures, new quality control techniques, access to finance and markets that may not be available locally(3); in addition to reducing poverty, increasing living standards and creating new employment opportunities.

Direct investment is legally defined by the Kuwait Direct Investment Promotion Authority (KDIPA) as an investment where the Investor, individually or with the participation of another investor, employs his capital directly through an

(1) UNCTAD, ‹Investment Policy Hub› <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> [accessed 16 March 2020].
(2) Leon Trakman, ‹Bilateral Trade And Investment Agreements' <https://www.researchgate.net/publication/228183220_Bilateral_Trade_And_Investment_Agreements>, p. 3.
(3) Douglas H. Brooks and Emma Xiaoqin Fan and Lea R. Sumulong, «Foreign Direct Investment in Developing Asia: Trends, Effects and LikelyIssues for the Coming WTO Negotiations» <https://www.adb.org/economics> [accessed 2 March 2020], p. 7.

Investment Entity in the State of Kuwait licensed under its law[(4)].

Foreign investment in general has two main forms which are foreign direct investment (FDI) and foreign indirect investment or as it is often referred to as foreign portfolio investment (FPI)[(5)]. The main difference between the two forms is related to the level of control the investor has over companies in other states. FDI is the basic approach of investing in other countries, which maintains the foreigners' right to ownership of the project and their right to manage it[(6)].

FDI is defined also as a long-term investment by a non-resident, but with a control of 10% or greater share[(7)]. In other words, FDI aims to acquire an asset in another country intending to own and manage that asset in the form of a branch or a subsidiary[(8)].

Practically, FDI manifests in different forms ranging from the development of new buildings, expansion of existing ones, acquisitions of companies, and in the case of multinationals, mergers, and relocations[(9)]. On the other hand, those involved in FPI aim to benefit by investing in shares and bonds of a company as shareholders without controlling the actual company[(10)]. FPI pursues the profit that results only from the fluctuations of the market; such investments are short-term and highly volatile in nature such as stocks and bonds[(11)].

For the host country and to stimulate foreign investment, many rules and regulations have to be introduced or modified to create an attractive legal environment for foreign investment and minimize restrictions against foreign investment. Therefore, Kuwait legislated Law No. 116 of 2013 regarding the Promotion of Direct Investment in Kuwait besides modifying other laws such as company law, and other laws and regulations that have connections to

(4) Law No. 116 of 2013 Regarding the Promotion of Direct Investment in the State of Kuwait.
(5) Wu, J., Li, S. and Selover, D. D. (2012) ‹Foreign Direct Investment vs. Foreign Portfolio Investment The Effect of the Governance Environment›, *Management International Review* 5(52), p. 645.
(6) Mabrook, Nazeeh, The Economic Impact of Foreign Investments – a comparative study – Dar Al Feker Al Jame'e, Alexandria, 2013, p. 34.
(7) Andrew Baum and Caludia Murray, 'Understanding the Barriers to Real Estate Investment in Developing Economies' <https://ideas.repec.org/p/rdg/repxwp/rep-wp2011-08.html> [accessed 11 January 2020], p. 10.
(8) D. Wallace Jr and D. B. Bailey, (1998) ‹The inevitability of national treatment of foreign direct investment with increasingly few and narrow exceptions›, Cornell Int›l LJ, 31, pp. 615-616.
(9) Andrew Baum and Caludia Murray, op.cit., p. 10.
(10) Wu, J., Li, S. and Selover, D. D. (2012) ‹Foreign Direct Investment vs. Foreign Portfolio Investment The Effect of the Governance Environment›, *Management International Review* 5(52), p. 645.
(11) Pailwar, Veena, Economic environment of business, PHI learning private limited, third edition, Delhi, 2018, p. 416.

foreign investment.

From an international legal perspective, many organizations and agreements have existed to improve international trade and investment by obliging countries to minimize national restrictions against foreign goods and foreign investment. The leading example is the World Trade Organization (WTO), which has many rules in different agreements that apply to international investment, even though the main and direct aim of the WTO is to liberalize international trade from direct and indirect trade impedements applied by countries.

This is because of the undividable connection between international trade and international investment. The main example of agreements of the WTO to limit the application of restrictions on foreign investment is the Agreement of Trade-Related Investment Measures (TRIMS agreement).

The agreement aims to minimize countries' restrictions on the trade of raw materials/ goods and services relating to foreign direct investment. Also, the WTO has the General Agreement on Trade in Services (GATS), which addresses foreign investment in services(12).

The violation of the WTO agreements by its members in the area of international investment stems from national measures and rules that the investment hosting countries take to create favored conditions for certain investors to attract them, or some conditions to maximize the gain from foreign investment as part of national economic policy. Examples of measures that hosting countries may apply on foreign investment include the guarantee favored conditions for certain investors, the condition of local input requirements, tariffs on certain imported goods and services, and measures to create trade balance. Such measures or others that could be applied in any way represent a breach of the major principles of the WTO.

The central hypothesis of this article is that national measures used to influence FDI could become a real challenge and threat to the progressive liberalization of international trade, and potent alternatives to tariff and non-tariff trade barriers (NTBs). The idiosyncratic nature of NTBs stems from the fact that these measures manifest themselves in many different forms of incentives for certain investors and limitations for the importation of certain goods and services, all of which are essentially going to work against the principles and obligations of WTO agreements.

(12) According to the WTO website, Kuwait is a member in the WTO since 1 January 1995, and a GATT signatory on 3 May 1963.

Overall the paper is a critical appraisal of the current WTO and Kuwaiti rules and regulations related to the main forms of foreign investment in light of each other to assess the level of cohesion and contradiction between them. Furthermore, the paper will assess in general whether the WTO rules are suitable for further liberalization of international trade where different members have the right to develop their national rules and requirements to influence foreign investment in certain industries or certain investors.

The paper is divided into six major sections. The first one is the introduction, the second section is a short summary about the Kuwaiti economic visison about foreign investment in general. The theird section explains the legal environment of FDI in. this psection exaplins the main laws related to FDI in Kuwait and the form of incentives Kuwaiti govrnments offers for FDI. The forth section highlights the rules of the WTO that have requlate FDI in order to minimize international trade restricons. The fefthis section explains the main retsricon that FDI faces in Kuwaiti market which are considrded as breaches to the WTO rules.

2. Foreign Investment in Kuwait

The state of Kuwait and as a part of its attendance in applying the concepts of globalized economies, the country has adopted an ambitious strategy called New Kuwait Vision 2035. The benefits of this strategy were expressed clearly by his highness, the former Emir of Kuwait, when he stated "[Vision 2035] will transform Kuwait into a financial and trade center, attractive to investors, where the private sector leads the economy, creating competition and promoting production efficiency".

The main rationale for Kuwait to encourage FDI is to diversify its national economic activities and minimize its dependence on revenue from oil export. Kuwait is one of the Gulf Cooperation Council (GCC) countries that are rich in oil reserves and a large part of its gross domestic product (GDP) and the economy is reliant on revenue from the exported oil at competitive prices, which compromised between 80% to 90% from 2000 till 2007. During those years, the average Brent crude oil price in dollars per barrel went up quickly from US$28.66 in 2000 to US$96.94[(13)]. However, the price of oil has been fluctuating and falling since 2008[(14)]. Therefore the country needs to look for alternative ways to generate revenues and create new job opportunities.

