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Review paper

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RECONCEPTUALISING INTERNATIONAL ECONOMIC LAW: TOWARDS COMPREHENSIVE AGREEMENTS ON INVESTMENT AND TRADE (CAITs)

ABSTRACT

There is a need to develop a new term for international economic law that reflects the re-integration of investment and trade in international agreements. Such a reflection is also required in the titles of new comprehensive international agreements. Although titles assigned to international agreements normally have no overriding legal effects, they are descriptors that allow us to make quick judgements and assumptions of their categories and contents. The article argues that BITs and FTAs with investment chapters have been collectively referred to as "investment treaties," however these distinct titles for new trade and investment agreements do not reflect the significant changes they have brought to traditional models. Citing the EU-China CAI as an example, there is a need for a new title for such agreements. The article proposes the title 'Comprehensive Agreements on Investment and Trade (CAITs)' as suitable for such a new generation of international trade and investment agreements. It discusses the proposed title in terms of its descriptive words; "comprehensive," "agreement," and "investment and trade." The differences between "comprehensive" and "deep" in terms of their meanings and implications are also considered.

Keywords: *comprehensive, investment, trade, agreements, EU-China CAI*

1. INTRODUCTION

Today, there are elements that reflect a change in the way that the international system operates. One such reflection is the 're-integration' of trade and investment from separate sub-disciplines. In particular, international trade and investment law are seemingly re-integrating once again from separate sub-

disciplines of international economic law.¹ Accordingly, there have been calls for reforms that reflect the ‘needs of our times’.

In relation to the titles of the new generation of international trade and investment agreements, the article agrees with Debra Steger, a scholar in international economic law. The work of Steger has made reference to the recent actions of the European Union (EU) and China, ‘that call into question the possibility of integrating trade and investment rules’.² Steger has also argued that the re-integration of the investment and trade demonstrates that we need to develop a new term for international economic law, more generally.³ She asks whether we should accept the agreements as they are, and leave dispute settlement systems with the responsibility to bring greater convergence between the trade and investment disciplines.⁴ In response to this question, this article posits that, in accepting the agreements as converging trade and investment, we should first begin with the admission of what the agreements are. Assigning the titles of only ‘trade’ or only ‘investment’ to new generation agreements that reflect both trade and investment elements, does not admit what the agreements substantively are. The observed differences between typical trade and typical investment agreements can be understood as deriving from the fundamentally

¹ The lines between international trade and investment law have become obscure, which has led to the assertion of a re-integration. See eg. Pauwelyn, J., *The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform*, Proceedings of the Annual Meeting (American Society of International Law), 108/ 2014, p. 255–58. Available at: <https://doi.org/10.5305/procannmeetasil.108.0255>. And see: Roger P. A., *The Convergence of International Trade and Investment Arbitration*, 12 Santa Clara J. Int'l L, 35/2013.

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1072.

² Steger, D. P., *International Trade and Investment: Towards a Common Regime?*, Prospects for International Investment Law and Policy, 1/ 2013, p. 156 IN: Roberto Echandi & Pierre Sauvé, eds., Cambridge University Press, 2013.

³ Debra Steger made remarks as part of a panel (*International Trade Law and International Investment Law: Complexity and Coherence*) to ‘consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.’ See: The American Society of International Law (ASIL) 108th Annual Meeting: *The Effectiveness of International Law*, 11 April 2014 video recording at: <https://www.youtube.com/watch?v=g7J7RnQJxM0&list=PL0KFz82Oj8Rbiyr5o8RzJ3pDw9YK9jW8d&index=1&t=3904s>. Also see: The American Society of International Law (ASIL) 108th Annual Meeting: *The Effectiveness of International Law*, 11 April 2014 video recording. The introductory remarks by its moderator, Andrew Mitchell, are available written form at: Andrew Mitchell, *Introductory Remarks by Andrew Mitchell*, Proceedings of The American Society of International Law (ASIL) Annual Meeting 108, 2014, p.251–51. doi:10.5305/procannmeetasil.108.0251. American Society of International Law, International Trade Law and International Investment Law, April 11

⁴ Steger, *op cit*, note 3.

different problems that trade and investment agreements are designed to solve.⁵ For instance, typical trade agreements emphasise state-to-state dispute settlement that can be justified based on the government-to-government nature of trade agreements.⁶ Typical investment agreements emphasise investor-state-dispute settlement that can be justified based on the government-to-investor nature of investment agreements.⁷ New generation agreements provide for both trade dispute settlement and investment dispute settlement in a single agreement. Although the titles assigned to international agreements, such as the new generation agreements normally have no overriding legal effects, they are descriptors that allow us to make quick judgements and assumptions of their categories and contents.⁸ Trade and investment agreements have brought significant changes to the traditional models that are not quite reflected in their titles, as their distinctive names.⁹

