Entry of Foreign Investments: Convergence of International Trade and Investment Law?

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Declaration

I, Murilo Otávio Lubambo de Melo, confirm that the work presented is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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Thesis Abstract

The thesis analyses how public international law regulates the entry of foreign investors and investments into states. It explores the various legal concepts and techniques to limit the freedom of states to accept investments and regulate their access, employed in different regimes of international law. These are: international trade law – mainly illustrated by the WTO (World Trade Organisation) agreements, in particular, the General Agreement on Trade in Services (GATS), and preferential trade agreements (PTAs) – and international investment law (IIL) – scattered through a network of bilateral investment treaties (BITs). The thesis concludes that there are signs that the international rules regulating the entry of investments in services are converging in several levels of alignment and treaty making. Convergence means a reduction of non-shared legal and systemic characteristics or an increase in shared characteristics.

Several factors support this conclusion: the progressive incorporation in treaties of establishment rights for investors, that is, commitments by states to allow foreign investments under certain conditions; the narrowing-down of investor-state dispute settlement clauses dealing with entry, which makes IIL systemically closer to international trade law regarding dispute settlement; the hidden liberalising power that flows from the broad interaction of the most-favoured-nation (MFN) clauses in the GATS and IIL with entry provisions; and, the incorporation of concepts and techniques from the international trade law world into investment chapters of larger international economic agreements, such as the GATS absolute standard of market access and its system of exceptions and justifications.

These converging signs are considered a natural evolution of the rules given that trade and investment sometimes represent complementary market access strategies in the context of global value chains. The thesis suggests that this move towards convergence may bring about more effectiveness to the rules by attaining the goal of investment liberalisation balanced with the safeguard of regulatory space.

Impact Statement

The thesis has an important impact on public policy design and on the improvement of domestic laws and treaties. The knowledge base of the thesis spans through two complex and technical regimes of international law, generally scattered in different areas of professional expertise (international trade law and international investment law). This means that the thesis has an appeal to both international investment arbitration professionals, who are engaged in the legal practice of investment law, and international trade practitioners, who work with WTO law and national trade laws. Furthermore, the doctrinal aspect of the thesis is an invaluable source for arbitrators and panel and WTO Appellate Body members as it provides the grounds for the interpretation of several treaty provisions in dispute settlement claims. Officials of international organisations – such as WTO, UNCTAD, OECD and World Bank – could equally resort to the thesis to inform their activities, such as writing reports, carrying out projects and providing secretariat or negotiation support to member states.

Most importantly, the insights presented in the thesis could be put to immediate beneficial use. It offers a repertoire of legal solutions that can be used by governments to set and guide their domestic and international policy-making activities. There is an array of organised knowledge that can be used to engage with or influence government ministers and high officials in the definition of the major and minor aspects of state's policies on the entry of investments. Besides, it has also an incremental impact. As international law evolves slowly, the conclusions can provide the basis for changes in international economic governance for decades. Non-governmental organisations and policy research institutes can resort to the critical inputs offered by the thesis in their analyses and position papers on the long-term discussion of the regulation of investments and international economic governance in general. Specialist or mainstream media can benefit from the public engagement generated by the thesis to fine-tune and nuance the public discourse.

Inside academia, the topics covered and the framework of analysis can provide the grounds for research-based teaching and for the redesign of curriculum in both undergraduate and graduate levels. LLB (Bachelor of Laws) and LLM (Master of Laws) courses in trade and investment law can profit extensively from the materials. The range of issues covered may sustain a publication agenda for the next three years, either in scholarly journals or in a book format. The thesis opens up an avenue for further scholarship in the field, especially in the areas that were not fully addressed. PhD researchers can build upon the insights to further develop the research into the convergence and divergence debate in international economic law. Apart from public and private international law, the thesis may have an impact on related academic disciplines, such as international political economy and international institutional economics.

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Finally, and most importantly, to my family and dear friends, my deepest gratitude.

Errors and omissions remain my own.

Dedication

To Ericka

and to my parents, Miguel and Cátia.

TABLE OF CONTENTS

LIST OF TABLES AND CHARTS

LIST OF ABBREVIATIONS

AB – Appellate Body
ASCM – Agreement on Subsidies and Countervailing Measures
ASEAN – Association of Southeast Asian Nations
ASIL – American Society of International Law
BIICL – British Institute of International and Comparative Law
BIT – Bilateral Investment Treaty
CETA – EU-Canada Comprehensive Economic and Trade Agreement
CJEU – Court of Justice of the European Union
CPTPP – Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRQ – Conflict Resolution Quarterly
DCF – Discounted Cash Flow
DSU – Dispute Settlement Understanding
EJIL – European Journal of International Law
ESIL – European Society of International Law
EPS – Electronic Payment Services
EU – European Union
FDI – Foreign Direct Investment
FET – Fair and Equitable Treatment
FTA – Free Trade Agreement
GATS – General Agreement on Trade in Services
GATT – General Agreement on Tariffs and Trade
GVCs – Global Value Chains
ICSID – International Centre for Settlement of Investment Disputes
IIAs – International Investment Agreements & Investment Chapters in PTAs
ILC – International Law Commission
IMF – International Monetary Fund

ISA – Investor-state Arbitration

ISDS – Investor-state Dispute Settlement

JIEL – Journal of International Economic Law

JWIT – Journal of World Investment & Trade

JWT – Journal of World Trade

MAI – Multilateral Agreement on Investments

MFN – Most-Favoured-Nation

NAFTA – North American Free Trade Agreement

OECD – Organisation for Economic Cooperation and Development

PCA – Permanent Court of Arbitration

PTA – Preferential Trade Agreement

SCC – Stockholm Chamber of Commerce

SSIA – State-state Investment Arbitration

TISA – Trade in Services Agreement

TPP – Trans-Pacific Partnership

TRIMS – Agreement on Trade-Related Investment Measures

TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCC – United Nations Compensation Commission

US – United States

USMCA – United States-Mexico-Canada Agreement

UK – United Kingdom

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UNGA – United Nations General Assembly

VCLT – Vienna Convention on the Law of Treaties

WTO – World Trade Organisation

INTRODUCTION

a. CONTEXT

Economic flows between states are progressively subject to international regulation. In international trade, goods, services and intellectual property are traded from an exporting state into an importing state; as to international investment, investors of a home state establish investments into a host state. Public international law regulates these foreign trade and investment flows through customary or treaty law and provides mechanisms for the resolution of conflicts.

At first glance, foreign investments are beneficial to the host state and to its citizens: capital inflows increase productive or innovative capacity and, coupled with labour, provide income opportunities.[1] However, certain types of foreign investment are considered detrimental: they may affect domestic entrepreneurship, lead to social disruptions and impact on the host state's financial stability.[2] For various reasons, states choose to differentiate what is allowed or not in terms of investments in their territories based on the origin of the capital. In fact, the topic of restrictions on access for foreign investments has picked up momentum.

The recent gloomy developments in world politics indicate a trend towards more restrictive policies. The nationalist rhetoric was more than present in the campaigns that led to Brexit and to the elections of the new United States President and of the far-right in Brazil. The increasing support for nationalist candidates shows that those ideas could spread around quickly.[3] The discourse of "taking back control"[4] and making the respective states "great again"[5] have led to restrictions on access for foreigners. In this context, the notion that investments, either foreign or domestic, are desirable might be replaced, in the official public discourse, by the

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[1] Jonathan Haskel and Stian Westlake, *Capitalism without Capital: The Rise of the Intangible Economy* (Princeton UP 2017) 3.

[2] Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements' (Organisation for Economic Cooperation and Development 2018) OECD Working Papers on International Investment 2018/01 14–16.

[3] Andreas Johansson Heino, 'Timbro Authoritarian Populism Index 2017' (2017) 12–13 <https://timbro.se/app/uploads/2018/01/populism-index-2017.pdf> accessed 15 August 2018.

[4] Tony Blair Institute for Global Change, 'Brexit: The Realities of "Taking Back Control"' (2018) <http://institute.global/news/brexit-realities-taking-back-control> accessed 15 August 2018.

[5] BBC World Service podcast, 'Make America Great Again (12 December 2017)' <www.bbc.co.uk/programmes/p05qwcr2> accessed 15 August 2018.

notion that only domestic capital or home-based production are able to ensure real economic sovereignty.

In this scenario, policy arguments against foreigners and foreign capital, as "easy targets", may gather strength.[6] They will not be restrained to the harms of speculative capital or concerns about national security, which lend them an aura of legitimacy. They could even be based on clear-cut prejudices and on a discriminatory conception that investments from abroad, or from specific countries, are undesirable only because of their origin. States may, thus, erect more barriers based on the protection of the national pride. Suspicions on the foreign character of investments may give rise to tighter investment screening, delay in licenses, or legislative restrictions to condition or prohibit foreign investments in certain areas.[7] While these policies lack economic rationality, they might have great political support.

In turn, from the point of view of the domestic investors, the incentives to support these policies are perhaps more nuanced. While some policies could indeed benefit them, the goals of home production and national innovation might go against a strategy of encouraging foreign investment abroad. Several corporations, with interests to expand their activities outside the national territory, may voice their concerns to their respective home governments aiming to get access to foreign markets.[8] In fact, the interests of multinational companies are behind several initiatives in international economic law, including in the service sector.[9] It is difficult for states to advocate for an investment liberalisation agenda when they adopt internal protection measures. Some are even sceptical about the incentives and capacity of populist governments to carry out their policies in the current state of globalisation.[10] Hence, the way to reconcile these agendas remains to be seen.

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[6] Roberto Azevedo, 'Speech at the International Monetary Conference in Washington DC' (4 June 2018) <www.wto.org/english/news_e/spra_e/spra223_e.htm> accessed 15 August 2018.

[7] See UNCTAD/OECD/WTO 'Nineteenth Report on G20 Trade and Investment Measures' UNCTAD/OECD/2018/19 (4 July 2018).

[8] For an illustration concerning the largest global multinational in the world in terms of revenues, see Anshu Siripurapu, 'Wal-Mart Official: U.S. Policy toward the WTO, Trade Lacks a "Constituency"' (*InsideTrade.com*, 13 November 2017) <https://insidetrade.com/daily-news/wal-mart-official-us-policy-toward-wto-trade-lacks-constituency> accessed 15 August 2018.

[9] Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73, 84–87.

[10] Richard E Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Belknap Press of Harvard UP 2016) 284–287. Cf Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 112–114.

What might then be the consequences for international law in treaty making, interpretation and adjudication? The increasing representation in power of political groups with a nationalist agenda means that investment and trade mega-regional negotiations may be grinding to a halt. The withdrawal of the US from the Trans-Pacific Partnership,[11] which did not enter in force, is a sign of current antipathy towards regionalism, in favour of bilateralism (or straightforward unilateralism). As states progressively adopt new discriminatory measures, they may disguise them as legitimate ones, in the face of legal scrutiny and international adjudication. This can be done by alluding to concepts such as national security, economic sovereignty or prudential measures. Hence, adjudicators of international economic rules should pay careful attention to the way states invoke these justifications. This is because they are mainly responsible for devising and fine-tuning the appropriate interpretative legal tests. However, another consequence is that adjudicative mechanisms themselves may be under threat.[12] Negotiators of future rules are expected to reflect the new trends into the language of the texts and adjusted commitments and into the scope of adjudication.