(13) Rubina Vohra, 'The Impact of Oil Prices on GCC Economies', Journal of Business and Social Science, Volume 8 (2017), pp.7-8.
(14) Rubina Vohra, op.cit., pp.7-8.

Until the first quarter of 2020, Kuwait has engaged in 83 Bilateral Investment Treaties (BITs) (66 of which are in force) and 12 Treaties with Investment Provisions (TIPs) (6 of which are in force)[15]. One of the major investment projects is the Silk City Project between China and Kuwait. The value of the first phase of the agreement is about $86 billion. This is a major step by the Kuwaiti government towards adopting the foreign direct investment model.

FDI in is considred Kuwait attracts about .029% FDI worldwide, which is considered the lowest in the GCC countries[16]. According to UNCTAD's World Investment Report 2020, FDI inflows in Kuwait was about USD 104 million in 2019, while it was USD 204 million in 2018[17]. The drop in investment inflow is believed to be related to the lack of diversity in the economy and the fall in oil prices[18]. Overall, the bulk of investments are directed towards the oil & gas sector, followed by real estate/construction and financial services[19].

According to the 2020 Doing Business report, which was established by the World Bank, Kuwait ranks relatively low compared to other Gulf countries. The rank of the country concerning start business is 83rd out of 190 economies this year, which represents an improvement upwards by 14 spots from 2019. The improvement was related to the positive changes to the procedures on how to start a business, as well as obtaining credit and construction permits[20].

3. The Legal Environment for FDI in Kuwait

In general, any country willing to promote the inflow of foreign investment needs to have the following: Firstly, a suitable legal environment to facilitate the procedural aspect of investment and secondly different forms of incentives and favored conditions through rules and regulations designed to influence the flow of foreign investment in the long term[21]. It needs to establish the appropriate legal environment that helps foreign investors to work comfortably in an environment that helps create investment opportunities with the presence of guarantees, benefits, and exemptions that can stimulate the private sector

(15) UNCTAD, ‹Investment Policy Hub› <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> [accessed 16 March 2020].

(16) F. Al-Jabsheh and S. Al-Qudsi and M. Hajeeh, (2018) "An Assessment of Private Investment Behavior in Kuwait, Available: Kuwait Foundation for The Advancement of Sciences (Accessed 29/8/2020), p. 54.

(17) (UNCTAD), United Nations Publications 2020, World Investment Report 2020, UNCTAD, p. 240.

(18) NORDEA 2020. Foreign direct investment (FDI) in Kuwait.

(19) Foreign direct investment (FDI) in Kuwait, https://www.nordeatrade.com/no/explore-new-market/kuwait/investment, accessed on 20/8/2020.

(20) World, B. (2020) Doing business 2020, World Bank Publications, pp. 4-6.

(21) Douglas H. Brooks and Emma Xiaoqin Fan and Lea R. Sumulong, op. cit., p. 12.

and attract foreign investors[22].

The legislations related to business and investment in Kuwait have recently changed greatly and became more liberal and capable of adopting the concepts of a globalized economy. These are essentially opposite to the previous laws that had nearly excluded foreigners from having businesses in the country. Most of the national laws were aiming to sustain the wealth of the country within the citizens and to preserve the assets from fleeing over borders.

Recently, massive changes were made to many laws and regulations that have now become more open and encouraging foreign investments. The state of Kuwait started upgrading its economic policy through massive modifications for the existing laws and related executive regulations that have a direct connection to foreign investment, as well as legislating new laws needed to create a suitable legal environment to achieve the state's new economic investment vision.

The following sub-discussion will be about commercial trade, company, and direct investment promotion laws as main laws related to foreign investment. The following discussion will highlight the structure of laws that are related to foreign investment, and emphasize the needed improvement.

3.1 Commercial Law No. 68 of 1980 and Its Amendments

Commercial Trade Law is a major law that contains the main legal rules of conducting or owning any forms of business in Kuwait. The original law was created in 1961, and replaced by a new modified law number 68 in 1980. The law does not regulate FDI directly, but it contains two articles of 23 and 24 as general conditions to allow the non-Kuwaiti individual or legal entities to practice or commercial activities or own commercial entities in Kuwait. The contradiction between Kuwaiti rules about the citizenship of owing businesses and the WTO rules in Kuwait is explained later in this paper.

Article 23 does not allow foreigners to participate in any business-related venture in Kuwait unless partnered with one or more Kuwaiti individuals who shall own no less than 51%. That article aims to grant the national (Kuwaiti) partners the majority of the capital and control over the management of any business projects. Article 24 also bans any foreign company from establishing a branch in the state of Kuwait and has restricted its practice of any business unless through a Kuwaiti agent.

(22) Article 12 of Havana Charter for an International Trade Organization.

3.2 Company Law No. 1 of 2016 and Its Executive Regulations[23]

Article 4 of the Kuwaiti Company Law recognized 7 forms of companies, which include General Partnership Company (Joint liability Company), Limited Partnership Company, Partnership Limited by Shares, Limited Liability Company, Public Shareholding Company, Single Person Company, Joint Venture Company. Furthermore, in article 234 the Closed Shareholding Company was added and in article 243, Holding Company was added to the list. The following discussion explains the conditions related to the nationality of the owner of each company.

a. General Partnership Company

In article 38/7, the Company Law states that Kuwaiti partners shall own no less than 51% of the company's capital. The members of this company shall be severally and jointly responsible for the company's liabilities irrespective of any agreement otherwise

b. Limited Partnership Company

According to Articles 56&57, in this form of companies there are two categories of partners and they are, the joint liability partnership members (who should be Kuwaiti citizens only and own at least 51% of the company capital), and the silent partners who participate in the company by contributing funds to the capital but shall not be responsible for any losses beyond the amount of their contribution.

c. Partnership Limited by Shares

This type of company is similar to the Limited Partnership Company, but its capital has to be divided into shares. Partnership Limited by Shares is a company made up of two types of partners, general partners, who shall be liable with all their assets for all the obligations of the company, and limited partners, who shall only be liable for the obligations of the company up to the amount of the shares they hold in the capital. Concerning the citizenship of partners of the company, the law is clear, but article 61 states that the general partner in this company shall be subject to the provisions that govern a partner in a General Partnership Company, while the limited partner shall be subject to the legal provisions, which govern a shareholder in a Shareholding Company.

(23) Sarbah, Alfred, and Wen Xiao, "Good corporate governance structures: A must for family businesses", *Open Journal of Business and Management*, 3.01, (2015), p. 40.

d. **Limited Liability Company**

According to article 92 of Company Law, it is an association of a maximum number of fifty partners. Each of them shall be liable only to the extent of his membership interest in the capital. Also, the law states that this company shall not be incorporated nor its capital be increased through public subscription. About the amount of the capital and the Kuwaiti citizen ownership, the law in Article 95 refers to its executive regulations to specify the minimum capital of the company and the percentage of the participation of Kuwaiti nationals in the capital of the company.