Reflecting the impact of these changes, there are scholars who have chosen to collectively refer to BITs and FTAs with investment chapters as 'investment treaties'.¹⁰ There has been an endeavour across scholarship to slot these agreements with overlapping features as either investment or trade agreements. The 'new generation' of comprehensive agreements such as the EU-China CAI continue to sound the alarm on the matter concerning the titles of 'new generation' international trade and investment agreements. The EU-China CAI is

⁵ See: Ralph, O., Staiger, R.W., Sykes, A.O., *Standing in international investment and trade disputes*, Journal of International Economics, 145, 11/ 2023.

⁶ Ossa *et al*, *op.cit*, note 5.

⁷ Ossa *et al*, *op.cit*, note 5.

⁸ It is the content of an instrument not its name, which makes it an "agreement" or "treaty". But with the purpose is to facilitate a general understanding of their scope and function, an overview of the key terms employed in the United Nations Treaty Collection to refer to international instruments, notes that although the titles of international instruments 'may follow habitual uses or may relate to the particular character or importance sought to be attributed to the instrument by its parties' (that normally have no legal effects), they may legally 'suggest the objective of the legal instrument, or of the accepted limitations of action of the parties to the arrangement'. Indeed, the actual intent of the parties can often be derived from the clauses of the instrument itself or from its preamble, but the name of the instrument 'might give a general indication of such intent'. See: United Nations Treaty Collection, *Definition of key terms used in the UN Treaty Collection* at:

https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml.

⁹ The Comprehensive approach on trade and investment agreements has brought significant changes to the traditional models, including the investor-state dispute resolution processes.

¹⁰ For example, Michael Ewing-Chow writes that '...potentially different regimes are created governing the protection afforded to foreign investors in a state which is a Member of the WTO but which has also entered into an *investment treaty*, whether in the form of a BIT or a FTA. [Emphasis added]' See: Ewing-Chow, M., *Thesis, Antithesis and Synthesis: Investor Protection in BITs, the WTO and FTAs*, UNSW Law Journal 548, 33; 30(2), 2007.

a *sui generis* agreement which contains elements of both trade and investment. However, it only has the term ‘investment’ in its title yet it is also thought to be a trade agreement.¹¹ This is still so, even after public clarification by the Director General of the Trade of the European Commission and publication of the agreement text as an ‘investment agreement’.¹² It is not clear whether this continued reference to the EU-China CAI as a ‘trade deal’ is an honest mistake by some legal scholars or a tacit suggestion on the interpretation of the agreement’s objective to reaffirm ‘commitments under the WTO Agreement and their commitment to create a better climate to facilitate and develop trade and investment between the Parties’.¹³

2. COMPREHENSIVE AGREEMENT ON INVESTMENT AND TRADE (CAIT)

In cognisance of the disciplinary overlap, this article proposes to refer to such agreements to both disciplines. Namely, under the category of Trade and Investment agreements (TIAs)¹⁴ which some scholars have already defined as

¹¹ Van der Loo, G., *Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations*, Royal Institute for International Relations, 3 June 2021. Available at: <https://www.egmontinstitute.be/lost-in-translation-the-comprehensive-agreement-on-investment-and-eu-china-trade-relations/>.

¹² See: Weyand, S., Director General, DG Trade, European Commission IN: CEPS webinar, *Understanding the new EU-China investment agreement*, 2021. Also, China called for talks of a Free Trade Agreement with the EU, in parallel with ongoing negotiations on the EU-China CAI. From this, it should clarify to the public that the EU-China CAI is classified by its officials as an “investment agreement” rather than a “trade agreement”. Also see: Valero, J., *China calls for opening free trade talks with the EU*, EURACTIV, 17 December 2019 at: <https://www.euractiv.com/section/economy-jobs/news/china-calls-for-opening-free-trade-talks-with-the-eu/>.

¹³ Van der Loo, G., *Lost in translation? The Comprehensive Agreement on Investment and EU-China trade relations*, 2021. As a ‘trade lawyer’, Van der Loo has conducted research on EU’s new generation of Deep and Comprehensive Free Trade Agreements to which he identifies similarity with the EU-China CAI. Also see: Article 1(1), Objectives, Section I: Objectives and General Definitions, *EU-China Comprehensive Agreement on Investment*, European Commission (2020). Accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement_en.