Against this backdrop, the thesis analyses how international law regulates the entry and access of foreign investors and investments into states. Public international law, through its traditional instruments, will limit the original freedom of states to accept investments and regulate their access. The thesis analyses the substantive and procedural aspects of the rules regulating entry, with an emphasis on the services sector. The focus on entry is explained by the great potential for substantive overlap between rules of trade and investment law in this regard. Both regimes share the aim of safeguarding economic opportunities, in some shape or form. In general terms, international trade law is about regulating access, and to the extent that international investment law regulates the entry of investments, as will be shown, it also regulates access.

The term “entry” is used as a general and all-encompassing term, covering all the notions behind the more specific terms “admission”, “establishment”, “commercial presence” and “access”, which will be extensively explained. There is

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[11] TPP (legally verified text released 26 January 2016) <www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership> accessed 15 August 2018. Only two states had ratified the TPP Agreement: Japan and New Zealand.

[12] Joost Pauwelyn and Rebecca J Hamilton, ‘Exit from International Tribunals’ (2018) Advance Article (17 August) Journal of International Dispute Settlement 1.

also no assumption that the concept only refers to *physical* entry of investors or the *tangible* nature of investments. It naturally includes situations where an investor – individual or juridical person – or investment comes under the jurisdiction of a state, through different sorts of *intangible* means.[13]

The emphasis on services is justified by the increasing reliance on services ("servicification") and the digitalisation of the global economy.[14] These two features coupled with the consolidation of global value chains (GVCs) may lead to a convergence of market access interests on services among states of different levels of development.[15] There is indication that the new globalisation trends would lead to or require the supply of international services with the "virtual" presence in the territory, which broadens the spectrum of options of supply and alters the incentives to investment.[16]

The intangible nature of services makes it difficult to measure the exact impact of this sector in the world economy. Nevertheless, it is widely recognised that international trade in services is increasing its share compared to trade in goods. Moreover, the provision of goods usually encompasses the provision of associated services. One cannot deny that a relevant part of the international provision of trade in services occurs by means of the presence of the service provider in the territory of the country and that services represent an important part of the global stock of foreign direct investment; this remains true even in the face of imprecisions on data collection that may result in an over-estimation of those shares.[17]

b. INTERPLAY BETWEEN INTERNATIONAL TRADE AND INVESTMENT LAW: LITERATURE OVERVIEW

The thesis explores an aspect of the international regulation of economic activities spread over two so-called regimes of international law. Each regime has

[13] For an explanation on how investments in intangibles are pervasive, but under-analysed, see Haskel and Westlake (n 1) 36–88.
[14] UNCTAD, 'World Investment Report' (United Nations 2017) UNCTAD/WIR/2017 155–215.
[15] Gabriel Gari, 'Services Negotiations: Where Have We Been and Where Are We Heading?' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016) 600–601.
[16] Baldwin (n 10) 288–289.
[17] UNCTAD, 'Investment Trends Monitor - Special Issue - June 2017' (United Nations 2017) UNCTAD/ITM/2017.

certain legal and systemic characteristics, which translate into international regulations using various legal concepts and approaches to deal with the same topic. These are international trade law – mainly illustrated by the World Trade Organisation (WTO) agreements, and for the purposes of this work, the General Agreement on Trade in Services (GATS)[18] – and international investment law – scattered through a network of bilateral investment treaties (BITs) between states, but increasingly incorporated into preferential trade agreements or wider economic partnerships (PTAs). The systemic-institutional differences will have an impact on the interplay between the regimes.

The regulation of international trade in services was introduced in the agenda of the Uruguay Trade Round in the 80s at the demand of the US and the process resulted in the GATS, under the framework of the newly established WTO.[19] It has been argued that a new expertise in trade in services, involving flows of information, networks of experts and the production of new knowledge, was essential to shape the new legal concepts[20] necessary to achieve the framework of the so-called "liberalisation" of services. While other WTO agreements touch on investments in one way or another – TRIMS[21] and ASCM[22] (in relation to local content requirements, for example) and TRIPS[23] (in relation to intellectual property, for instance) – it is in the GATS that a major part of this regulation is found.

In general, academic literature has highlighted the interrelation between international trade law and investment law. Government regulation progressively affects both trade and investment flows and the growing convergence will probably not be reversed: differences in adjudication seem to be an "accident of legal history".[24] When the same economic activity fulfils both definitions in trade and investment treaties, the regulatory bifurcation is difficult to justify, as the historical

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[18] General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1B 1869 UNTS 183 (GATS).
[19] Juan A Marchetti and Petros C Mavroidis, 'The Genesis of the GATS' (2011) 22 EJIL 689, 692–694.
[20] Andrew Lang, 'Legal Regimes and Regimes of Knowledge: Governing Global Services Trade' (LSE 2009) LSE Law, Society and Economy Working Paper n 15/2009 <http://eprints.lse.ac.uk/24558/1/WPS2009-15_Lang.pdf> accessed 15 August 2018.
[21] Agreement on Trade-Related Investment Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1868 UNTS 186 (TRIMS).
[22] Agreement on Subsidies and Countervailing Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1869 UNTS 14 (ASCM).
[23] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1C 1869 UNTS 299 (TRIPS).
[24] Piet Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (2010) 13 JIEL 3, 5.

and political causes for it may have disappeared.[25] This remark applies particularly to the area of investments in services, as will be shown.

While the relationship between trade and investment has been described as "living apart together", it is getting stronger as investment is more extensively negotiated inside trade arrangements.[26] The overlapping treaty coverage is an evidence of the connection between trade and investment; treaty negotiators start to blend in, which generates a wider perspective on investment commitments.[27] There is nothing inherent in the fact that investment regulation has mainly developed bilaterally as opposed to trade, which has a significant multilateral component.[28] Having arisen out of trade agreements, investment treaties are returning to their origins.[29] Some even claim that the convergence should lead to a rethinking of investment and trade law as merged systems, part of an emerging international economic law regime.[30]

In turn, others are more cautious and highlight the distinct approaches of both sets of rules. Some underline that the conceptual differences between trade and investment explain the different regulations, each regime responding to particular policy purposes and challenges.[31] There have been critiques of the reliance on arguments raised in the framework of dispute settlement in the WTO to solve investment cases, on grounds of legitimacy.[32] The criticism focuses on the undue transplantation of interpretations, approaches and solutions from trade law to investment law and underline the broader mandate of WTO tribunals and the wider flexibility of WTO treaty language, as will be developed.[33] Some say that while informed cross-fertilisation between the two fields has been limited, it may

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[25] Tomer Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 146–147, 155.
[26] Mary E Footer, 'International Investment Law and Trade: The Relationship That Never Went Away' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013) 264, 296.
[27] Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016) 71.
[28] Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 ICSID Review 372, 417.
[29] Jeswald W Salacuse, *The Law of Investment Treaties* (2nd ed, OUP 2015) 103.
[30] Sergio Puig, 'International Regime Complexity and Economic Law Enforcement' (2014) 17 JIEL 491, 515; Sergio Puig, 'The Merging of International Trade and Investment Law' (2015) 33 Berkeley J Intl L 1, 59.
[31] Diane Desierto, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making' (2014) 26 Florida J Intl L 51, 54–55.
[32] Debra Steger, 'International Trade and Investment: Towards a Common Regime?' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 165.
[33] Desierto (n 31) 56–57.

increase in the context of the new mega-regionals.[34] Others emphasise the deep normative differences underlying the systems and claim that cross-fertilisation will remain limited, so that the convergence is far from real.[35]

The debate continues. As the incorporation of trade and investment rules in the same agreements is "taking center stage", both regimes are re-converging in the context of a progressively "complex and overlapping network of rights and obligations."[36] The main driver of convergence seems to be the common strategic challenge of both regimes on how to balance market values with regulatory concerns, essential to ensure the durability of state commitments.[37] While a sub-set of international decisions are preferable for providing this mature reconciliation, institutional and textual divergences derived from different state preferences persist and states should avoid careless transplant of doctrines and norms.[38]

It has been argued there is nothing wrong in having two regimes challenging the same measures[39] and competing for the best regulatory approach.[40] Norms of different regimes, upon which the same international subjects are bound, with similar or indistinguishable normative content – directing similar or identical behaviour – have been labelled as multi-sourced equivalent norms.[41] They are a feature of international law and a facet of its fragmentation.[42] Some aspects of the international rules regulating the entry of investments can be considered multi-sourced equivalent norms, as will be shown. As both regimes potentially regulate the same situations, adjudication can take place in both forums, even if the rights and obligations are substantially the same. In this regard, it should be noted that

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[34] Gabrielle Marceau, Catherine Quinn and Juan Pablo Moya Hoyos, 'Judging from Venus: A Response to Joost Pauwelyn' (2015) 109 AJIL Unbound 288, 292.
[35] Mark Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 209.
[36] Joost Pauwelyn, 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform' (2014) 108 Proceedings of the Annual Meeting (ASIL) 255, 255–257.
[37] Sungjoon Cho and Jürgen Kurtz, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29 EJIL 169, 170.
[38] ibid 198–203.
[39] Arwel Davies, 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?' (2012) 15 JIEL 793.
[40] Christian Tietje, 'Perspectives on the Interaction between International Trade and Investment Regulation' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 171.
[41] Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 5.
[42] International Law Commission (ILC) 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' Conclusions of the Word of Study Group – App (2 May 2006) UN Doc A/CN.4/L.682/Add.1 paras 11-16.

no matter how similar or identical the content of international rules is, the conditions for their creation, application and termination and the institutions and mechanisms for their implementation may be different.[43] The absence of coordination between regimes, that is, the lack of mechanisms to ensure coherence in treaty making, application and/or interpretation is also an aspect of international economic law.[44]

c. CONCEPTUAL FRAMEWORK AND QUESTION

This thesis mainly undertakes a scholarly study of public international law, by describing the principles and rules related to the topic and setting out a structural framework to analyse them.[45] It then examines some situations in which the connections between trade and investment are particularly present. The case studies serve to the test the framework and illustrate the challenges in the interpretation of the rules. To some extent, this thesis hints at some normative considerations, in an exercise of providing an account of the underpinnings and logic of the current developments of the rules.[46] Since there is recourse to the notions of convergence and effectiveness, it is necessary to briefly delineate what is meant by those terms.

Convergence is a polysemic concept, with different meanings, according to the context. The ordinary meaning of the expression – "the action or fact of converging; movement directed toward or terminating in the same point"[47] – offers the first notion. Convergence analysis in comparative law refers to the progressive movement towards the same substantive rules, with the consideration of solutions adopted by different legal systems. Regulatory convergence indicates the phenomenon of different domestic jurisdictions progressively adopting the same regulation over an area.[48]

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[43] Martins Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 14–15.