However, the latest and applicable executive regulations do not explain that. While the old executive regulations that are related to the old version of Company Law No 97/2013 specify that Kuwaiti nationals have to own at least 51% of the capital of the company. Currently, it can be said that the laws and regulations are silent about this matter, which means that they could be subject to different interpretations in practice.

e. **Public Shareholding Company**

It is defined by article 119 of the Company law as a company whose capital is divided into tradable shares of equal value no less than 100 files. This company requires an approval decision by the minister of trade and business. This form of company is used for major businesses, and the Kuwaiti laws specify that insurance, banking, and transportation businesses have to be conducted through Public Shareholding Company. Company law did not stipulate any conditions or put forward answers about the nationality of the founders or the shareholders in general. Instead, it is left to be decided by different authorities, especially The Kuwait Direct Investment Promotion Authority (KDIPA), Central bank of Kuwait, or Capital Market Authority.

f. **A Single Person Company**

Article 95 allows to establish this form of company and to be fully owned by one natural or legal person. Company law and its executive regulations do not contain any specification about whether the company can be owned by foreign investors or not. At the same time, Article 91 of the law stipulates the application on this company the rules and regulations of Limited Liability Company.

g. **Joint Venture Company**

According to the Kuwaiti Company Law this company is exempted from the formal registration. It can be established by an informal agreement between two partners or more, its existence is merely between the partners, its contract shall not be subject to official registration by companies register.(24) Accordingly, this form of company is not suitable for foreign investment in the real sense. This is because rules and regulations specify certain conditions about the types of companies and activities that can be subject to investment laws and registration.

h. **Closed Shareholding Company**

This company is very similar to a Public Shareholding Company, except that it is owned by the founders only. The law allows the establishment of this company by submitting written authenticated documents and does not require a decision by the Minister of trade and business, except in the case when the company is established to hold concessions or monopolies for certain business activities.(25) Concerning the nationality of partners in this company, the law and its executive's regulations do not contain any specific conditions.

i. **Holding Company**

According to Article 244, a Kuwaiti Holding Company has to be in the form of a Shareholding Company, Single Person Company, or Limited Partnership Company. Therefore, the company is going to be governed by its related rules and the rules related to the form of the company that has been selected to operate through. The law does not state any conditions about the nationality of shareholders, but it allows in article 243 the company to invest units in Kuwaiti or foreign companies or funds.

3.3 Direct Investment Promotion Law No. 116 of 2013

Direct Investment Promotion Law No. 116 of 2013 is the successor of Direct Foreign Capital Investment Law No 8 of 2001. The new law represents an advanced stage in promoting foreign investment when it is compared to the old one. The main weakness in the first law is that it lacks specific guidelines for the investors' rights and obligations and the procedures required to establish a

(24) Kuwaiti Company law Articles 76-79.

(25) Kuwaiti Company law Articles 234 and 235

business project in Kuwait[26].

The main target of the new law No. 116 is to minimize the requirements and facilitate the obtaining of a business license, which used to be very complicated under the old law. The law entered into force in December 2014 by the issuance of the executive regulation No. 502 of 2014. The key developments in the new law came in the form of incentives and exceptions that can be given for the approved foreign investors.

One of the main outcomes of the new law is the establishment of The Kuwait Direct Investment Promotion Authority (KDIPA). Within the few years since its implementation, the authority had managed to accomplish many developments in the field locally and internationally. KDIPA is, essentially, a specialized public authority to approve applications of foreign investors and to allow them to enjoy the favored and conditions.

The authority has financial and administrative independence and is connected directly to the minister of trade and commerce. The main general goals of that authority are to create a suitable environment for foreign investors according to the aims of the Kuwait vision 2035 and to bridge the legislative gaps that were imposed by previous laws. The new vision aims to transform Kuwait into a world-class financial and commercial center, as well as diversify and sustain the economy for upcoming generations.

KDIPA has been given duties and the authorization to make major decisions related to approving investment applications and deciding incentives and exceptions that can be offered for foreign investment.[27] Incentives are only given to investors in exchange for the benefits received; projects and investments should offer Kuwait market an increase in the value of chains of commodity knowledge and technology transfer, as well as job creation[28].

Also, KDIPA works towards promoting and attracting value-added and innovation-based direct investment into Kuwait to enhance technology transfer and settlement, KDIPA has organized both internal and external programs that emphasized the vision of the authority.

Other duties of KDIPA are to receive and approve applications for investment

(26) Hussain Abdallah, “foreign investment law disrupts investment promotion, and lacks investment guidelines”, Alqabass newspaper, issue No.10979, 4/1/2004, www.mohamoon-kw.com, accessed on 5/3/2019.

(27) Kuwait Direct Investment Promotion Authority: https://www.kdipa.gov.kw/en/about-2/,

(28) Yousif Al Mutairi, The Legal System for the Investment of Foreign Capital in Kuwait, Master thesis, Kuwait University, March 2009, p. 80, F.N. 53.

licensing and granting incentives according to criteria set in its establishing law, and cooperation with relevant authorities. This entails providing aftercare services and facilitation as well as continued follow-up and monitoring throughout the life of the licensed projects, starting from when the business begins operating.

The applications are filed and filtered online before investors can further represent their projects. Each application is received, studied, and analyzed within a period of 30 days; pending approval the project is then assigned to an account manager as a representative of KDIPA to facilitate the investors' needs.

Other major positive aspects of the Law No 116 of 2013, is that it allows in article 12 after the approval of KDIPA that the percentage of foreign ownership for businesses can reach up to 100% in several sectors. The law provides incentives for investors such as tax exemption, investors, and their staff to have the right to transfer their profits, capital, or any gain abroad, the disposal of their shares, or participation in the investment entities.

The industries covered by the FDI Law that allows 100% foreign ownership, include infrastructure (water, power, wastewater treatment, and communications); insurance; information technology and software development; hospitals and pharmaceuticals; air, land, and sea freight; tourism, hotels, and entertainment; housing projects and urban development; and investment management.

3.4 Kuwaiti Incentives for Foreign Investment

FDI law in Kuwait contains different forms of legal guarantees or incentives for investors, which include the following.

3.4.1 Tax Exemption

According to Article 1 of Law No 2 of 2008, foreign companies investing in Kuwait, directly or indirectly, are liable to pay corporate tax which is fixed at 15% of net taxable income. Additionally, KDIPA has the right to offer further privileges on tax exemptions from income tax or any other taxes for a period not exceeding ten years from the date of the actual commencement of operations of the licensed investment entity.

Similarly, companies are exempt for any expansion of an investment entity, licensed under the provisions of its law, from taxes for a period of no less than the duration of the exemption granted to the original investment entity as of the date of commencement of production or actual operation of the expansion[(29)].

According to the executive decree no. 76 of 2018, issued by the director manager of KDIPA, tax exemptions may also be granted through KDIPA for investing companies that participate in national labor training in technical and professional aspects. The decree also includes tax exemptions in exchange for contracting with national suppliers of resources and services, in the condition that such resources are relevant and of importance for the investment line of work[(30)].