¹⁴ This abbreviation should not be confused with the Trilateral Investment Agreement (TIA). See eg. United Nations Conference on Trade and Development (UNCTAD), *China - Japan - Korea, Republic of Trilateral Investment Agreement* (2012). Last accessed April 3, 2024. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3302/china---japan---korea-republic-of-trilateral-investment-agreement-2012->.

‘those agreements relevant to trade and international investment’.¹⁵ In the fashion of TIAs, the proposal of this article is to title the ‘new generation’ of agreements as Comprehensive Agreements on Investment and Trade (CAITs). In the following paragraphs, this proposition is explained in the separate terms; ‘Comprehensive’, ‘Agreement’, and the proposed title identifying the terms of both disciplines ‘Investment and Trade’. This article does not intend to propose new terminology for consideration. Rather, currently existing terms are understood, and a combination of the terms is explored.

2.1. ‘Comprehensive’

Although, international trade and investment instruments now refer to the term “comprehensive” in their titles, there seems to be no particular legal definition of the term in the agreements. Seemingly, a general, not necessarily legal understanding of the word ‘Comprehensive’ is followed, in that it is ‘including or dealing with all or nearly all elements or aspects of something’,¹⁶ or ‘covering completely or broadly’.¹⁷ In cognisance that there are broader areas restricting trade and investment beyond the traditional, we have seen new generation trade agreements such as EU FTAs seek to substantially liberalises all trade by addressing trade and investment in a “comprehensive” manner.¹⁸ Considered a new generation investment agreement, the EU-China CAI, also takes a

¹⁵ See eg: Delany, L., Signal, L., and Thomson, G., *International trade and investment law: a new framework for public health and the common good*, BMC Public Health 18, 602 (2018). <https://doi.org/10.1186/s12889-018-5486-6>. Although, as also indicated in the article by Delany et al. the definition is not limited to trade and investment but extending to international intellectual property as well. The important point for this article is the scholars’ argument that “The character of TIAs has become more comprehensive...”. These agreements are also referred to by some scholars as ‘Free Trade Agreement TIAs’. See: Reinisch, A., Footer, M.E., and Binder, C., eds., *International Law and ...: Select Proceedings of the European Society of International Law. Select Proceedings of the European Society of International Law*, Oxford: Hart Publishing, 2016. Also, Armand de Mestral and Alireza Falsafi refer to NAFTA as a TIA. The scholars note that TIA models are particularly suited to promoting policy objectives beyond pure trade or pure investment. See: De Mestral, A., and Falsafi, A., 8. *Increasing use of alternative dispute resolution in IIAs* IN: De Mestral, A., Lévesque, C., eds. *Improving International Investment Agreements*, Routledge, 2013.

¹⁶ “*Comprehensive*.” Languages.oup.com. Oxford Languages, 2022. Web. 1 April 2022. ‘Google’s English dictionary is provided by Oxford Languages, widely regarded as the world’s most authoritative sources on current English’. See: Oxford Languages, Oxford Languages and Google at: <https://languages.oup.com/google-dictionary-en/>.

¹⁷ “*Comprehensive*.” Merriam-Webster.com. Merriam-Webster, 2022. Web. 1 April 2022. Merriam-Webster is the oldest dictionary publisher in the United States. It is ‘America’s most trusted online dictionary for English word definitions, meanings, and pronunciation.’ See: <https://www.merriam-webster.com/>.

¹⁸ The new generation of EU FTAs provide for ‘comprehensive’ chapters on investment.

“comprehensive” approach on investment as well as trade by addressing market access.¹⁹ But, before a conclusion on the proposition on the term “comprehensive”, in the next paragraph it is important to discuss the flinch of this article from the term “deep” that some writers have seemingly used synonymously with “comprehensive”.²⁰

Some of the new generation of EU FTAs are known as ‘Deep and Comprehensive Free Trade Areas (DCFTAs)’. ²¹ The DCFTAs are reported to be

¹⁹ The EU-China is spoken of as a new generation BIT. In the subsequent section, I discuss the choice in the article to refer to the instrument as an “agreement” than a “treaty”.