[44] Katja Gehne and others, 'Introduction - Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundation' in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: from Fragmentation to Coherence* (CUP 2011) 3; Puig, 'The Merging of International Trade and Investment Law' (n 30) 50–53.

[45] Scott J Shapiro, *Legality* (Harvard UP 2013) 1.

[46] Interpretive jurisprudence, according to ibid 2.

[47] 'convergence, n' (*OED Online,* OUP) <www.oed.com/view/Entry/40732> accessed 15 August 2018.

[48] Such as that achieved by EU directives or in the context of EU public law, for eg Joanne Scott, 'Member States and Regions in Community Law: Convergence and Divergence' in PR Beaumont,

In the context of international law, convergence comes within the debate of fragmentation. In this light, the approach developed by Kurtz defines convergence in the prospective sense as "a predicted increase in the legal and systemic characteristics shared by the two regimes and a predicted reduction in non-shared characteristics …"[49] This definition is adequate for three reasons. First, it comes from an attempt to analyse convergence in the specific context of international economic law. Second, it has been well accepted and referred in subsequent literature.[50] Third, it is clear and broad enough to encompass both substantive (content) and procedural (adjudicative) perspectives.

Substantive convergence refers to the movement of international regulation towards the same direction with an increase in the similar legal characteristics. The normative case for regime convergence would be strengthened for those contexts in which the regimes directly overlap.[51] In turn, the idea of adjudicatory convergence will refer to a progressive move to similar mechanisms of adjudication and enforcement, with the same systemic characteristics. It will deal with the extent to which dispute settlement mechanisms in both regimes can use similar tools.

Treaty-making convergence is referred as a facet of convergence in which legal ordering is contained in the same instrument, in what one could consider a merged regulation across regimes. In turn, as seen above, it may happen that the same phenomena are regulated similarly but through norms in different regimes. In this case, there is active alignment of regulation, which is still an aspect of convergence. Legal alignment facilitates global economic exchanges and the lack thereof makes legal ordering more difficult.[52] In the context of alignment, interpretative convergence is achieved when similar concepts and standards are interpreted in the same way through adjudication in different regimes.

In any case, to analyse whether convergence is a welcome development, one must at least consider briefly the question of the underpinnings or logic of the

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Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2001); Michaela Drahos, *Convergence of Competition Laws and Policies in the European Community: Germany, Austria and the Netherlands* (Kluwer Law International 2001) 9–10.

[49] Kurtz (n 27) 24.

[50] Gáspár-Szilágyi Szilárd, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP forthcoming 2019).

[51] Broude (n 25) 147–148.

[52] Gregory Shaffer and Michael Waibel, 'The (Mis)Alignment of the Trade and Monetary Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 226.

law and what the law should be (*de lege ferenda)*.[53] This exercise requires the definition of a functional benchmark. The underlying suggestion is that increasing the common features and reducing the differences between the regimes will bring more effectiveness. As a criterion relevant for legal theory and prominent in international economic law, effectiveness may provide a guide to treaty making and adjudication to assess these new developments. International law, as an order to which all the states and national legal orders are subordinated, will only constitute an effective legal order if it is, by and large, applied and obeyed.[54] International law rules may lose at all the label of "law" if they are completely ineffective.[55]

This presupposes no bias against fragmentation per se, which will only be problematic if it affects the adequate functioning and performance of the competing legal regimes, therefore hindering their effectiveness.[56] A problem of fragmentation and incoherence only exists when there is "lack of effectiveness and efficiency of the systems, due to overlaps, or conflicts regarding their *objectives as legal orders* and their *specific objectives as regulatory entity for a certain issue*."[57] If there are no conflicting trade-offs, the issue to be tackled is how to catalyse the synergies of the interconnected regimes for them to perform better and to achieve more overall effectiveness.[58] This is particularly evident when there are overlapping international regimes that share similar normative goals, as will be argued.

The idea of effectiveness is generally intertwined with issues of impact, enforcement, compliance or implementation. While some focus on the "*outward* impact of (primary and secondary) rules, institutions, and narratives of international law on all international actors and law-appliers",[59] others concentrate on the coercive institutions and sanctions required for state's compliance.[60] In a more nuanced approach, Meyer argues that "effectiveness refers to whether the law has

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[53] Shapiro (n 45) 2.
[54] Hans Kelsen, *Principles of International Law* (Robert W Tucker ed, 2nd ed, Holt, Rinehart and Winston 1966) 560–562.
[55] Robert W Tucker, 'The Principle of Effectiveness in International Law' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (U California P 1953) 31.
[56] Gehne and others (n 44) 42–43.
[57] ibid 45.
[58] ibid.
[59] Jean d'Aspremont, '"Effectivity" in International Law: Self-Empowerment Against Epistemological Claustrophobia' (2014) 108 Proceedings of the Annual Meeting (ASIL) 165, 165 (emphasis in the original, fn omitted).
[60] See Liam Murphy's opinion summarised in Vijay Padmanabhan, 'The Idea of Effective International Law: Continuing the Discussion' (2014) 108 AJIL 91, 91.

changed a state's behavior from what it would have been in the absence of the law."[61] It seems that compliance understates effectiveness and the complex purposes that actors impose on international legality; there could be low compliance with high effectiveness and vice versa.[62]

The suggestion is that effectiveness depends highly on security and predictability, which is ensured by consistency and coherence.[63] Clarity, non-contradiction and constancy are key standards to assess legality.[64] Nevertheless, inconsistency and unpredictability only become a problem when they lead to arbitrariness through a departure from the reason of the law or to the impossibility of recognising the law as a guide to behaviour.[65] Besides, in the context of international law, while the idea of rule of law encompasses clarity and predictability,[66] vagueness and inconsistency in language may be the only way in which treaty parties can strike a deal. Whether the extent of the duty of adjudicators to ensure consistency[67] and coherence[68] is debatable, international courts certainly play a role to make international law more effective and complete.[69]

While every international regime tolerates some degree of non-compliance or inconsistency,[70] one might expect that in regimes of international economic law, effectiveness is only promoted with nothing but a reduced degree of inconsistency. This is because international economic law rules deal with the long-term expectations of state governments, economic agents, and citizens, which interact

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[61] Timothy Meyer, 'How Compliance Understates Effectiveness' (2014) 108 AJIL 93, 94.
[62] Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy 127 in the context of international trade law, see 131-133; Meyer (n 61) 96–97. See also Kingsbury, to whom discussing compliance is not helpful if the concept is not given meaning by reference to a theory of international law Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1997) 19 Michigan J Intl Law 345, 368. For the WTO, see Sivan Shlomo Agon, 'Is It All About Compliance? Towards a Multidimensional Goal-Based Approach for Analyzing the Effectiveness of the WTO DSS' (2014) 108 Proceedings of the Annual Meeting (ASIL) 118.
[63] In this regard, Franck emphasises that "Coherence does not ensure that any particular result would be fairer or more just than achieved by some other principle, or even a purely random result. Coherence legitimates a rule, principle, or implementing institution…." Thomas M Franck, *The Power of Legitimacy among Nations* (OUP 1990) 147–148.
[64] Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969) 65–69, 79–81.
[65] Timothy Andrew Orville Endicott, *Vagueness in Law* (OUP 2000) 185–204.
[66] UNGA Res 67/1 (30 November 2012) UN Doc A/RES/67/1 paras I.2, I.8.
[67] *Saipem SpA v The People's Republic of Bangladesh,* ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007) [67]. For the online sources, see (n 124).
[68] Kurtz (n 27) 251–252.
[69] Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 423–425; David Caron, 'International Courts and Tribunals: Their Roles amidst a World of Courts' (2011) 26 ICSID Review 1, 2–3.
[70] Kelsen (n 54) 561.

in various and successive transactions.[71] These actors need to behave rationally based on clear guidance given by international regulation and change their behaviour accordingly. Even sub-optimal international economic law arrangements can be adapted and reproduced to be more effective in the long run.[72]

Apart from the content-neutral notions of security and predictability, assessing the effectiveness of legal norms means evaluating how they fulfil their objectives and purposes.[73] International economic law needs to allow for the expression of several normative dimensions if it desires to be a sustainable regulator of international economic governance.[74] In this light, the analysis of effectiveness, as a meta-parameter, must consider the broad goals of each regime. This requires some inquiry into the aims of the trade and investment law regimes when it comes to welcoming investments. It also asks for an analysis of the object and purpose of the specific provisions that deal with the matter.

As the analysis of the conditions of entry of foreign investments is generally undertaken under the label of liberalisation, it is valid to evaluate to what extent investment liberalisation is an aim expressed in international economic law treaties. In fact, a trade-liberalising agenda is an overarching goal of the WTO regime and adjudicators are expected to take that into account.[75] The preamble of the WTO Agreement states that trade liberalisation is among its aims.[76] In the GATS, the principle of progressive liberalisation is clearly structured in the text and in the

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[71] Roberto Echandi and Maree Newson, 'The Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch' (2014) 17 JIEL 847, 866.

[72] Pauwelyn, 'At the Edge of Chaos?' (n 28) 375–376, 380.

[73] Antony Allott, 'The Effectiveness of the Law' (1980) 15 Valparaiso University Law Review 229, 233.

[74] For a fairness approach, see Oisin Suttle, 'Book Review Essay: Poverty and Justice: Competing Lenses on International Economic Law: John Linarelli (Ed.), Research Handbook on Global Justice and International Economic Law. Chelthenham: Edward Elgar, 2013. Krista Nadakavukaren Schefer (Ed.), Poverty and the International Economic Legal System: Duties to the World's Poor. Cambridge: Cambridge University Press, 2013.' (2014) 15 JWIT 1071; Oisin Suttle, 'Equality in Global Commerce: Towards a Political Theory of International Economic Law' (2014) 25 EJIL 1043. For an efficiency approach, see Alan O Sykes, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 The Journal of Legal Studies 631; Anne Van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 JIEL 507, 534–537; Eric A Posner, *Economic Foundations of International Law* (Belknap Press of Harvard UP 2013) 263–328.

[75] This is because adjudicators are expected to support the regime in which they operate; therefore, it is important to identify its implicit or explicit goals. Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 43. See also David Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley J Intl L 401, 415; Caron (n 69) 2–9.

[76] Marrakesh Agreement, Recital 4.

dispute settlement decisions.[77] As will be developed, investment liberalisation, including the notion of the prevention of investment protectionism, is a goal of the GATS as well as of several PTAs.

In turn, investment liberalisation has been described as a secondary, subsidiary objective of BITs, not always reflected in the text of agreements, but alluded to in background documents.[78] The focus of BITs on investment protection has overshadowed the objective of investment liberalisation. Investment promotion and investment facilitation, which until recently had not achieved a prominent legal status, could also be added to the conceptual repertoire[79] As will be detailed, the models which traditionally grant entry rights have been clear to state that liberalisation is an objective to be achieved.[80] The fact that BITs refer more explicitly to the protection of investors does not mean that generalised market access to investors as a class and the preservation of competitive opportunities is not one of their aims.[81] The recognition of this degree of commonality in goals, as will be developed, may reinforce the idea that convergence in the entry of investments is a natural way to bring about effectiveness.