3.4.2 Complete Ownership by Foreign Investors

Kuwaiti investment laws mentioned some exceptions which may allow foreigners to own more than 49% and up to 100% are found in some rules and regulations. KDIPA law no. 116 of 2013 article 12, clause (1) states that a foreign investor is entitled to own 100% of his company's capital, with no further explanation about whether the capital is monetary funds or other assets[(31)].

The executive regulation of Investment law,[(32)] states that the foreign investor might obtain a 100% share of the capital of a shareholding company, or a limited liability company, or a single-person company, or a branch of a foreign company licensed to operate in the State of Kuwait for the purposes of Direct Investment, Representative offices having the sole purpose of preparing market studies and production possibilities without engaging in a commercial activity or activity of commercial agents.

It further states that the Board shall set the principles and rules in this regard[(33)]. In addition, Article 8/6 of the executive regulation Module Eleven which is related to dealings in securities of Capital Market law states that non-Kuwaiti investors may own and subscribe for Sukuk and Bonds, taking into consideration any restrictions stipulated in the Prospectus or any other law on Shares' ownership by non-Kuwaitis.

(29) Kuwait Direct Investment Promotion Authority Law, Article 27, clause 1+2.

(30) Executive decree no. 76 of 2018 concerning the alteration of the mechanism of granting tax exemptions, enforced in Jan. 1st, 2018.

(31) Article (12) The Application for the License shall be submitted in accordance with the provisions of this Law by an Investment Entity specified according to the following cases: 1. A Kuwaiti Company having one of the legal entity forms of companies set forth in the Companies Law promulgated by the aforementioned Decree Law No. (25) Of 2012, which will be incorporated for the purpose of Direct Investment. Foreign participation in such company may amount to 100% of the capital of the company in accordance with the principles and rules set forth under the Companies Law.

(32) Executive Regulations Implementing Law No. (116) of 2013 regarding the Promotion of Direct Investment in the State of Kuwait

(33) Law No. 116 of 2013 Regarding the Promotion of Direct Investment in the State of Kuwait, Article 12.

3. Currency Transfer

Kuwait law had guaranteed the investor's right to transfer abroad their profits, capital, or proceeds resulting from the disposal of his shares or participation in the Investment Entity or the compensation outlined in this Law. Moreover, employees in the investment entity were given the right to transfer their savings and entitlements abroad and did not have it restricted with any obligation[(34)].

3.4.4 Protection from Arbitrary Expropriation and Confiscation

The Kuwaiti law provides a guarantee of the absolute right of ownership and undertakes that no project funds or assets shall be confiscated except if it is in the public interest and only under the applicable laws and with compensation equivalent to the true economic value of the expropriated project at the time of expropriation[(35)].

For example, in the administrate judgment no. 860-932/2014 the courts of the State of Kuwait on 28th of February 2006, ruled for the compensating sum of 195,000 KD in damages for a company for the confiscation of its owned land in Failaka Island without the proper legal procedures, which prevented them from their rightful use of the real estate[(36)].

3.4.5 Use of Land and Real Estate

The foreign investment law of Kuwait sustains in article 27 clause (4) the right to the use of land and real estate.

3.4.6 Use of Their Foreign Labor

Foreign investors operating through KDIPA are free to import their employees and technical staff[(37)]. Imported labor is to enjoy education and health services, however, the authority also encourages the hiring of Kuwaitis by offering additional exemptions for projects that thrive to hire Kuwaiti employees even if not at the beginning of the launch of the project.

3.5 Critical Appraisal of the Kuwaiti Legal Environment of FDI Investment

Despite Kuwait's ambition to diversify its economic activities through the promotion of foreign investment, it can be said that the legal environment of economic policy is still dominated by the concept of preserving the country's economy for the national citizen. This is due to the high level of

(34) Article (22) of law no. 116 of 2013.
(35) Article (19) of the law no. 116 of 2013.
(36) Kuwaiti Court decision no. 860-932/2004, Salah Aljasem network, http://www.saljas.com/
(37) Article 27 clause (5) of law no. 116 of 2013.

state intervention in the national economy where 90% of jobs are provided by the civil services, and in most part, the national budget is used for salaries[(38)].

To encourage the private sector to engage in business activities, the economic policymakers in Kuwait adopt the position of giving the citizen a priority for owning companies or joining as main partners. The national preservation concept can be seen from all the rules related to foreign ownership of businesses. Firstly, foreign businesses are not automatically approved and have to be looked at by authorities on a case by case basis.

Other evidence is that there are many activities which are excluded completely from foreign investments and are considered as sensitive sectors. The excluded sectors include extraction of crude petroleum, extraction of natural gas, manufacture of cook oven products, manufacture of fertilizers and nitrogen compounds, manufacture of gas, distribution of gaseous fuels through mains, real estate, security and investigation activities, public administration, defense, compulsory social security, membership organizations, and recruitment of labor[(39)].

The preservation concept is expressed clearly in all rules related to foreign investment by limiting foreign ownership for each business in Kuwait. The basic rule for foreign business ownership is that foreigners shall not own more than 49% of the capital, which exceptionally can be overturned as an exception in some cases by decision-makers who can approve up to 100% foreign ownership. The aim of giving the national citizen a higher percentage of ownership is to keep the business under the control of the Kuwaiti citizen, which indirectly could discourage foreigners to invest in Kuwait.

4. The WTO and Foreign Investment

The WTO as an organization is one of the major tools of economic globalization. Its first goal is to minimize all forms of restrictions against the movement of goods and services between countries. During the Uruguay Round of international trade negotiations regulations of foreign direct investment became part of the three agreements in the WTO, which are the General Agreement on Tariffs and Trade (GATT) the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Investment

(38) Foreign direct investment (FDI) in Kuwait,
https://www.nordeatrade.com/no/explore-new-market/kuwait/investment, accessed on 20/8/2020

(39) Council of Ministers Decision No. 75 of 2015, KDIPA website,
https://www.kdipa.gov.kw/en/feb-08-2015/ accessed on 20/8/2020

Measures (TRIMs Agreement)[40].

The new development is due to the undeniable fact that international trade and investment today constitute integral parts of economic globalization which has become a reality that can no longer be denied or avoided. Article 1 of the TRIMs agreement states that the agreement only applies to investment measures affecting trade in goods. The GATS, on the other hand, covers investment measures affecting trade in services.

Other core principles of the WTO that help enhance economic globalization are the most favored nation (MFN) and national treatment (NT). Those principles aim to create equal treatments for the competitors of foreign goods or services in host countries so they can be treated on the same footing as the national similar ones.

The WTO deals with international investment through its general rule of the GATT and other rules in other related agreements to minimize restrictions against foreign investment. The main targeted restrictions by the WTO that can restrict the international movement of foreign capital are local content requirements (which require that locally-produced goods be purchased or used), manufacturing requirements (which require that certain components be domestically manufactured), trade balancing requirements, domestic sales requirements, technology transfer requirements, export performance requirements (which require that a specified percentage of production volume be exported), local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions.

The following discussion identifies the main WTO agreements and rules related to the globalization of international investment, as well as countries' obligations when they apply the stated restrictions as part of their FDI policy.