²⁰ For instance, Annette Bongardt and Francisco Torres write that ‘in most cases the EU negotiates comprehensive (i.e. deep) free trade agreements with third countries’. See: Bongardt, A., and Torres, F., *Comprehensive Trade Agreements: Conditioning Globalisation or Eroding the European Model?*, 52 (3), 2017 p.165–170 at: <https://www.intereconomics.eu/contents/year/2017/number/3/article/comprehensive-trade-agreements-conditioning-globalisation-or-eroding-the-european-model.html>. The abbreviation i.e. is short for the Latin phrase *id est*, meaning “that is” or “that is to say” or “in other words.” It is ‘used to explain exactly what the previous thing that you have mentioned means’ in order to clarify its *meaning*. See: “i.e.” Oxford Advanced Learner’s Dictionaries, 2022. Web. 1 April 2022. Also see: “i.e.” Merriam-Webster.com. Merriam-Webster, 2022. Web. 1 April 2022. So, it may be interpreted that the scholars mean that ‘the EU negotiates comprehensive free trade agreements with third countries. In other words, that the EU negotiates deep free trade agreements with third countries.’ But the EU has made a separation of its FTAs including a group of those titled “deep”. See: Overview of the trade Agreements covered by European Commission, *Report on Implementation of EU Free Trade Agreements*, 2018 at: https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157468.pdf. Some scholars have also noted that the EU’s FTAs vary substantially, classified into four groups: “‘First Generation’ Free Trade Agreements negotiated before 2006; ‘New Generation’ ‘Second generation’ Free Trade Agreements, i.e. comprehensive FTA’s negotiated after 2006; Economic Partnership Agreements (EPAs) with Africa, Caribbean and Pacific countries; Deep and Comprehensive Free Trade Areas (DCFTAs) deepening political association and preparing for economic integration. See: Wruuck, P., *What future for EU trade policy and free trade agreements?*, European Investment Bank, 2019 at: http://respect.eui.eu/wp-content/uploads/sites/6/2019/11/Chapter4_Wruuck_Future_EU_Trade_Agreements.pdf. The writers of the paper that I refer to are not legal scholars but scholars in the field of economics, so the weight of my point may seem like there’s nothing to it. However, in the same paper, the scholars have also written that ‘the European Commission has embarked on a new generation of international agreements *that also aim* at abolishing non-tariff barriers to trade.’ This indicates the understanding that the new generation agreements may not necessarily provide for the ‘behind the border’ rules (i.e. deep) but rather also *aim* for such rules. From this, the understanding is that the agreements may be ‘comprehensive’ addressing ‘behind the border’ issues with commitments but not necessarily with ‘deep integration’ through rules. I also discuss this further in the subsequent paragraphs.

²¹ The EU proposed to use the DCFTAs as cornerstones of their future relationship with the Eastern Partnership, at the 2009 Prague summit. See: Koeth, W., *The ‘Deep and Comprehensive Free Trade Agreements’: an Appropriate Response by the EU to the Challenges in its Neighbourhood?*, EIPASCOPE, 2014. Available at: https://www.eipa.eu/wp-content/uploads/2022/01/EIPASCOPE_2014_WKO.pdf. The

prompted by the failure of the WTO member countries to reach a 'comprehensive' agreement on trade liberalisation that would include the 'behind the border' issues such as regulatory issues, rules on foreign investment and investment protection, government procurement²². In response to whether deep and comprehensive trade agreements would violate WTO obligations, Lydgate and Winters also make the distinction between "deep" and "comprehensive".²³ As also Van der Loo, in a study comparing DCFTAs, writes of the "comprehensive" dimension in reference to broad coverage and "deep" dimension mainly related to the approximation clauses of the DCFTAs.²⁴ While it may seem that the terms "Comprehensive" and "Deep" are synonymous or that the joint reference to "Deep and Comprehensive" sounds tautological in that "comprehensive" agreements are a call for "deep" integration,²⁵ Mattoo et al. write that Deep Trade agreements (DTAs) aim at establishing "economic

DCFTAs are more "deep" than new generations FTAs. In this paragraph, I also explain the term "Deep".

²² Koeth, *op cit.* note 21. Prior to the Uruguay Round negotiations spanning from 1986 to 1993, the linkage between trade and investment received little attention in the framework of the General Agreement on Tariffs and Trade (GATTs). The original GATT had reached 'behind the border', although the extent of the prohibitions was not clear. The GATT prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions, obligations which the Agreement on Trade-Related Investment Measures (TRIMs) negotiated during the Uruguay Round intended to clarify. In this sense, there was a call for a widening of GATT and the deepening in the context of behind-the-border disputes by going beyond traditional trade liberalisation in talking of the rules and disciplines of the trading system. See: Narlikar, A., Daunton, M., and Stern, R.M., *The Oxford Handbook on The World Trade Organization*, Oxford University Press, May 31, 2012. For its effectiveness as 'the foundation of the trading system', it is believed that the WTO needs to negotiate new rules and adopt reforms. However, WTO members have not reached consensus for a new comprehensive agreement on trade liberalisation and rules, which supports the impetus of member states concluding comprehensive' agreements to include the 'behind the border' issues that the WTO has failed to address. See: Cimino-Isaacs, C.D., and Fefer, R.F., *World Trade Organization: Overview and Future Direction*, Congressional Research Service, Updated October 18, 2021 at: <https://sgp.fas.org/crs/row/R45417.pdf>.