Liberalisation, as an "ideologically-charged concept", needs to be understood according to the normative goals that underlie liberalisation efforts.[82] In a public international law framework, obligations and commitments to ensure liberalisation are balanced by the inherent rights of host states, as expressed in the

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[77] GATS arts XIX, XX and XXI. See also WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body* (19 January 2010) WT/DS363/AB/R [392]-[394] <http://docsonline.wto.org>.

[78] Salacuse (n 29) 112.

[79] The idea of investment facilitation is currently the object of structured discussions in the WTO with the aim of a future plurilateral agreement. The framework encompasses mechanisms to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention." WTO 'Joint Ministerial Statement on Investment Facilitation for Development' WT/MIN/(17)/59 11th Ministerial Conference (Buenos Aires, 11 December 2017).

[80] Patricia McKinstry Robin, 'The Bit Won't Bite: The American Bilateral Investment Treaty Program' (1983) 33 American University Law Review 931, 946. For a contemporary approach, see the ASEAN Comprehensive Investment Agreement – ACIA (signed 26 February 2009). ACIA Art 1(a) lists as an objective the creation of "*a free and open investment regime in ASEAN"*, through the "*progressive liberalisation* of the investment regimes of Member States" (emphasis added).

[81] For a slightly different perspective, see Andrew Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar 2016) 21; Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' (2008) 102 AJIL 48, 54–56.

[82] On the different perspectives around the term, both in the technical and normative perspectives, see Niamh Dunne, 'Perspectives on Liberalisation' (LSE 2017) LSE Law, Society and Economy Working Paper n 06/2017 27 <http://eprints.lse.ac.uk/87549/> accessed 15 August 2018.

terms of the treaties, which constitute their regulatory space. This is evident in the structure of the bargain struck in the WTO agreements.[83] In international investment law, there are indications that host states' regulatory space is progressively being shaped by the same concerns, as evidenced in the academic discourse and arbitral decisions.[84] It is true that the discourse of assertion of regulatory freedom in international investment law and in the WTO regimes may differ in terms of the way in which the arguments are deployed.[85] However, when one considers that ensuring the competitive opportunities for investors is a shared normative goal, there is a higher degree of discourse commonality. In the context of the entry of foreign investments in services, one may say then that the common strategic challenge in the convergence of rules seems to be how to strike a balance between investment liberalisation and the safeguard of states' regulatory space.

Therefore, the relevant questions become clearer: to what extent is there substantive and adjudicative convergence between international trade and investment law, when it comes to the entry of investments in services? Do those signs of convergence bring about more effectiveness to the rules of both regimes by attaining the goal of investment liberalisation balanced with the safeguard of regulatory space?

d. ROADMAP AND CONTRIBUTION

The thesis is divided in two parts and each part has four chapters. Part A discusses how international economic law regulates the entry of international investments and enforces the rights and obligations associated with it. Chapter I deals, first, with the idea of entry expressed by the concept of "admission" and the qualified obligation to admit in the practice of traditional BITs – or, more generally international investment agreements – IIAs. It does so by analysing the evolution of the interpretation of treaty clauses governing states' rights and obligations in relation to the admission of investments. Subsequently, it focuses on the concept of "establishment", another notion expressing entry. The chapter includes an overview of the US Model BIT and of the practice under the North American Free

[83] Shany (n 75) 45.
[84] See generally Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1, 86–87.
[85] Desierto (n 31) 117–132.

Trade Agreement – NAFTA.[86] It briefly comments on the trends towards the conferral of establishment rights and obligations.

As issues of the interpretation of fundamental concepts have arisen in both investment and trade treaties,[87] chapter II covers the entry of investments as expressed in the concepts of commercial presence, market access and discrimination in the GATS, with a focus on service suppliers. Finally, it examines the illustrative approaches adopted in the CPTPP[88] and in the CETA,[89] among others. Chapters I and II suggest that, at least in the provisions of entry of investments in services, there are some signs of an increasing convergence of both concepts and rules. The aim is not to exhaust the analysis of all the existing treaties in that regard, something that data analysis can do more efficiently through similarity measures,[90] but to illustrate trends by a qualitative analysis of how concepts are progressively being expressed.

The adjudication and enforcement of these rights and obligations, including jurisdictional aspects and remedies will be dealt with in chapters III and IV. They show whether and how states and investors can adjudicate rights and obligations associated with the entry of investments. In addition, they assess how states can limit that enforcement. First, chapter III examines whether treaties potentially applying to the certain situations confer jurisdiction for international adjudication. Then, chapter IV analyses available remedies and mechanisms to induce conformity with decisions arising from the adjudication of the rules.

Part B analyses the concept of convergence through a set of situations. Chapter V casts light on aspects of the interaction between the trade and investment regimes. Attention is turned to a specific treaty provision which provides the linkage between obligations in both regimes, the Most-Favoured-Nation (MFN) clause. Present in most treaties, it has the potential to incorporate the better

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[86] North American Free Trade Agreement (adopted 17 December 1992) 32 ILM 289, 605 (1993) (NAFTA). NAFTA is to be replaced by the United States-Mexico-Canada Agreement (signed 30 November 2018, pending ratification) (USMCA).

[87] Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (n 24) 5, 26.

[88] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018).

[89] Comprehensive Economic Trade Partnership between Canada and the European Union (signed 30 October 2016).

[90] See eg Wolfgang Alschner, Julia Seiermann and Dimitriy Skougarevskiy, 'Text-as-Data Analysis of Preferential Trade Agreements: Mapping the PTA Landscape' (UNCTAD 2017) UNCTAD Research Paper n 5 UNCTAD/SER.RP/2017/5.

treatment granted to investors from one regime into another, including rights related to investment entry and liberalisation.

Finally, chapters VI to VIII supplement the understanding, by exploring topics, cases and hypotheticals in which the concepts can be applied. Case studies were selected to test the framework and highlight the challenges of applying and interpreting international economic rules regarding entry. They are organised around three topical issues. Chapter VI deals with the first issue – investment screening regulation – that is to say, any mechanism or procedure of notification or evaluation for the authorisation of a foreign investment. Chapter VII tackles the second one: the protective regulation of certain sectors for domestic investors. Under this umbrella, one can place regulatory measures limiting entry, aimed at insulating companies, such as national champions or well-connected domestic groups. Chapter VIII covers, as the third issue, the scope of host states' regulatory space by analysing measures to safeguard certain financial and fiscal policies (prudential measures), having an impact on the entry of foreign investors.

The thesis hopes to contribute to the current debate of convergence and divergence of international economic law, by furthering the understanding of the rules and engaging with different perspectives. There is a critical thread permeating the chapters, which corresponds to current debates in the academic and policy-making spheres on: the goals and reform of the international investment and trade regimes; the scope of the regulatory space in international investment and trade agreements; and the legitimacy of the interpretation and adjudication of rules through investor-state and state-state arbitration mechanisms. While those questions go much beyond the scope of this work, they help to place the debate in a larger setting.

The first added value of the thesis is that it establishes a structured framework of analysis of a specific aspect of the discussion. This corresponds to the relation between the regulation of international trade in services (eg GATS, PTAs) and the regulation of international investments. In this regard, it analyses the issue not only on substantive terms but also on institutional and adjudicatory terms, under the backdrop of public international law. Second, the thesis tackles a topic that, from the point of view of international investment law, is underexplored and understudied: the entry of investments. It expects to fill an important gap in explaining the extent to which international investment law also regulates the

liberalisation and access of investments. Third, the thesis discusses several real situations and hypotheticals involving trade in services and investment rules in a way that has escaped academic attention. The circumstances behind those cases bring new light to the issues.

PART A – REGULATION OF ENTRY BY INTERNATIONAL ECONOMIC LAW

CHAPTER I – REGULATION OF ENTRY BY INTERNATIONAL INVESTMENT LAW[91]

a. ADMISSION

i. General International Law

As a starting point, it is useful to briefly explore the backdrop of international law in the area, before addressing the concept of admission. While there is a general duty for states to admit their own nationals into their territory, there seems to be no general rule that obliges a state to grant access to a foreign individual or entity.[92] A state cannot "claim the right for its nationals to enter into, and reside on, the territory of a foreign state."[93] It has great discretionary powers to accept foreigners and allow them to perform economic activities in its territory.[94] In other words, its regulatory space is very wide and not severely limited by international law. By treaty, however, a state may accept obligations not only on the entry of foreigners but also on the settlement of business activities.[95]

In the context of foreign investments, the general observations above equally apply. The right of the state to prohibit, control or allow entry of foreign investors arises from a dimension of sovereignty.[96] There appears to be no general legal obligation on the matter of admission of investments from the viewpoint of

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[91] A preliminary version of chs I and II is available as Murilo Lubambo, 'How Does International Economic Law Regulate the Right of Entry of Investments in Services?' (Social Science Research Network 2016) Society of International Economic Law (SIEL), Fifth Biennial Global Conference <http://papers.ssrn.com/abstract=2801925> accessed 15 August 2018.

[92] *Nottebohm Case (Liechtenstein v Guatemala)* (dis op of Judge Read) [1955] ICJ Rep 4, 46; Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978) 136–137.

[93] Robert Yewdall Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Longman 1992) 897; Goodwin-Gill (n 92) 196.

[94] Dominique Carreau and others, *Droit International Économique* (6th edn, Dalloz 2017) 524–525.

[95] Goodwin-Gill (n 92) 160–97; Jennings and Watts (n 93) 898.

[96] Giorgio Sacerdoti, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties' (2000) 1 JWIT 105, 105; Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 10; Rudolf Dolzer and Christoph H Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 88; Sornarajah (n 10) 110.

customary international law.[97] Thus, there is consensus that each state is generally sovereign to admit investments and set the conditions for their admission. However, the definition of the exact features of this inherent right is essential to provide the background in which states operate in the absence of mutual commitments.

The admission of foreign investments apparently does not require justification or reasoning and seems to be at the state's own convenience. While, ideally, the rule of law should guide all internal actions of the state, its precise characteristics at the international level are not fully defined.[98] One might say that actions attributed to the state may result in the admission of an investment even if it is prohibited under the state's domestic regulations or in the denial of an investment even if it should be allowed.

This may be tempered by considerations based on the principle of good faith, which is not a rule, but can be perhaps understood as a limitation on a state's external sovereignty.[99] Good faith may play a role in cases of state unilateral acts strongly encouraging or granting admission, followed by an unjustified refusal, when an investor actually attempts entry.[100] An argument of estoppel could also be raised in order to bar actions by the host states which go back on previous representations upon which the investor has relied.[101] The writings of classical authors already indicated a more nuanced approach, suggesting perhaps a relative right of settlement to exercise economic activities in a foreign territory and the need to justify a refusal by the host state.[102]

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[97] Ibrahim FI Shihata, 'Recent Trends Relating to Entry of Foreign Direct Investment' (1994) 9 ICSID Review 47.

[98] Rosalyn Higgins, 'The Rule of Law: Some Sceptical Thoughts', *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009) 1339.

[99] Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, 58.