4.1 GATT Rules of Non-Discriminatory

The GATT contains two major general principles, the first one is called most favored nation treatment (MFN) and the second is national treatment (NT), which have to be considered by all members of the WTO when they lay down their national trade rules and regulations. Those principles originally were implemented by GATT to liberalize the movement of goods between countries. After the development of the TRIMs Agreement, as the main agreement related to the liberalization of foreign investment that affects trade

(40) E. M. Burt, (1997) 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization', Am. UJ Int'l L. & Pol'y, 12, pp. 1015-1036.

in goods, non-discriminatory principles of GATT have become applicable on TRIMs that may affect trade in goods or services(41). Those principles are explained in the following discussion.

4.1.1 Most Favored Nation Treatment (MFN)

MFN is a pillar in the international trade system, through which foreign investors or good exporters from many countries have the right to equal opportunities to compete fairly in a host country(42). MFN is implemented in Article 1 of the GATT as a universal principle to improve the benefits of globalization of all economic activities.

The main aim of MFN is to limit any discrimination between businesses and investors' competitors in the host market and for all to have the same trade privileges and concessions that host countries provide(43). When it comes to national measures related to FDI, MFN works as a general obligation to limit the application of national rules in host countries as methods of discrimination between investors.

This is because many of TRIMs rules are related to very complex discriminatory measures; MFN works as a backup general obligation to limit indirect discriminatory measures between investors. In other words, the application of the MFN principle to deal with TRIMs will help make investment requirements in host countries neutral concerning the origin of investment.

According to the GATT 1947, Article I, satisfying the MFN obligation in international investment is based on two main points. First, the national rules and practices of host countries should avoid providing any advantages, favors, privileges, or immunity to any local investors over the other similar form of investment from other countries. Second, any advantage, favor privilege or immunity granted by any member to any investor shall be granted immediately and unconditionally to any other like investment regardless of its country of origin(44).

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(41) TRIMs Agreement Article 2, (Article 2: National Treatment and Quantitative Restrictions1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement)

(42) R. Mahardika and E. Latifah, (2018) 'Varying Application of Most-Favoured-Nation Principle In International Investment Treaty', Yustisia Jurnal Hukum, 7, pp. 392-399.

(43) R. Bhala, (2005) *Modern GATT Law: a Treaties on the General Agreement on Traiffs and Trade,* London, Sweet & Maxwell, p 52.

(44) R. Mahardika and E. Latifah, op.cit., pp. 392-399.

4.1.2. National Treatment (NT)

GATT Article III contains the principle of NT, which obliges countries to treat foreign investor/investment and local similar ones on equal terms. This obligation imposes another non-discriminatory treatment for international investment and trade to complete the MFN obligation. The NT is applicable domestically, and the main condition for its application is that the foreign investments have to satisfy the host country's entry requirements.

4.2 Rules of TRIMs Agreement

The core aim of the TRIMS agreement is the expansion and progressive liberalization of world trade, and the indirect aim is to reduce foreign investment barriers that have a connection with international trade[(45)]. In other words, the TRIMs Agreement does not regulate investment directly but rather deals with investment measures that may distort trade[(46)].

To achieve its goal, the TRIMs agreement adopts the general obligation that national rules and requirements related to investments would be illegitimate if they are not inconsistent with the non-discriminatory principles of the GATT and cause distortion to international trade in goods.[(47)] The connection between trade and foreign investment is due to the ability of the investment to improve economic activities in host countries, and the ability of the investors to gain market access abroad[(48)].

The TRIMs Agreement states clearly in its annex the main type of national requirements countries may use as restrictions against foreign investment, especially those of local content, trade balancing, import substitution, foreign exchange, and export limitation requirements. The agreement states those requirements and obliges countries to take into account the principles of national treatment and most favored nation when they apply them on foreign investment.

4.3 The General Agreement on Trade in Services (GATS)

This agreement aims to liberalize the international market of service providing. It contains a set of commitments and obligations for countries to be considered when they lay down their national rules for service providers.

(45) WTO, 'Agreement on Trade Related Investment Measures' <https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm> [accessed 12 February 2020]

(46) J.-A Crawford and B. Kotschwar, (2018) *Investment provisions in preferential trade agreements: Evolution and current trends*: WTO Staff Working Paper, p. 2.

(47) D. H. Brooks and E. X. Fan and L. R. Sumulong, (2003) 'Foreign direct investment in developing Asia: trends, effects, and likely issues for the forthcoming WTO negotiations', p. 13.

(48) Ibid, p. 5.

Generally speaking, foreign services are provided through cross border supply, consumption abroad, movement of national persona, or commercial presence. The latest method is the most common especially in developing countries and as FDI(49).

When host countries apply restrictive measures against FDI in services that can become a sort of limitation on the number of suppliers, the value of services, the type of entity of suppliers, or the percentage of foreign capital invested to provide services(50).

The agreement in article 2&8 obliges countries to adhere to the principle of MFN and not to give monopoly rights to certain service providers. In Article 17 also, GATS obliges countries to adhere to national treatment principles of treating foreign service providers as they treat their national providers for the same service. Overall GATS contains different obligations to limit the restriction against service providers, whether the service is provided in the form of FDI or any other form.

4.4 The Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures (ASCMs) defines subsidy as any direct or indirect financial contribution by a government or public bodies to national industries to improve their performance. The subsidy includes measures that lower the price to below normal for consumers, make it high for producers, or reduce the production cost for producers and subsequently the cost to consumers(51).

Broadly speaking, subsidies are divided into two types, namely, domestic subsidy and export subsidy(52). This way of distinguishing subsidies is used in the Agreement on Agriculture, which provides different conditions for each type(53). The key difference between the kinds of subsidies is that the domestic

(49) A. Hardin, A. and L. Holmes, (1997) 'Services Trade and Foreign Direct Investment, Industry Commission Staff Research Paper', AGPS, Canberra, Available: Australian Industry Commission. DOI: https://www.pc.gov.au/research/supporting/service-trade-foreign-direct-investment (Accessed 24/6/2020), p. 23.

(50) https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s7p1_e.htm

(51) W. Legg, (2003) 'Agricultural Subsidies: Measurement and Use in Policy Evaluation', Journal of Agricultural Economics, 54(2), p. 179.

(52) J. H. Jackson and W. J. Davey and J. Alan O. Sykes, (2002), Legal Problems of International Economic Relations: Cases, materials and Text on the National and International regulations of Transnational Economic Relations. 4th edn.: West Group.p 767.The different kind of subsidies and their impacts on international trade of goods are explained in chapter 7.

(53) Domestic support and export subsidies are treated as one group because they are based on the same principles as financial incentives for national products unless it is necessary to distinguish between them as the case in of dealing with agricultural support.

subsidy improves the competitiveness of national products against like imported ones within the national market whereas export subsidy improves the competitiveness of national products against similar ones outside the borders and within the international market.