²³ The scholars argue that deep but not comprehensive trade agreements would not necessarily violate WTO obligations. See: Lydgate, E., and Winters, A.L., "Deep and Not Comprehensive? What the WTO Rules Permit for a UK-EU FTA, *World Trade Review* 18, 3/2019, p451-79. doi:10.1017/S1474745618000186. Also, The EU and NAFTA are described as "deep" and both compatible with the rules of the WTO. See: Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington at: <http://depts.washington.edu/canada/nafta/98chapters/4stubbsnafta98.htm>.

²⁴ Van der Loo, G., *The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study*, CEPS Special Report, 24 June 2017. Available at: <https://www.ceps.eu/ceps-publications/the-eus-association-agreements-and-dcftas-with-ukraine-moldova-and-georgia-a-comparative-study/>.

²⁵ Van der Loo, *op cit.* note 13. Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington. For example, Stubbs writes that 'Through widening there was a further call for deepening of the EU.'

integration” rights as well as include enforcement provisions that limit the discretion of importing governments in these areas, as well as provisions that regulate the behaviour of exporters.²⁶ And thus, not just liberalisation but the meaningful liberalisation of trade.²⁷ “Deep” agreements ‘provide far-reaching and progressive regulatory approximation’ to the laws of the parties, going beyond the ‘new generation’ FTAs, that are merely “comprehensive”.²⁸ Compromising at a “deeper level” requires countries to fulfill their negotiated commitments, by making the necessary legal, regulatory, and administrative changes.²⁹ DTAs support the rights of the parties to the agreements by setting the rules through regulation,³⁰ as economic integration has become ‘deeper’, tackling measures ‘behind the border’. These agreements are deepening, in the sense that they cover rules on an expanding set of policy areas, such as investment, that goes well beyond the traditional focus of preferential trade agreements such as tariffs.³¹ While these agreements are still referred to as trade agreements, their

²⁶ Mattoo et al. write that DTAs aim at establishing five “economic integration” rights: free (or freer) movement of goods, services, capital, people, and ideas. See: Mattoo, A., Rocha, N., and Ruta, M., eds., *Handbook of Deep Trade Agreements*, The World Bank, 2020. Available at:

<https://openknowledge.worldbank.org/bitstream/handle/10986/34055/9781464815393.pdf>

²⁷ In its position paper on the Trade Sustainability Impact Assessment in support of negotiations of DCFTAs, the EC describes DCFTAs as intended to provide for substantial liberalisation of trade and investment conditions’. See: European Commission, *Commission services position paper on the Trade Sustainability Impact Assessment in support of negotiations of a Deep and Comprehensive Free Trade Area between the European Union and respectively Georgia and the Republic of Moldova* at: https://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152461.pdf.

²⁸ To achieve the objective of deepening political association and economic integration between the EU and its associated partners, ‘the DCFTAs provide far-reaching and progressive regulatory approximation to EU law in trade-related areas and foresee gradual reciprocal market opening. With these distinctive components they go beyond the ‘new generation’ FTAs and represent “a unique type of trade agreements”.’ See: Deep and Comprehensive Free Trade Areas (DCFTAs) EU, Georgia and Moldova, *About the Deep and Comprehensive Free Trade Areas (DCFTAs) between the European Union, Georgia and Moldova* at: <https://www.dcfta-evaluation.eu/>. Also, towards ‘predictable and enforceable trade rules’.. See: European Commission, *Deep and Comprehensive Free Trade Areas (DCFTA) of the EU-Ukraine Association Agreement* at: <https://ec.europa.eu/chafea/agri/en/content/deep-and-comprehensive-free-trade-areas-dcfta-eu-ukraine-association-agreement>.

²⁹ Hornbeck, J.F., *Free Trade Agreements: U.S. Promotion and Oversight of Latin American Implementation*, Inter-American Development Bank 2009 at: <https://publications.iadb.org/publications/english/document/Free-Trade-Agreements-US-Promotion-and-Oversight-of-Latin-American-Implementation.pdf>.

³⁰ See: Mattoo, A., Rocha, N., and Ruta, M., eds., *Handbook of Deep Trade Agreements*, 2020.