[100] Robert Kolb, *La Bonne Foi En Droit International Public: Contribution à l'étude Des Principes Généraux de Droit* (1st edn, Presses universitaires de France 2000) 108, 323–38, 357–93, 482–86.

[101] James Crawford, 'L'Estoppel En Droit International Public . Précédé d'un Aperçu de La Théorie de l'estoppel En Droit Anglais. By Antoine Martin. Paris: Éditions A. Pedone, 1979' (1981) 51 British Ybk Intl L 290.

[102] Francisco de Vitoria, *Francisci de Victoria De Indis et De Ivre Belli Relectiones* (first published 1557, The Carnegie Institution of Washington 1917) 151–54, 161–62; Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres. Vol. 2, The Translation* (Francis W Kelsey tr, first published 1625, Oceana : Wildy & Sons 1964) 201–05; Hugo Grotius, *Hugo Grotius Mare Liberum, 1609-2009* (Robert Feenstra ed, first published 1609, Brill 2009) 33, 131–33; Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (New edn corr, tr from the French, G G J and J Robinson 1793) 35–39, 134, 156–60, 167–68, 171, 173. See also Sornarajah (n 10) 128, fn 84.

Another aspect of the right becomes evident if the reasons for non-entry or discrimination amounts to a breach of rules which have been considered as peremptory norms of general international law (*jus cogens).*[103] One example is racial prejudice.[104] While state practice indicates a degree of recognition of discretion in that regard,[105] the principle of non-discrimination on racial grounds exerts a limit on the state's decision-making power.[106] If a prohibition or limitation on investments aims at ending the economic dominance of a particular group, this may constitute objective justification.[107] It is submitted that blatant acts against prospective investors, which are arbitrary and unjustified, that is, motivated solely by racial discrimination and lacking objective justification are to be considered unlawful and prohibited under general international law.[108]

In any case, the establishment of permanent presence and the settlement of foreign businesspeople and foreign investors have been historically granted by formal agreements.[109] In the Chrysobull (or Golden Bull) at the end of the 11th century, among other privileges, Byzantium granted the right of establishment for Venetians in parts of the Byzantine territory, including Constantinople – where there was a quarter for Venetian traders.[110] This comprised the ownership of buildings, wharfs and anchorage areas to facilitate and promote the trade

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[103] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 53; *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22*; Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [79]; Sornarajah (n 10) 110.

[104] Charter of the United Nations (entered into force 24 October 1945) 892 UNTS 119 (UN Charter) arts 1(3), 13(1)b, 55(c), 76(c); ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ARSIWA) 85; ILC Study Group 2006 (n 42) paras 33-35; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 [34]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6 [64].

[105] Fiona C Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302; Fiona C Beveridge, *The Treatment and Taxation of Foreign Investment under International Law: Towards International Disciplines* (Juris/Manchester UP 2000) 11.

[106] Randolph John Nogel, 'Human Rights and Uganda's Expulsion of Its Asian Minority' (1973) 3 Denver Journal of International Law and Policy 107, 109; Goodwin-Gill (n 92) 187–88.

[107] Sornarajah (n 10) 131–132, 165–166.

[108] *Barcelona Traction* (n 104) [33]-[34]; Beveridge, *The Treatment and Taxation of Foreign Investment under International Law* (n 105) 11–13; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 British Ybk Intl L 264, 319.

[109] Karl Moore and David Lewis, 'The First Multinationals : Assyria circa 2000 B.C.' (1998) 38 Management International Review 95, 103; Posner (n 74) 291.

[110] Peter Frankopan, 'Byzantine Trade Privileges to Venice in the Eleventh Century: The Chrysobull of 1092' (2004) 30 Journal of Medieval History 135, 138; Diego Puga and Daniel Trefler, 'International Trade and Institutional Change: Medieval Venice's Response to Globalization' (2014) 129 The Quarterly Journal of Economics 753, 765–766.

enterprise, which generally required high long-term investments.[111] In the 12th century, King Henry II of England granted concessions for the establishment of Cologne merchants, which could set up headquarters in London and exercise market rights to trade at fairs in England.[112] While involving some sort of request and exchange of favours, those arrangements cannot be properly called treaties.

In turn, the right to remain and engage in business activities granted by early Friendship, Commerce and Navigation Treaties (FCN) treaties involved reciprocal obligations and encompassed the settlement of some form of investments, such as warehouses.[113] It is important to point out that FCN treaties, unlike BITs, were often concluded between capital exporting countries.[114] At the beginning of the 20th century, a right of settlement in relation to industry (manufacturing and mining) started to be present in treaties, mainly in the form of a non-discrimination principle.[115] Some FCN treaties, such as the Iran-US treaty, provided for the right of nationals to enter the country to engage in commercial activities and to develop the operations of an enterprise in which they are in the process of investing.[116]

A turning point occurred after the modern decolonisation as some states adopted a defensive approach regarding foreign investments.[117] This suspicion naturally meant that they would not be willing to offer international commitments to allow foreign investments. While in a context of post-colonialism, some states asserted their economic sovereignty by opposing anything associated with the former coloniser, during the 1990s most of them would shift their developmental strategies.[118] It is within this background that the next section analyses admission clauses.

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[111] Frankopan (n 110) 139; Puga and Trefler (n 110) 770, 806.
[112] Terence Henry Lloyd, *England and the German Hanse, 1157–1611: A Study of Their Trade and Commercial Diplomacy* (CUP 1991) 17.
[113] Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010) 415.
[114] Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Pub 2006) 71.
[115] Vandevelde, *Bilateral Investment Treaties* (n 113) 30–31, 416.
[116] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957, one year`s termination notice given 3 October 2018) 284 UNTS 93, art II(1). It also recognised the legal status of foreign companies and their access to justice, but this did not amount to rights for them to engage in activities [Art III(1)].
[117] Sornarajah (n 10) 27.
[118] Cho and Kurtz (n 37) 175–177.

ii. Typical Clauses

The main instruments to promote obligations of admission are treaties negotiated by states by which they commit themselves to accept investments. The majority of BITs follow the so-called admission model, or investment-control model; it reserves to the host state the discretion to set admission procedures and entry conditions, which may change from time to time.[119] This full flexibility has been described as allowing for discretion to carry out national development goals.[120]

Several policy and economic arguments support this approach and a good number of them also refute it.[121] They are not going to be dealt with here, since they represent choices resulting from political processes and economic realities. The adoption of the admission model may also suggest that treaty parties were not concerned with entry restrictions, which would make sense in a context where capital importing countries were keen to attract investments from capital exporting countries. Admission policies and procedures represent an important and visible signal to investors, as the first point of contact, setting the tone and attitude for the following long-term relationship.[122]

The logical purpose of admission model treaties is that the state maintains the right to decide on the admission of investment and investors.[123] States have applied several formulas in their BIT clauses, adopting a two-part provision, with the following language:[124]

> I.
> A state [shall] admit such investments:
>
> II.
> - "in accordance with the applicable laws and regulations";[125]
> - "in conformity with the applicable laws and regulations";[126]
> - "subject to its laws and regulations";[127]

[119] Joubin-Bret (n 35) 11–12.
[120] Pollan (n 114) 76.
[121] ibid 139–141.
[122] ibid 3, 17, 139.
[123] Joubin-Bret (n 96) 28.
[124] Unless otherwise indicated, all the IIAs and model BITs and all the investment decisions mentioned here are available at the UNCTAD Database and in the website Italaw respectively at <http://investmentpolicyhub.unctad.org/IIA> and <www.italaw.com> accessed 15 August 2018.
[125] China-Japan BIT (signed 27 August 1988) art 2.1.
[126] Treaty of Friendship, Commerce and Navigation between the USA and the Italian Republic (signed 2 February 1948, entered into force 26 July 1949) 79 UNTS 171, art III(2).
[127] Jamaican Model BIT, art II.

- "in accordance with its laws and regulations";[128]
- "subject to its rights to exercise powers conferred by its laws or regulations";[129]
- "subject to its rights to exercise powers in accordance with the applicable laws and regulations";[130]
- "in accordance with its laws and investment policies applicable from time to time".[131]

Some BITs did not even include the duty of admission in accordance with local laws but used the language "endeavour" to admit; in fact, the language "shall admit" in the first part has been described as rather imperative and strong.[132] The language of the second part of the clause appears to mean that the final admission decision depends on internal rules of the host state.[133]

In this regard, the analysis of the meaning of these terms in treaties should carefully follow the interpretative rules of the VCLT.[134] As a proxy to the ordinary meaning of the expression, one point of departure would be to check definitions from dictionaries. This recourse is common and has been used, for example, in *Churchill v Indonesia*, an investment arbitration award: the Tribunal ascertained the ordinary meaning of the treaty provision by resorting to the Oxford Dictionary of English and concluded that "the verb *'to admit' means 'to allow'* or *'to accept' …* that same dictionary defines the noun *'admission'* as *'the process or fact of entering or being allowed to enter a place or organization*'."[135] More specialised dictionaries bring the following definition to "admitted corporation": "A corporation licensed or authorized to do business within a particular state. – [a]lso termed *qualified corporation; corporation qualified to do business.*"[136]

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[128] Switzerland-Peru (signed 22 November 1991) art 2.1.
[129] Netherlands Draft Model BIT (2018) art 3.1.
[130] China-Japan-Korea Investment Treaty (signed 13 May 2012) art 2.1.
[131] Australia-Vietnam BIT (signed 5 March 1991) art 3.1.
[132] Antonio R Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 ICSID Review 428, 430; Otto Sandrock, 'The Right of Foreign Investors to Access German Markets: The Meaning of Article 2(1) of the German Model Treaty for the Promotion and Protection of Foreign Investments' (2010) 25 ICSID Review 268, 281.
[133] Pollan (n 114) 76.
[134] VCLT (n 103) arts 31-32.
[135] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction – Churchill Mining Plc (24 February 2014) [288] (pend applic for annulment, 31 March 2017) (emphasis added, fns omitted).
[136] Bryan A Garner and Henry Campbell Black (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 415 (emphasis in the original).

Some maintain that this kind of language is unnecessary.[137] If there are no commitments, the argument goes, a state would be naturally free to admit investments in accordance with its interests. However, as shown in the first section, customary international law also allows for arbitrary and non-reasoned decisions, perhaps tempered by *jus cogens*, good faith and estoppel. Admission clauses are not merely a reinstatement of customary international law, since the discretion is to be exercised within the framework of the law and not on the basis of a frivolous decision.[138] The progress of this language is evident in comparison with previous expressions focusing on the conformity with national development policies and underlining specific procedures.[139] The provision is not without effect, as posited by Vandevelde, since:

> It incorporates local law with respect to establishment into the BIT so that a failure by the host state to adhere to its own law violates the BIT ... Thus, while the host state may change its law at any time, it must adhere to its own law until such time as that law has been changed.[140]

In fact, a rule of international law can make adherence to domestic law relevant "by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it."[141] As the reference to legislation is unqualified, it points to the evolving legislation, not only at the time of the conclusion of the BIT but also subsequently.[142] The host state is free to review its laws after the BIT has entered into force.[143] It is important to recall that a "denial of admission or *its subjection to requirements not in conformity with the law* would therefore be a violation of the treaty, if not towards the investor, surely *in respect of its national state*."[144] The host state itself is bound by the obligation, and has to observe, for example, procedures of registration and authorisation.