Subsidies distort foreign investment and trade because the financial support for national industries limits the real exercise of international trade rules and principles(54). Subsidies limit international trade competition, especially when exporting countries use allowable subsidies to hide illegitimate financial support to their national industries or go beyond the legitimate level of subsidies. Problems of subsidies also arise when the countervailing measures are used as a counterpart action to offset the adverse effects of subsidies and are not based on a real act of subsidizing by exporting countries.

5. FDI Restrictions and Performance Requirements in Kuwait

Overall, national measures against FDI can make the penetration of foreign markets difficult and costly and in extreme circumstances can lead to a ban on foreign ownership of firms in some sectors(55).

The main examples of restriction for FDI are local content requirements, manufacturing requirements, trade balancing requirements, domestic sales requirements, technology transfer requirements, export performance requirements, local equity restrictions, foreign exchange restrictions, payment restrictions, licensing requirements, and employment of citizen restrictions.

The application of those restrictions in Kuwait is highlighted in the following discussion under three major titles of local content requirements, trade balance requirements, and national administrative measures.

5.1 Local Content and Performance Requirements

Local content requirements (LCRs) are condition applied by host countries obliging investors to utilize a minimum percentage of national labor, material, and parts in their projects(56). The failure to meet the condition of the local content requirement by foreign investors will usually lead to governments of

(54) P. V. d. Bossche, (2005) The Law and Policy of the World Trade Organization. Cambridge University Press. Reprint, 2006, p. 572.

(55) A. Hardin and L. Holmes, (1997), 'Services Trade and Foreign Direct Investment, Industry Commission Staff Research Paper', AGPS, Canberra, Available: Australian Industry Commission. DOI: https://www.pc.gov.au/research/supporting/service-trade-foreign-direct-investment (Accessed 24/6/2020), p. 32.

(56) Rabiu Ado, «Local content policy and the WTO rules of trade-related investment measures (TRIMS): The pros and cons.» *International Journal of Business and Management Studies* 2, no. 1 (2013): 137-146, p. 138.

host countries increasing tariffs or imposing restrictions on imported inputs(57).

LCR essentially contradicts the WTO TRIMS Agreement, which prohibits the use of domestic content requirements, restrictions on imports and exports related to local production, and foreign exchange restrictions(58). LCR is usually used by developing countries that are rich with natural resources to encourage their national industries, especially when it comes to investments that need raw material, oil, or gas(59).

Performance requirements (PRs) are conditions applied to foreign investors as national requirements by host countries to maximize the input of FDI for the national economy(60). Restrictions for FDI stems from the requirements and conditions applied by host countries as part of their national policies to achieve their national economic, political, and social goals.

LCRs and PRs complete each other for the aim of maximizing the benefits of FDI for the host countries of investment.

However, the excessive application of performance on investors can be considered as a breach of the WTO rules, when such application goes beyond a reasonable level. The forms of restrictions and their restrictive impacts of LCRs and PRs in different countries depend on the following: the level of need of each country for FDI, the level of development, the level of strength of national industries, the unemployment level, the availability of local components for industries, and security concerns.

In general, PRs have binding nature and can distort FDI even if they are not imposed by investment agreement or law. This is related to their way of applying them as preconditions for FDI to benefit from the incentives host countries offer(61).

The application of LCRs and PRs by Kuwait is expressed clearly in different laws and regulations. The main examples of performance requirements that are stated in Kuwaiti investment laws are the transfer and settlement of technology and modern management into Kuwait, the need of the local and Gulf market for FDI, contribution to economic diversification, increase in

(57) Douglas H. Brooks and Emma Xiaoqin Fan and Lea R. Sumulong, op. cit., p. 12.
(58) Jo-Ann Crawford and Barbara Kotschwar, ‘Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends’, in WTO<https://www.wto.org/english/res_e/reser_e/ersd201814_e.pdf, [accessed 13 March 2020], p. 18.
(59) Rabiu Ado, op. cit., p. 141.
(60) S. H. Nikièma, (2014) ‹Performance requirements in investment treaties›, *IISD Best Practices Series,* 30, p. 1.
(61) Ibid, p. 2.

national exports, creation of job opportunities and training for the national workforce, contribution to the development of areas that lack similar projects, the level of offered services to the community. Most of those conditions can be misused and become restrictions on FDI and international trade when they violate the non-discriminatory rules of the WTO.

Article 29 of investment law provides that the value, type, duration of incentives, and exemptions granted for investments, each according to its type and nature, shall be connected to the criteria of local content and performance requirements. This is manifested through requiring foreign investors to use national professional and consulting services, use national products, and create job opportunities and training for the national workforce(62).

Additionally, article 87 of the Tenders law states that a foreign contractor is obliged to purchase no less than 30% of its contractual requirements from the local market or from local registered suppliers who are also classified in the list of Public Tenders Central Bureau. The same article also provides that a foreign contractor is obliged to subcontract no less than 30% of original contract work to a local contractor who is also classified in the list of Public Tenders Central Bureau(63). This law indirectly leads to forms of restrictions against foreign investors who may want to apply for public tenders, but find it difficult to meet the requirements.

To sum up, If we assess the LCRs and PRs in Kuwait in light of the WTO rules, it can be said that these requirements are in breach of major principles of the WTO especially those of national treatment(NT) and most favored nation(MFN). The above examples of conditional enjoyment of certain investment incentives if foreign investors meet the local content and performance requirements, in the end, constitute impediments to international trade as it is stated by the TRIMs Agreement.

Such requirements could be challenged before the WTO dispute settlement body like what happened in a similar situation in Indonesia. In *Indonesia–Autos* dispute, the EC, Japan, and the US complained about the Indonesian National Car Program.

This was because the program provides import duty reduction, exemptions, and benefits for using a certain percentage of local automotive parts. The Complainants alleged that Indonesian measures were violating many rules from different agreements, particularly Articles I and III of GATT 1994,

(62) Law No. 116 of 2013 Regarding the Promotion of Direct Investment in the State of Kuwait.
(63) The Tenders law No. 49 of 2016.

Article 2 of TRIMs Agreement, Articles 3, 6, and 28 of the SCM Agreement, and Articles 3, and articles 20 and 65 of the TRIPS Agreement[(64)].

5.2 Trade-Balancing Requirements

Balance of Payment (BOP) requirement aims to create a balance between the value and volume of imported components and the value and volume of exported local products[(65)]. The exceptions originally were in the Havana Charter of the International Trade Organization (ITO), which allowed countries to use import restrictions during a balance of payments crisis[(66)].

Currently, Articles XII and XVIII:B of the GATT allows members of the WTO to apply import restriction measures to safeguard their financial position when they face BOP difficulties. Article XII, which has been elaborated by the *Understanding of the Balance-of-Payments Provisions of the GATT 1994*, sets out the general requirements and limitations for using BOP restrictions in any country.

Article XVIII deals exclusively with the BOP in developing countries and such countries tend to be the major group with BOP problems because their total value of imports is usually greater than their total value of exports which is generally due to their low level of economic development[(67)].

Due to the distort effect of BOP are in essence contradict the principles of the WTO'sTRIMS Agreement, which prohibits the use of restrictions on imports and exports related to local production and foreign exchange restrictions[(68)].