³¹ Mattoo et al, *op.cit.* note 26. Mattoo et al. writes that Deep Trade Agreements are about ‘moving from the administration of protection – quotas, tariffs, and subsidies – to the administration of precaution – security, safety, health, and environmental sustainability.’

goal is integration beyond trade or deep integration.³² Whereas trade agreements that are not 'deep' are defined as 'shallow', focussed on tariffs and other at-the-border measures that directly affect market access, as opposed to behind-the-border.³³

The corollary is thus that “deep” investment agreements should go beyond their traditional focus to cover rules at-the-border measures that directly affect market access.³⁴ But as “deep” agreements are about codifying regulatory alignment through binding commitments and a dispute settlement mechanism, the article accepts that not all trade and investment agreements are necessarily “deep”.³⁵ As enlightened earlier in this article, the EU-China CAI does not include rules on investment protection nor rules on trade in goods. The proposition is thus that agreements such as the EU-China CAI may be titled “Comprehensive” in providing for trade liberalisation principles such as market access but not necessarily “deep” in providing for those rules.³⁶ Rather, the concept of “deep” is proposed in this article as perhaps a more a relative than an absolute term, in relation to a certain level of economic integration.³⁷

³²Also see: The World Bank, *Deep Trade Agreements, Deep Trade Agreements: Data, Tools and Analysis* at: <https://datatopics.worldbank.org/dta/about-the-project.html>. Also see:

³³O'Brien, E., and Gowan, R., *What Makes International Agreements Work: Defining Factors for Success*, The NYU Center on International Cooperation (CIC), September 2012. Available at: https://cic.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf. Also, Roger Alford responds to 'Why would countries sign deep PTAs with investment chapters instead of simply relying on shallow PTAs, the WTO, or BITs?' See: Alford, *op.cit.* note 1.

³⁴ As perhaps, would be expected of the EU-China CAI intended to rebalance the asymmetry between the EU and China in terms of investment as well as providing that the agreement would liberalise market access. See: European Commission, *Commission publishes market access offers of the EU-China investment agreement*, 12 March 2021 at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2253>.

³⁵ For instance, Great Britain was considered to be opposed to deepening by accepting market integration but with behind the border issues remaining autonomous. See: Stubbs, N.A., *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington. Although, in 2018 was reported to be headed towards the model of a Deep and Comprehensive Free Trade Agreement (DCFTA) embedded within a broader Association Agreement (AA). See: Emerson, M., *Theresa May's Deep and Comprehensive Free Trade Agreement*, CEPS, 6 March 2018 at: <https://www.ceps.eu/ceps-publications/theresa-mays-deep-and-comprehensive-free-trade-agreement/>.

³⁶ Stubbs, *op. cit.* note 35. *Chapter 4 Regional Economic Integration: a Comparison of NAFTA and the EU*, University of Washington.

³⁷ For instance, the EU has DCFTAs towards political and economic integration, but that with the UK also 'goes beyond traditional free trade agreements' but titled 'The EU-UK Trade and Cooperation Agreement' and explained as an agreement that 'While it will by no means match the level of economic integration that existed while the UK was an EU

To conclude the proposition of 'Comprehensive', the article supports the 'new generation' of agreements continued usage of the term to also maintain the indication of newness in the titles, to contrast with the older agreements.³⁸ Indeed, overlapping the trade and investment disciplines, some old agreements may also be argued to be 'Comprehensive' as they also address rights within both trade and investment.³⁹ Rather, the proposition of this article to use the term 'comprehensive' in the new generation, should not be understood as an interpretation that the earlier agreements are relatively not comprehensive but to serve as a label of distinction between the old and the new.⁴⁰

2.2. 'Agreement'

Today, the majority of international instruments are designated as "agreements" either with a generic meaning for those instruments which do not meet its definition of "treaty" or for a specific meaning as a particular term referring to a "narrower range of subject-matter than "treaties".⁴¹ On this "agreement" trend,

Member State, the Trade and Cooperation Agreement ...provides a solid basis for preserving our longstanding friendship and cooperation'. See: Stubbs, *op.cit.* note 35. Also see: European Commission, *The EU-UK Trade and Cooperation Agreement* (2021) at: https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en. In support of the proposition, relevant to this article, the EU and China have different approaches to economic integration.(China's One Belt, One Road initiative is currently the most important program for deep economic integration). Thus, befitting that the EU-China CAI is not "Deep".

³⁸ In contrast with "TIAs", mentioned in the previous section as agreements relevant to trade and international investment. For example, the Accord de commerce et de protection des investissements entre la Confédération suisse et la République Rwandaise (1963).