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[137] For instance, while Shihata emphasises that this provision establishes a presumption in favour of admission, he claims it is not a fundamental change compared to the absence of a BIT, since it would reflect customary law on the matter, see Shihata (n 97) 55.
[138] Parra (n 132) 431–433.
[139] Sacerdoti (n 96) 108.
[140] Vandevelde, *Bilateral Investment Treaties* (n 113) 413 (emphasis added).
[141] ILC ARSIWA 2001 (n 104) 38, art 3, para 7.
[142] Shihata (n 97) 55.
[143] Dolzer and Schreuer (n 96) 89.
[144] Sacerdoti (n 96) 109 (emphasis added).

iii. Rescuing an Interpretation

It is submitted that the ordinary meaning of entry clauses, such as admission and establishment, is perhaps overshadowed by the alleged focus of BITs exclusively on the protection of investments, as will be further analysed.[145] This is the reason why in investment arbitration decisions most of the discussion concerning the legal concept of admission/authorisation focuses on a slightly different issue. Instead of analysing the obligation of the host state to follow domestic law to give access to foreign investments, the interpretative task has been to check whether an investment is covered and protected by a BIT, that is, if it was regularly "admitted".[146] This generally leads to the conclusion that the protection standards of the BIT can be applied.

Some argue that the admission clause acts as a filter to the protection by the BIT, preventing illegal or unlawful investments from being protected.[147] This draws on a line of awards in cases such as *Salini v Morocco*,[148] *Tokios Tokelés v Ukraine,*[149] *Bayindir v Pakistan*[150] and *Inceysa v El Salvador*.[151] All those cases dealt with the interpretation of the reference "in accordance with the law and regulations" included not in the admission clause but in the definition of investment. However, even in the latter situation, the provision should not be interpreted as a requirement of validity of the investment for the purposes of protection; it is arguably a mere deference to the host state's domestic rules regulating the

[145] The *Saluka v Czech Republic* Tribunal has warned against the excessive focus on protection: "The protection of foreign investments *is not the sole aim of the Treaty*, *but rather a necessary element alongside the overall aim of encouraging foreign investment* and extending and intensifying the parties' economic relations. … an interpretation which exaggerates the protection to be accorded to foreign investments may serve to *dissuade host States from admitting foreign investments* and so undermine the overall aim of extending and intensifying the parties' mutual economic relations." *Saluka Investment BV v Czech Republic* UNCITRAL Partial Award (17 March 2006) [300] (emphasis added).

[146] For a decision that denies jurisdiction for the lack of an "admitted" investment, see *Philip Morris Asia Ltd v The Commonwealth of Australia*, UNCITRAL PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

[147] Joubin-Bret (n 96) 18, 27.

[148] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* ICSID Case No ARB/00/4 Decision on Jurisdiction (23 July 2001) 42 ILM 609.

[149] *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) [84]-[86].

[150] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29 Decision on Jurisdiction (14 November 2005) [109].

[151] *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (25 July 2006) [190]-[207].

acquisition of rights.[152] In fact, arguments used to provide the grounds for decisions in several investment arbitration cases[153] indicate an increasing recognition that even in the absence of such or similar clauses, illegal investments are not to be protected.[154] This covers situations where the investor obtained their investments by actively corrupting government officials. An approach based on general principles is fully capable of excluding those investments.

This argument is in line with Vandevelde's observation that tribunals "have interpreted a provision that purports to expand investor rights as actually imposing a limitation on them."[155] The most defensible way to assign meaning to the admission clauses, as developed above, is to consider it as the qualification of the obligation of the state to act in accordance with its *own* regulations. As shall be analysed in chapter VI, the extent of the obligation of states to follow their own laws in the admission of investments is a key component of some contentious cases.

In *Aguas de Tunari v Bolivia*, the tribunal's discussion developed around one objection raised by Bolivia: that the language used in the admission clause prevented jurisdiction. The second sentence of art 2 of the Bolivia-Netherlands BIT reads: "Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."[156] The language makes reference to "rights to exercise powers", which, to some commentators, means a "positive right to admit investments".[157] The Tribunal recognised the *"obligation to allow the entry* of foreign investment*"* and the *"duty to admit* investments" and

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[152] Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 ICSID Review 155, 172–175.

[153] *Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*, ASEAN ID Case No ARB/01/1 Award (31 March 2003) [58]; *Inceysa* (n 151) [230]-[257]; *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) [182]; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) [135]-[146]; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) [101]; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (10 June 2010) [123]-[127]; *Yukos Universal Limited (Isle of Man) v The Russian Federation,* PCA Case No AA 227, Final Award (18 July 2014) [1349], [1352]; *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/11/12, Award (10 December 2014) [332].

[154] Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 Law and Practice of International Courts and Tribunals 281, 310–11, 314–15, 322; Dai Tamada, 'Host States as Claimants: Corruption Allegations' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 117.

[155] Vandevelde, *Bilateral Investment Treaties* (n 113) 418.

[156] (signed 10 March 1992, terminated 1 November 2009).

[157] Joubin-Bret (n 96) 23.

concluded that admittance should take place "in accordance with the laws or regulations in force *at that time*."[158]

This supports the interpretation presented here. Firstly, because the tribunal characterises the admission clause as an "obligation" and "duty", although limited, which restores the meaning of the clause. Secondly, because it emphasises the "right to exercise powers" as expressed as a right to deny the admission of investments, if the denial power is within the scope of the laws and regulations. In a more nuanced approach, the *MTD v Chile* tribunal seems to accept the principle that there is no obligation of a state to issue licenses when this is against the "laws and regulations"; there is no right of an investor to a change of regulation, even for wrongly admitted investments.[159] Thirdly, the decision in *Aguas de Tunari* reinforces the interpretation that the wrongfulness of an act of denial of admission contrary to domestic law should be evaluated with reference to the laws in force at the time the investor attempts an investment. That is the point in time to evaluate a violation of the host state resulting in a non-admission decision. Cases focussing on the illegality of investments have also highlighted this issue.[160] Hence, in the context of entry, the point in time when compliance should be evaluated is generally the time an investment is about to be made.

One should not interpret the expression "states shall admit" as a requirement of a formal act of admission, rather than a right. This would lead to the inaccurate conclusion that investments that generally do not require express authorisation, licence or permit would be outside the scope of protection. In the same way, in the presence of expressions such as "accepted", investments are covered even if they were not subject to an "acceptance" phase. That is the case, for instance, when they are made in a non-prohibited area or by the acquisition of shares, thus dispensing with any positive act of the host state.[161] *Churchill* also recognises the principle that the admission requirement is to be analysed in the

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[158] *Aguas de Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005) [147] (emphasis added).

[159] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile,* ICSID Case No ARB/01/7 Award on Merits (25 May 2004) [206] and Decision on Annulment (21 March 2007) [107]. *MTD* also suggests the principle that a state that admits an investment contrary to its own laws and regulations is in breach of the FET. Award [188].

[160] Schill (n 154) 309. See also *World Duty Free Company Limited v the Republic of Kenya,* ICSID Case No ARB/00/7, Award (4 October 2006) [142]; *Phoenix* (n 153) [103]; *Fraport AG* (n 153) [331].

[161] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines,* ICSID Case No ARB/03/25, Annulment Decision (23 December 2010) [105]-[106].

context of the legislation when admission occurs; where that legislation does not require approval, it should *not* be required afterwards.[162]

Acceptance takes place as soon as an investor makes an investment when its internal law does not prohibit it. The discussion in the *Yukos v Russia* case exemplifies though the complexity of the matter. There, it was explicitly recognised that the process of admission may involve a continuum of stages, consisting of several consecutive phases "rather than an instantaneous act".[163] To find out the exact moment of "admission" is a task that will define the coverage of the treaty and the extent of the host state's obligation.

In the light of the above, admission clauses in accordance with laws and regulations should be read as an obligation towards host states to avoid caprice or whimsicality. They are not a mere reflection of customary international law, but instead, represent a fairly small, but significant progress. They contain an obligation or duty regarding the entry of investments for host states to avoid discrimination not based on their domestic legal system.

Some additional comments are necessary. The first is why there are more reported cases on investors not complying with the law than on states not respecting their own laws. Denials of admission and omissions to admit legal investments are all acts that can be attributed to the state.[164] These decisions must follow internal laws and regulations. Otherwise, an internationally wrongful act will be committed at the moment of the refusal or omission to act in accordance with the law in force at the time an attempt to invest is made. This interpretation of the clause was blurred over the years by the discussion of the protection of illegal investments. While this fact may explain the lack of litigation, the absence seems also to be connected to the structure of enforcement of the investor-state mechanism, which will be further developed in chapters III and IV.

The second is why states would act against their laws. The fact is while states with less resources, keen to attract investments, will not act to bar investors, well-endowed states, where foreign investors are naturally inclined to invest, may have incentives to be less transparent. This occurs especially if government decisions reflect the interests of domestic companies with protectionist aims, as

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[162] *Churchill v Indonesia* (n 135) [288]-[292].
[163] *Yukos* (n 153) [1368]-[1369].
[164] ILC ARSIWA 2001 (n 104) arts 4-11.

will be seen in chapter VII. An alternative incentive are unorthodox situations such as those underlined in the next section.

iv. Unlawful Requirements and Corruption

A special situation where the non-compliance with domestic law in the admission of investments may have an international repercussion is related to unlawful requirements in the admission. This encompasses acts of public officials or local authorities producing arbitrary delays, with unjustified requests or extra requirements for an investment to take place. For example, an undue delay in approving one's investment, in violation of an internal rule regulating mandatory deadlines or reasonable duration of process, may arguably constitute a breach of the admission clause. Some have acutely argued that investment barriers are often introduced by the public administration rather than by law, since administrators and public servants are more subject to pressure by internal interest groups.[165]

This would also cover illegal requests of personal advantages in exchange for the admission of an investment.[166] Corrupt officials "may create scarcity, delay, and red tape to encourage bribery",[167] as regards the entry of investments. The requests may be carried out by low-level officials; hence, the limitation of bureaucratic requirements and of the discretion involved in licensing and operating small and medium international businesses reduces the opportunities for corruption.[168]

In case of large investments, bribes may be required by top-level officials or the heads of states themselves.[169] This matters here when an investor has the right to enter a country, under the current legal system. For instance, when it has already legitimately won a competitive bidding or a concession or when there are no laws that prohibit the investment to take place at the time of admission. In this context, it has been noted that "to *keep an investor out of the country* because it refused to pay a bribe, to *deny an investor a concession* because a competitor paid bribes or for the government to *refuse a renewal of contract* because the investor refuses to

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[165] Pollan (n 114) 20.
[166] Tamada (n 154) 119–120.
[167] Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2nd edn, CUP 2016) 92.
[168] ibid 188, 200, 284, 527.
[169] ibid 12, 31, 101, 195.

pay a bribe" could amount to BIT violations.[170] It is true that sometimes neither the host state nor the international investor may have an incentive to raise corruption charges.[171] From the part of the host state, this is less evident when there are changes in government, so the new power could report corruption and blame it on its predecessors.[172] In turn, an investor facing illegal requests would only have incentives to report them if it has lost interest in investing in that particular state in the future.