In Kuwait, Article 29 of Kuwaiti Investment law provides that all the value, type and duration of incentives, and exemptions granted for investments, each according to its type and nature, shall meet certain obligations related to performance requirements and lead to a balance in payment.[(69)]

5.3 National Administrative Measures

Countries differ in their administrative policies in their national administrative rules and regulations. These differences could lead to crucial impacts on international trade and investment. However, The stimulation of FDI requires

(64) https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2017_e.pdf, accessed on 2/9/2020.

(65) Unctad (2019) ‹International Classification of Non-Tariff measures, February 2019 version (UNCTAD/DITC/TAB/2019/5)›, p. 41.

(66) S. J. Anjaria, (1987) 'Balance of Payments and Related Issues in the Uruguay Round of Trade Negotiations', The World Bank Economic review, 1(4), p. 671.

(67) M. R. Islam, *International Trade Law of the WTO,* (Oxford University Press, 2006), p. 53.

(68) Jo-Ann Crawford and Barbara Kotschwar, op. cit., p. 18.

(69) Law No. 116 of 2013 Regarding the Promotion of Direct Investment in the State of Kuwait.

very efficient national administrative and technical systems, and not the use of the rules of such a system by host countries as restrictions for the flow of foreign capital.

The major national administrative regulations that have a restrictive impact on the inflow of foreign capital generally include entry permission and application approval, paperwork,customs valuation procedures, customs classification procedures, customs clearance procedures, exchange and other financial controls measures, domestic content and mixing requirements, services rules, price control measures, and advertising and media regulations.

In practice, the problems of administrative regulations arise when those regulations are unclear, complex, or designed to reduce the entry of foreign capital(70). National administrative financial and service rules play a leading role in restricting international trade and investments. Service barriers, for example, maybe found in any trade sector and their negative impacts increase with the importance of the service. Many countries have applied their national administrative requirements in a discriminative way to restrict the flow of foreign goods and capital.

In Australia, for example, the Australian Broadcasting Authority (ABA) requires at least 80 percent of total commercial television advertising between 6:00 a.m. and midnight to be about Australian products(71).

The administrative rules set for obtaining visas and crossing borders for citizens in general and traders, in particular, are a challenge in many developed and developing countries. In the US, for example, there is often an expected delay in crossing its border even for people from the member countries of NAFTA as there are more than 35 statutes which customs can apply(72).

Other countries may require local sponsorship to get a business visa, as is the case in GCC countries(73). Also, countries like Japan have strong restrictions on the provision of foreign skills in the areas of accounting and engineering(74).

Essentially, the complex finance measures and foreign exchange policies set

(70) Roberts, D., Josling, T. E., and Orden, D., 1999 A Framework for Analyzing Technical Trade Barriers in Agricultural Markets. U.S Department of Agriculture, Economic Research Service, <http://www.ers.usda.gov/publications/tb1876/tb1876.pdf> accessed on 15 May 2005, p. 4.

(71) USTR 2004, foreign trade barriers, Office of the United State Representative, p. 14.

(72) D. A. Gantz, (2003) ‹Comparing the Southern Border to the Northern Border and the Issues to be Dealt With at each›, *Canada-United States law Journal,* 29, p. 366.

(73) R. K. Gupta, (1997), Non-Tariff Barriers or Disguised Protectionism. India: Consumer Unity & Trust Society (CUTS), p. 28.

(74) Ibid, p. 28.

by host countries can represent barriers to FDI when they increase the cost of the imported components that investors require[75]. Such barriers will become more burdensome for investors who are obligated to meet a certain level of trade balance and performance requirements. When the administrative rules for specific services like buying insurance policies or using banking operations and other services are complex and unreasonable, they will unquestionably work as effective investment restrictions. In addition, national administrative regulations related to price control could become impediments to FDI when they lead to an increase in the price of imported components.

Concerning Kuwait, despite the massive reform for its economic policy and rules, the inflow of FDI still faces many restrictions that stem from administrative requirements and actions of public authorities. Generally speaking, according to FDI rules, all the decisions related to the permission of entry and incentives granted to each investor is made on a case by case basis and is left up to the officers in charge.

Such freedom given to individual decision-makers can be misused and can lead to arbitrary decisions and corruption[76]. An example of that is the arbitrary decision that can be made by officers to not grant the investor the entry permission, or the types and levels of incentives that can be granted for each investment. These arbitrary decisions can result in extra cost or monopoly.

In comparison with other countries about FDI, Kuwait is not considered very attractive for investors compared to other neighboring countries. According to the World Bank Doing Business 2020, Kuwait ranks 83 out of the 190 countries whereas the United Arab Emirates (UAE) ranks 16[77]. The rank has improved slightly since 2016, which was 86[78]. This low rank for Kuwait is mostly due to the obstacles investors face to establish investment businesses.

Another part of the administrative restrictions for investment in Kuwait is the negative list of excluded activities from FDI. Overall, complex or unclear administrative procedures discourage the inflow of FDI. In other words, national administrative measures related directly or indirectly to FDI have to be reformed in light of the rules of trade and financial liberalization and to

(75) UNCTAD, S. 2005. Methodologies, Classifications, Quantification and Development Impacts of Non-Tariff Barriers. Geneva: UNCTAD, pp. 4-5.
(76) Kuwait scored 40 points out of 100 on the 2019 Corruption Perceptions Index reported by Transparency International. For details https://tradingeconomics.com/kuwait/corruption-index , accessed on 29/8/2020.
(77) World, B. (2020) *Doing business 2020.* World Bank Publications, p. 4.
(78) F. Al-Jabsheh and S. Al-Qudsi and M. Hajeeh, op. cit., p. 24.

fight against corruption[79].

5.4 Restrictions Related to Preferential Trade Agreements

According to Article XXIV of the GATT, two or more members of the WTO are allowed to arrange different forms of regional and bilateral preferential trade agreements (PTAs). The arranged agreements could cover many economic and trade activities, and they have special regulations and favored conditions which would benefit exclusively the partners of the formed group.

According to the preamble of the Understanding of Article XXIV of the GATT 1994, the endorsement of such arrangements would increase the liberalization of international trade between countries that are geographically adjoined, have close economic ties, and share similar cultures and traditions. In practice, PTAs grant special market access to the parties of the agreements; they create special favored conditions that encourage import and export between members, reduce tariff and help improve the movement of capital and investment.

The formation of PTAs could take the form of customs unions, as is the case of the EU, free trade agreements as is the case of NAFTA, bilateral closer partnership arrangements such as that which exist between Australia and New Zealand (AANZFTA), or a political and economic union such as the case of the Gulf countries (GCC).

To ensure that the WTO rules which govern international trade are not breached due to the establishment of PTAs, some conditions must be met. These include that the trade barriers against non-members of the PTAs should not be increased or worsened in comparison with its status before the creation of the new PTAs.

In addition, the WTO must be informed of all arrangements and conditions set under the new PTAs and such agreements must be transparent and available to all members of the WTO whether they are part of these agreements or not (GATT, Article XXIV).