³⁹ *Rwanda - Switzerland TIA* (1963), United Nations Conference on Trade and Development (UNCTAD). Last accessed April 3, 2024. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3669/rwanda---switzerland-tia-1963->

⁴⁰ Hence the general proposition to refer to such agreements as International trade and investment agreements (TIAs). The proposed term already encompasses the disciplinary overlap. Although not to suggest that the earlier agreements are not comprehensive. But perhaps also, the new generation agreements are "more comprehensive" as they cover an expanding set of policy areas, such as competition policy, environmental law etc. See: Emily O'Brien and Richard Gowan, *op.cit.* note 33. The areas beyond the traditional areas of "trade and investment" fall outside the scope of the article, so extension to the term 'Comprehensive' to new generation TIAs in this article is for the purposes of distinction by name than by the extended features for the agreements beyond "trade and investment".

⁴¹ But also, 'treaty terminology might be indicative of the relationship of the treaty with a previously or subsequently concluded agreement.' See: United Nations Treaty Collection, Definition of key terms used in the UN Treaty Collection at: https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml. For example, the Comprehensive and Progressive Agreement for Trans-Pacific

this article accepts usage of the term as the usage of "treaty" for international instruments has considerably declined in the favour of "agreements" that are usually less formal and deal with a narrower range of subject-matter.⁴² The new generation is identified as overlapping disciplines typically with more elements of trade or investment and a narrower range of either. For instance, the EU-China CAI is titled as an instrument on 'investment' but lacks provisions resembling traditional international investment agreements as well as dealing with 'trade' but to a lesser extent than typical trade agreements.

2.3. 'Investment and Trade'⁴³

Finally, the proposition of the titles of the agreements in this article, is to explicitly accept the provision for both trade investment to complete the puzzle and settle the discourse on whether Comprehensive Investment Agreements are really investment agreements or whether Comprehensive Trade Agreements are really trade agreements. This is even more troubling when an agreement is titled as an "Investment Agreement" yet classified by its officials as a "Trade Agreement".⁴⁴ We have, anyways, already witnessed that both regimes may

Partnership (CPTPP), that does not have the term "treaty" in its title but described as '*a short-form treaty* that incorporates by reference all of the provisions of the Trans-Pacific Partnership (TPP) agreement'. See: Government of Canada, *How to read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* at: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/chapter_summaries-sommaires_chapitres.aspx?lang=eng.

⁴² Although the United Nations (UN) General Assembly has never laid down precise definitions of the terms, the 1969 Vienna Convention on the Law of Treaties defines "treaties" as "international agreements" with certain characteristics. Its Art.3 refers also to "international agreements not in written form" and thus less formal. So, the term "international agreement" in its generic sense covers a wide range of international instruments such as oral agreements that may be rare but can have the same binding force as treaties. So, the word "treaty" in its generic sense had been generally reserved for engagements concluded in written form. Although acknowledging this, the choice in this article to accept the term "agreement" in the titles of new generation instruments is based on the specific meaning that the instruments may deal with subject matter from one of the sub-disciplines; trade or investment, but at a narrower range of one or both disciplines. See: *Id.* United Nations Treaty Collection, *Definition of key terms used in the UN Treaty Collection*.

⁴³ Alternatively, "Trade and Investment". In that order, the abbreviation would read "CATI". With no particular importance but a matter of preference, I propose an order with a multi-layered acronym (abbreviation pronounced as a word) that reads "CAIT" as the diphthong "ai" creates a monosyllabic word that sounds more phototactically plausible.

⁴⁴ Replacing earlier ASEAN investment agreements, the ASEAN Comprehensive Investment Agreement (ACIA) is titled as an "Investment Agreement". Also see: Maxwell, I., Wegner, K., *The New ASEAN Comprehensive Investment Agreement*, Asian International Arbitration Journal, 5, 2/2009. p.167-189

apply to the same activity or measure by states, as goods and services may be supplied by way of both trade and investment.⁴⁵ Hence, the proposition to identify this new generation of comprehensive agreements as a direction to both disciplines should not necessarily be seen as a substantive novelty but a proposal to explicitly call agreements for what they already are, without possibly misleading limitation of the titles to a single discipline. This essence is captured by some of the EU's new generation of FTAs titled as 'Free Trade Agreement and Investment Protection Agreement'.⁴⁶ In cognisance that not all trade agreements necessarily pertain to matters of 'free trade', the proposed title with 'Investment and Trade' should therefore suffice.