As a member of the GCC, Kuwait is obliged to adhere to GCC Economic Agreement–2002 as a form of PTAs between GCC members. Article 3 in the agreement obliges each member from the GCC countries to allow natural and legal citizens of other GCC members to be treated as Kuwaiti citizens concerning engagement in all economic, investment, service activities, capital

(79) J. Morisset and L. O. Neso, (2002), Administrative barriers to foreign investment in developing countries: The World Bank. Available at: https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-2848.

movement, tax treatment, stock ownership, and formation of corporations.

The state of Kuwait recognized the agreement through law No. 5 of the year 2003[80] Consequently, the conditions of commercial Trade Law and Company law related to the citizenship of owning a business have to be excluded for individuals and legal entities who have the citizenship of any country from the GCC.

In practice, countries in different circumstances have used the PTAs to justify their trade impediments against non-members. For example, Turkey has a customs' union with the EU (ATC) and has claimed that it has the right to adopt quantitative measures against countries that are not part of that union.[81] Based on that attitude, Turkey took quantitative restriction measures against imported textiles and clothing from India, which led to the *Turkey* – Textiles dispute[82].

In this dispute, Turkey did not deny that its measures were inconsistent with Articles XI and XIII of the GATT and Article 2.4 of the A*greement on Textiles and Clothing* but claimed that its measures were justified under Article XXIV[83].

However, the Panel decided and the Appellate Body (AB) confirmed the decision in favor of India because the restrictions were new measures and did not exist during the establishment of the ATC[84].

The Kuwaiti laws give GCC citizens an unconditional right to be treated as Kuwaitis concerning the engagement in all economic activities such as investment, service activities, capital movement, tax treatment, stock ownership, and formation of corporations. Therefore, GCC citizens are not subject to the restrictions applied by Commercial and Company laws on foreigners in general and are allowed to engage in and have full ownership of major business activities.

(80) G.C.C. Economic Agreement–2002, https://www.pai.gov.kw/fi/web/pai/g.c.c.-economic-agreement-2002, accessed on 20/9/2020.

(81) P. V. d. Bossche, The Law and Policy of the World Trade Organization, (Cambridge University Press, 2005), reprint, 2006, p. 657.

(82) *Turkey – Restrictions on Imports of Textiles and Clothing product,* DS34, (*Turkey – Textile*) dispute adopted on 19 November 1999.

(83) WTO, WTO Dispute Settlement: One-Page Case Summaries 1995 – December 2007, 2007, WTO, <http://www.wto.org/english/res_e/booksp_e/dispu_summary06_e.pdf> accessed on 2 February 2007, p. 12.

(84) WTO, WTO Dispute Settlement: One-Page Case Summaries 1995 – December 2007, 2007, WTO, <http://www.wto.org/english/res_e/booksp_e/dispu_summary06_e.pdf> accessed on 2 February 2007, p 12.

On the other hand, foreign citizens of non-GCC countries are obliged to partner with Kuwaitis who should own at least 51% of the business. Such an exception should be considered a breach of the MFN obligation of the WTO.

This is because it discriminates against non-GCC citizens and it does not meet the conditions of Article XXIV of the GATT of transparency, not creating extra barriers for non-members of PTA, and the availability to all members of the WTO. Although it can be argued that the Kuwaiti laws allow 100% foreign ownership of investment business, this right is not unconditional and has to be decided on a case by case basis.

The transparency condition related to the development of PTAs requires direct national legal rules that give foreigners the right to full ownership of the business as is the case with GCC citizens. However, the investment rules in Kuwait are drafted in a way that can be subject to different interpretations and that leads to non-transparent practice by investment decision-makers' authorities. Ultimately, the approval of 100% business ownership for non-GCC foreigners is left in the hands of individuals and it cannot be appealed.

6. Conclusion and Recommendations

This paper has highlighted the importance of FDI for Kuwait as a modern approach for economic development and diversification, the international legal framework of FDI in the scope of the WTO, and the main categories of restrictions for FDI. The conclusion that can be derived is that there is a strong connection between international trade and international investment.

The connection is due to the positive impact of investment on national industries and enabling host countries to become more active in the international market of goods and services as importers and exporters. However, countries with conservative economic policies are not fully adhering to the rules of economic globalization presented by the WTO.

They usually adopt certain policies to attract foreign investment, but at the same time, they enforce requirements on foreign investment as conditions to benefit from certain investment incentives in host countries. The main examples of such requirements that can be used by national authorities are local content requirements, trade performance, and adopting investment-related rules and regulations that are not direct and subject to different interpretations.

The TRIMS Agreement recognizes that certain investment measures can restrict and distort trade. The agreement states clearly that members of the WTO may not apply any forms of measures that discriminate against foreign products or that leads to quantitative restrictions.

As a member of the WTO, Kuwait is required to reform its FDI rules to be in line with the major principles of national treatment and the most favored nation of the WTO. Moreover, Kuwait is required to consider the major aim of the WTO of facilitating international trade and related investment during the application of its national administrative measures and not to use them as indirect impediments against FDI.

In particular, the rules of foreigners' maximum ownership of business and forms and levels of incentives for FDI have to be redrafted to be more direct and to be subject to different interpretations and decisions by different officers. Indirect rules could be misused and can lead to arbitrary decisions, corruption, and the creation of a business monopoly. Making different decisions for each investor or giving priority for national investment could be considered as a breach of the WTO principles of national treatment and most favored nation.

Also, the application of requirements of local content, trade balance, trade performance, and unreasonable restrictions by administrative authorities could be considered as a breach of the WTO rules. Any form of a breach can be used by other members of the WTO as a ground for a legal challenge before the WTO dispute settlement system, and to justify trade restrictions against exported goods from Kuwait by its trade partners.

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Table of Contents

Subject	Page
Abstract	35
1. Introduction	36
2. Foreign Investment in Kuwait	39
3. The Legal Environment for FDI in Kuwait	40
3.1 Commercial Law No. 68 of 1980 and Its Amendments	41
3.2 Company Law No. 1 of 2016 and Its Executive Regulations	42
3.3 Direct Investment Promotion Law No. 116 of 2013	44
3.4 Kuwaiti Incentives for Foreign Investment	46
3.4.1 Tax Exemption	46
3.4.2 Complete Ownership by Foreign Investors	47
3.4.3 Currency Transfer	48
3.4.4 Protection from Arbitrary Expropriation and Confiscation	48
3.4.5 Use of Land and Real Estate	48
3.4.6 Use of Their Foreign Labor	48
3.5 Critical Appraisal of the Kuwaiti Legal Environment of FDI Investment	48
4. The WTO and Foreign Investment	49
4.1 GATT Rules of Non-Discriminatory	50
4.1.1 Most Favored Nation Treatment (MFN)	51
4.1.2 National Treatment (NT)	52
4.2 Rules of TRIMs Agreement	52
4.3 The General Agreement on Trade in Services (GATS)	52
4.4 The Agreement on Subsidies and Countervailing Measures	53
5. FDI Restrictions and Performance Requirements in Kuwait	54
5.1 Local Content and Performance Requirements	54
5.2 Trade-Balancing Requirements	57
5.3 National Administrative Measures	57
5.4 Restrictions Related to Preferential Trade Agreements	60
6. Conclusion and Recommendations	62
References	64