It is acknowledged in this article that the EU-China CAI is neither a typical trade agreement nor a typical investment agreement, as it seeks to draw on the principles of both trade and investment disciplines. Although the EU-China CAI deals with trade and investment to a lesser extent than typical trade and typical investment agreements, the lesser extent to which trade or the lesser extent to which investment is reflected in the EU-China is not a basis in the article, to reject the terms 'trade' or 'investment' in the title of the EU-China CAIT. Trade

at:<https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/5.2/AIAJ2009008>. However, although the ASEAN website makes no classification, the official website of the investment promotion of ASEAN classifies the agreement under "ASEAN Free Trade Agreements" despite the option to also categorise it under "other instruments" that is available on its website. See: Invest in ASEAN, *ASEAN Agreements* at: <http://investasean.asean.org/index.php/page/view/asean-agreements>.

⁴⁵ See: ASIL, *op.cit.* note 3. The American Society of International Law (ASIL) 108th Annual Meeting, *International Trade Law and International Investment Law: Complexity and Coherence* panel to 'consider whether the international trade and investment law dichotomy appears increasingly anachronistic, or whether each regime is maturing according to complementary principles.' Joost Pauwelyn remarks on overlapping proceedings. There have been decisions by the WTO on the trade issues and investor-state tribunals on investment protection claims based on the same facts. Most infamous, on 8 May 1998, the US requested consultations with Mexico in respect of an anti-dumping investigation of high-fructose corn syrup (HFCS), followed by parallel Chapter 19 proceedings and WTO dispute settlement. See: Mexico – Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (WT/DS132) (*United States v. Mexico*). But also, under the same facts, the US investors alleged a breach of Chapter 11 of the NAFTA and imposed ISDS rights under ICSID. Roger Alford also discusses parallel proceedings light of the convergence of trade and investment. See: Alford, *op.cit.* note 1. *Convergence of International Trade and Investment Arbitration*, 2013.

⁴⁶ The *EU-Singapore Free Trade Agreement and Investment Protection Agreement* (2018), European Commission. Last accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements/texts-agreements_en and the *EU-Vietnam Trade Agreement and Investment Protection Agreement* (2019), European Commission. Last accessed April 3, 2024. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement_en.

agreements may be typical but vary in their extent on trade matters. Investment agreements may also be typical but vary in their extent on investment protection. Notwithstanding the varying degrees, the recognition of either discipline is typically not dismissed in their titles. The EU-China CAI should also not be denied reference to both 'trade and investment' in its title.

3. CONCLUSION

The article has proposed the use of the term "Comprehensive Agreements on Investment and Trade" (CAITs) to describe the new generation of international economic law agreements that integrate both investment and trade. The argument is that the traditional titles assigned to international agreements, such as BITs and FTAs, do not reflect the changes brought about by these new agreements. The proposal for the use of CAITs aims to identify the terms of both disciplines, investment and trade, in the title of these agreements. The article has cited the EU-China CAI as an example of such an instrument, which is titled as an investment instrument but lacks provisions resembling traditional international investment agreements and deals with trade to a lesser extent than traditional trade agreements.

The use of the term "comprehensive" is proposed to describe the agreements because they address all elements or aspects of something, including issues beyond traditional trade barriers. The article has also discussed the term "deep" to distinguish it from the term "comprehensive." Moreover, the proposal supports the trend towards using the term "agreement" rather than "treaty" for comprehensive agreements, particularly those that deal with a narrower range of subject-matter than treaties. The EU-China CAI deals with both investment and 'trade' but to a lesser extent than traditional trade agreements. Thus, it is proposed to explicitly title these agreements 'investment and trade', without a possibly misleading limitation of the titles to a single discipline.

It is known that research work is never truly finished. The issues of the titles of new generation agreements are too broad and complex to capture in a single article. It is unfortunate that the paper stops at proposing a title that admits the convergence of trade and investment realms in the titles of new generation trade and investment agreements. The conclusions illuminate that there are lingering questions and open ends that spark interest in further research. The lingering questions are re-enforced by the research gaps and limitations. The limitation of this article is in depth research on the challenges of categorising and assigning titles to these complex agreements that cover multiple areas as well as the possible legal implications for their titles. An investigation of the impact of the

titles of international agreements on their interpretation and implementation should be conducted. This could include an analysis of the legal effects of titles and their role in shaping perception and expectations of the intent of the agreements. Future research may further explore the existing terms and their limitations in addressing whether there is a need for a new term for international economic law that reflects the current changes in the international system. It may also be felt that these recommendations for future research are perhaps more interesting than the focus of this article. It may also be argued that the contribution of this article is in sparking this interest of further research identified by this article. Which would perhaps not have been as apparent without the research of this article itself first conducted and consequentially sparking further research interest.

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