But while a foreign investor cannot bring an international arbitration claim against a government official or a competitor,[173] they can do so in the context of the invocation of the international responsibility of the host state.[174] As highlighted above, acts of government officials of several levels can be attributed to the state. Arguably, investors who were competing for the same business opportunities and lost their bids can then rely on those facts to bring an international claim against the host state, in the presence of a BIT.[175] In this context, Rose-Ackerman and Palifka recall that:

> *cases brought by disappointed bidders* or defrauded lenders would require the country involved to make a transparent accounting of its behaviour ... Proposals for an international dispute-resolution mechanism are an example of the more general principle that one way to fight corruption is to *give losers a means of lodging a complaint*.[176]

Investor-state arbitration, under the remit of current investment treaties, does indeed offer some unexplored avenues, as will be detailed in chapters III and

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[170] Joost Pauwelyn, 'Different Means, Same End: The Contribution of Trade and Investment Treaties in Anti-Corruption Policy' in Susan Rose-Ackerman and Paul D Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Carolina Academic Press 2013) 258 (emphasis added).

[171] Rose-Ackerman and Palifka (n 167) 474.

[172] *World Duty Free v Kenya* (n 160) [180].

[173] Pauwelyn, 'Different Means, Same End: The Contribution of Trade and Investment Treaties in Anti-Corruption Policy' (n 170) 259.

[174] In addition, when potential benefits are high, home states, to which obligations in BITs are also owed, may have the interest to bring a claim. The home state of an investor might raise concerns under the OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions or under the United Nations Convention Against Corruption, respectively, OECD Convention (signed 17 December 1997, entered into force 15 February 1999) 2802 UNTS 6 art 12; UN Convention (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UNCAC) art 66.

[175] Carrington interestingly proposes that an international forum in the model of ICSID should be created to evaluate cases brought by outsiders to the corrupt deal. Paul D Carrington, 'Private Enforcement of International Law' in Susan Rose-Ackerman and Paul D Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Carolina Academic Press 2013) 294.

[176] (n 167) 475–476 (emphasis added).

IV. For the time being, it suffices to say that BITs may have a role to play in the fight against corruption in the context of admission of investors. The admission clauses analysed above provide the grounds for claims against host states. There are generally anti-corruption legislative frameworks in most host states' laws. Frustrated prospective investors could bring claims arising from the fact that their investments were not admitted in accordance with the laws because another investor, domestic or foreign, and the host state had engaged in corruption. The outcome could be some sort of remedy, equivalent to a reward to the prospective investor "for coming forward with evidence even if the reason they lost the bid was not moral scruples, but their own *unwillingness to make a large enough payoff*."[177] Causation and damages considerations aside, one might envisage some sympathy for international claims brought by prospective investors against the host states, given the growing consensus that investments tainted by corruption should not be protected.

In sum, the reestablishment of the clause's full meaning and legal effects is important to show that current investment treaties are able to deal with these types of situations. It also sets the starting point for the transition from an international obligation to respect the states' own regulations towards an obligation that states' regulations conform to an international standard or to entry commitments, as will be shown.

b. ESTABLISHMENT

i. Concept of Establishment and US Model BIT

Obligations regulating the entry of investments have also been expressed using the concept of "establishment". This section starts with an analysis of the re-emergence and interpretation of the concept. The aim is to provide elements to check whether the progressive adoption of the concept is part of a trend towards more convergence with international trade law.

Despite being explicitly referenced in BIT's preambles, the goal of promotion and, when present, liberalisation of investments has been commonly described as

[177] ibid 219 (emphasis added).

subsidiary to the protection granted to investments and as a natural consequence thereof.[178] One way to frame it is to say that while investment promotion is generally in the *host states'* interests, investment liberalisation is favoured by capital exporters in light of *their* interests.[179] In fact, investment promotion was not considered at first an objective of the US BIT programme.[180] Nonetheless, the removal of investment restrictions, more connected to the idea of investment liberalisation, was actually among the aims of the first American BITs.[181] In this regard, the 1984 US model BIT played a key role in the modern transition in the language of "admit/permit". This was done through the linkage to national treatment, that is, treatment no less favourable than the treatment provided to domestic investors.

It is true that the old US FCN treaties signed after the 1900s granted certain rights of establishment for corporations, most notably in the post war period, when the emphasis on the promotion of private foreign investment was more evident.[182] In Europe, the so-called Establishment Conventions were a common instrument.[183] However, the reorientation to grant a right of "establishment" in BITs only reappeared with the US BITs in the second half of the 80s. The provision stated that parties "shall permit such investments to be established" and granted national treatment.[184] The explicit use of the concept of national treatment in BITs is evidence of a closer connection with international trade law compared to the concept of admission, as will be shown. From the Investment Chapter in the US-

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[178] For a discussion of the origins and aims of BITs, see Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard Intl LJ 469.

[179] Salacuse (n 29) 113.

[180] One of the reasons was the concern that this would mean an incentive to outward investment, and therefore, job exportation. José Enrique Alvarez and Kenneth J Vandevelde, 'The BIT Program: A Fifteen-Year Appraisal' (1992) 86 Proceedings of the Annual Meeting (ASIL) 532, 535.

[181] Robin (n 80) 946.

[182] Emily A Arikaki, 'Appendix 1: Treaties of Friendship, Commerce and Navigation and Their Treatment of Service Industries' (1985) 7 Michigan Yearbook of International Legal Studies 343, 344–345; John F Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2012) 51 Columbia Journal of Transnational Law 302, 313.

[183] See Convention of Establishment between the United States of America and France 401 UNTS 75 (entry into force 21 December 1960). For an account of the negotiation history, see Kenneth J Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017) 346–353. See also the European Convention on Establishment of Companies (concluded 20 January 1966, not entered into force) ETS No 57. For an older example, see Chapter III.(c).iii below (n 547).

[184] See eg US BITs in force with Senegal (signed 6 December 1983), Democratic Republic of the Congo (signed 3 August 1984) and Cameroun (signed 26 February 1986).

Canada Free Trade Agreement,[185] a renewed type of language emerged, later on replicated in NAFTA. Several other treaties started to readopt the concept of "establishment" as a substitute or as a supplement to "admission" or "permission".

From 1994, the US progressively, though not continuously, started to change the language of its treaties with other countries. The new language was the following:

> Article II [186]
> 1. With respect to the *establishment,* acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment *no less favorable* than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment), whichever is most favorable (hereinafter "national and most favored nation treatment").

A related question is whether the wording of the US model clause on national treatment of establishment covers the entry of investments that do not require establishment in the long-term, as suggested by Juillard.[187] Many think that the language in the US model covers both admission and establishment rights.[188] The literature emphasises some points of distinction between the concepts and this raises the issue of how different the concepts really are.

One view is that, while entry rights encompass both admission and establishment rights, admission refers to the ability to make an investment in a permitted form and establishment refers to the type of presence permitted.[189] Another view is that the right of admission is related to the rules for admission; in turn, the right of establishment relates to the manner in which the activity will be carried out throughout the duration of the investment.[190] For others, the right of admission may be temporary or permanent while the right of establishment relates

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[185] (signed 2 January 1988) art 1602 <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf> accessed 15 August 2018.
[186] US-Georgia BIT (signed 7 March 1994) art II (emphasis added).
[187] Patrick Juillard, 'Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment' (2000) 15 ICSID Review 322, 337.
[188] eg Martín Molinuevo, *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (Kluwer Law International 2012) 87.
[189] ibid 77.
[190] Ignacio Gómez-Palacio and Peter Muchlinski, 'Admission and Establishment' in Federico Ortino, Peter Muchlinski and Christoph H Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 230.

to the permanence of presence, which is valuable to long-term investments.[191] In this vein, an investor with a short-term business might need no more than a right of admission compared to a long-term business where a right of establishment is necessary.[192] In foreign direct investment – FDI, the differences would lose their meaning since a long-term relationship is presupposed.[193] In addition, there have been claims that a right of admission works well in the case of portfolio investment in a local company, but both need to work together when transfer of capital and productive assets are necessary.[194]

As a proxy for ordinary meaning, legal dictionaries bring the following definitions:

> establish**,** vb. (14c) 1. To settle, make, or fix firmly; to enact permanently.
> established, *adj.* (17c) 1. Having existed for a long period of time; already in long-term use <an established legal rule> …
> establishment, n. (15c) 1. The act of establishing; the quality, state, or condition of being established. …[195]

While the definitions emphasise permanence and duration, the history of the smooth transition from the FCN treaty language, to the admission/permission language leading to the establishment language indicates that it is hard to sustain a radical difference, based on type, form or manner, between these treaty terms. This would go in line with the view that considers the distinction without relevant legal significance: disregarding the duration of ownership and control, all acts of investing should be considered establishment.[196]

As will become evident, treaty practice recurs to both concepts: while it appears that there are slight differences between the expressions, mainly concerning the permanence aspect, in most of the cases they overlap. In fact, it is the extension of the definition of investor and investments what will actually

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[191] UNCTAD 'Admission and Establishment' (New York and Geneva United Nations Publication 2002) UNCTAD/ITE/IIT/10 (vol II) 12-13. See, generally, United Nations Centre on Transnational Corporations, 'Key Concepts in International Investment Arrangements and their Relevance to Negotiations on International Transactions in Services' (New York United Nations Publication 1990) UNCTC ST/CTC/SER.A/13; UNCTAD 'International Investment Agreements in Services' (New York and Geneva United Nations Publication 2005) UNCTAD/ITE/IIT/2005/2, 31-33.
[192] Dolzer and Schreuer (n 96) 88.
[193] Pollan (n 114) 54.
[194] Gómez-Palacio and Muchlinski (n 190) 232–233.
[195] Garner and Black (n 136) 664.
[196] Vandevelde, *Bilateral Investment Treaties* (n 113) 407.

determine the scope of the non-discrimination standard in treaties.[197] This is the subject of the next section.

ii. Contingent Standards: NAFTA and other IIAs

Both national treatment and most-favoured-nation (MFN) treatment are contingent standards. In other words, adjudicators must carry out an evaluation in relative terms and compare two situations in order to find discrimination. This evaluation has been generally developed through arbitral decisions concerning the treatment of *established* investments. A reference model when it comes to entry rights, the NAFTA investment chapter has key provisions, the analysis of which is essential for a first understanding of non-discrimination applicable to the entry of investors. Several subsequent agreements are inspired by provisions in the NAFTA, which justifies the analysis. This remains true even in the context of its renegotiation, which resulted in the USMCA. The investment chapter applies to all sectors, including services, covering MFN and national treatment with respect to the "establishment" of investments (arts 1102 and 1103). The national treatment provision and the definition of investor are transcribed below:

> Art 1102: National Treatment
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the *establishment, acquisition, expansion*, management, conduct, operation, and sale or other disposition of investments.
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the *establishment, acquisition, expansion*, management, conduct, operation, and sale or other disposition of investments.
> Sec C Definitions
> Art 1139: Definitions
> …
> investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, *that seeks to make*, is making or has made an investment.[198]

It is also worth highlighting other NAFTA provisions that may in the end apply to investments. This the case of NAFTA Chapter 12, which covers service

[197] Most importantly, "if the term 'investor' includes only private entities, then the national treatment provision will *not guarantee to foreign investors the right to establish investment in sectors of the economy open only to state enterprises*." ibid 414 (emphasis added).
[198] (emphasis added). Art 1102 now corresponds to USMCA art 14.4 (n 86).

supply, including "the presence in its territory of a service provider of another Party".[199] NAFTA arts 1202 and 1203, respectively national treatment and MFN in the services sector, apply to service providers in like circumstances, affecting thus foreign investors in services.[200] The national treatment provision and the definition of service provider are the following:

> Article 1202: National Treatment
> 1. Each Party shall accord to *service providers* of another Party treatment no less favorable than that it accords, in like circumstances, to its *own service providers.*
> …
> Article 1213: Definitions
> service provider of a Party means a person of a Party that *seeks to provide* or provides a service;[201]

While "treatment no less favourable" and "like circumstances" deserved a lot of attention from tribunals and academic literature,[202] "establishment" did not meet the same fate. One can interpret the presence of the highlighted expressions ("establishment, acquisition, expansion", "seeks to make" and "seeks to provide") as giving rise to international obligations to grant access to investments and investors. It has been held that art 1102 has "a broad definition indeed, as it includes *almost any conceivable measure* that can be with respect to the *beginning* … of an investor's business activities".[203] NAFTA includes a provision on non-conforming measures (art 1101.2, Annex I and II), in which states could list all the areas where no obligations were undertaken, eg restricted investment areas. Those expressions are also connected to the interpretation of certain provisions in the GATS, as will be shown.

Some argue that the lack of disputes concerning establishment shows that states accepted, without resistance, the liberalising effect of national treatment.[204] In fact, cases decided by NAFTA tribunals involving trade in services (*SD Myers v Canada*)[205] or trade in goods (*Pope & Talbot v Canada,*[206] *Canada Cattlemen v*

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[199] art 1201.1 (d)
[200] Nicolas F Diebold, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (CUP 2010) 182.
[201] (emphasis added).
[202] DiMascio and Pauwelyn (n 81) 71–79; Kurtz (n 27) 79–135.
[203] *Merrill and Ring Forestry LP v Canada,* UNCITRAL, ICSID Case No UNCT/07/1, Award (31 March 2010) [79] (emphasis added).
[204] Pollan (n 114) 98–99.
[205] *SD Myers, Inc v Government of Canada,* UNCITRAL, First Partial Award on Merit and Separate Opinion (13 November 2000).
[206] *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award on Merits (10 April 2001).

US,[207] *Softwood Lumber*[208]*)* have been brought as investment disputes.[209] These NAFTA cases are arguably mixed trade/investment cases dealing with discriminatory denial of opportunities for market access.[210] Investors framed those typical access problems as a protection problem to benefit from the particular features of the investment protection regime, as will be seen in chapters III and IV. As an example, the *SD Myers* award decided that an export ban interfered with the operations of the investor, which provided services of processing and disposal of hazardous waste. The discriminatory measure breached the national treatment obligation and resulted in compensation for lost income, derived of losses of market opportunities.[211] This aspect will be later developed in chapter IV. For now, it is worth emphasising that some treaties clarify that market opportunities cannot be considered investments.[212]

In any case, it is useful to briefly describe the analytical tests required to apply these contingent standards. Despite the differences in the textual expression of national treatment in several investment treaties, one could at least observe some common lines on its interpretation. This will help to verify whether its application to the entry of investments would call for any specific particularities or if the general approach would be fit for purpose. In general, there is the need to: 1) set an appropriate comparator; 2) define whether there is difference in treatment and also 3) inquiry on any reasonable relationship to rational policies, to then find out if there is de jure or de facto discrimination against the foreign investor.[213] There is no consensus on the approach to follow in the favourability analysis. The questions hinge on whether the modification of conditions of competition is the only

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[207] *Canadian Cattlemen For Fair Trade et al v US,* UNCITRAL Arbitral Award on Jurisdiction (28 January 2008).

[208] *Re NAFTA and a Request for Consolidation by the USA of the Claims in Canfor Corporation v USA and Tembec et al v USA and Terminal Forest Products Ltd v USA,* Order of the Consolidation Tribunal (7 September 2005) (Softwood Lumber). For a comment, see Joost Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking' (2006) 9 JIEL 197.

[209] Rodney Neufeld, 'Trade and Investment' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 642.

[210] Gómez-Palacio and Muchlinski (n 190) 232.

[211] *SD Myers, Inc v Government of Canada,* UNCITRAL, Second Partial Award on Merit (21 October 2002) [100].

[212] See eg Korea-US FTA (signed 30 June 2007) art 11.28 fn 13: "For greater certainty, market share, access to market, expected gains, and opportunities for profit-making are not, by themselves, investments." See also EU-Mexico Agreement (concluded 21 April 2018) art 3, fn 9.

[213] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 357–358.

relevant concern, what the appropriate domestic comparator should be and whether there are specific considerations or justifications to save the measure.[214]

On the issue of choosing comparators, the presence of the expression "like circumstances" has been the source of several debates. Cases indicated that the analysis invites some sort of endorsement of the role of competition as a condition for likeness.[215] A tribunal even suggest going beyond the "same business and economic sector" approach and finding out the market segment in which there is competition.[216] Other tribunals have rejected this role[217], so that competing in the same economic or business sector bears less or no weight. The result is that investors in very different sectors were considered to be in like circumstances.

That was the conclusion in *Occidental v Ecuador*, where the comparison of the treatment to the oil investor was made in relation to the treatment available for investors in flowers, mining, seafood, lumber, bananas and palm oil.[218] Also, investors in close competition were not considered to be in like circumstances, such as in *Methanex v US,*[219] given that identical comparators were available. In some settings, only when there were no identical comparators could an investor be compared to less like comparators.[220] Therefore, it is with reason that the hermeneutics of *Occidental* and *Methanex* have been subject to criticism.[221] The latter approach has been described as a laudable outcome, through bad means, given the narrowness of the comparators.[222] In fact, some tribunals recognised that even if the companies were in the same business and economic sector, operating

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[214] Mitchell, Heaton and Henckels (n 81) 135–150.

[215] *SD Myers* (n 205) [250]-[251], *Pope & Talbot* (n 206) [78]; *United Parcel Service of America, Inc. v Canada*, UNCITRAL, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007) [17] (Separate Statement of Dean Ronald Cass); *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) [371]-[373]; *Corn Products, International, Inc. v Mexico,* ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008) [135].

[216] *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No ARB/10/17 Award (26 February 2014) [396]-[397]. See also dis op Joaquín Morales Godoy [184-187].

[217] *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN 3467, Final Award (1 July 2004) [173]; *Methanex Corporation v US,* UNCITRAL Case, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) pt IV ch B [16]-[19]; *Merrill* (n 203) [90]-[93].

[218] *Occidental* (n 217) [168]-[173].

[219] *Methanex* (n 217) [19].

[220] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico,* ICSID Case No ARB(AF)/04/05, Award (21 November 2007) [202].

[221] Kurtz (n 27) 98–99.

[222] Mitchell, Heaton and Henckels (n 81) 74.

in the same industries and following the same general rules, they were not in like situations.[223]

Regarding the appropriate domestic comparator, there are different approaches. The most prevalent approach is a comparison to the "most favoured domestic" investor, that is, a comparison of the foreign investor with any other domestic investor that has been better treated, which lowers the threshold for the breach.[224] Another approach is a comparison to domestic investors as a group, which is justified by the use of "investors" in the plural form in most BIT clauses. This could involve either an analysis of a proportion of affected investors or an analysis of the aggregate differential impact.[225] Some tribunals have ruled that the term "treatment in similar situations" requires a comparison of factual situations and cannot be read to refer to *applicable* legal standards of protection: the mere fact that investors have invested in a particular state is not enough to say they are in similar situations.[226] This conclusion has been subject to well-founded criticism.[227] In fact, there is nothing in the expression "similar situations" that would exclude a consideration of abstract treatment.

Concerning the justification in case less favourable treatment is found, it is not always that an equivalent of GATT[228] art XX or GATS art XIV (the general exceptions, as shall be seen in chapter II) is present in IIAs. The analysis of the rationality of policies has been used as a way to justify the differences in treatment.[229] For some, as seen above, regulatory purpose should have a role: at least indirectly in the comparison of investors and investments and more directly in the analysis of treatment.[230] In this light, an analysis of arbitral decisions indicates that significant protectionist purposes tend to condemn a measure while minor (*de minimis)* protectionist effect compared to other non-discriminatory effects will save

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[223] *Champion Trading Company & Ameritrade International, Inc v Arab Republic of Egypt*, ICSID Case No ARB/02/9, Award (27 October 2006) [134], [154]-[156]. See also *Parkerings* (n 215) [427], [430].
[224] Mitchell, Heaton and Henckels (n 81) 151–153; Kurtz (n 27) 110–115.
[225] Mitchell, Heaton and Henckels (n 81) 153–155; Kurtz (n 27) 116–121.
[226] *İçkale İnşaat Limited Şirket v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) [329]-[332].
[227] Stephan Schill, 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath' (2017) 111 AJIL 914, 931–932.
[228] General Agreement on Tariffs and Trade (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1867 UNTS 183 (GATT).
[229] *Pope and Talbot* (n 206) [78]; *United Parcel Service of America* Award (n 215) [175]-[177].
[230] Mitchell, Heaton and Henckels (n 81) 2.

it.[231] As a solution, Mitchell and others interestingly advocate that a measure will not amount to less favourable treatment in like circumstances if it "does not have a *significant protectionist regulatory purpose* (or a regulatory purpose of differentiating between foreigners) and is rationally connected to or the least restrictive means of achieving a non-protectionist purpose …".[232]

Therefore, even when faced with close textual expressions in relation to national treatment, tribunals have differed in their interpretation.[233] A definitive answer on the most adequate way to interpret discrimination standards and on whether to give a greater role to regulatory purpose would go over the scope of this work. What matters here is to find out the aspects of the test affecting the application of the standards to the establishment of investors. This is the subject of the next section.

iii. Non-Discrimination: Particularities of Entry Cases?

First of all, when it comes to the basis of comparison, it must be borne in mind that the investor which has been denied national treatment upon establishment is probably *not* an investor yet. The case involving Mexican investments in the US (*Trucking Services*) was a rare example of a case directly dealing with the situation. It decided that:

> A blanket refusal to permit a person of Mexico *to establish an enterprise in the United States* to provide truck services for the transportation of international cargo between points in the United States *is, on its face, less favorable than the treatment* accorded to U.S. truck service providers in *like circumstances*, and is contrary to Article 1102.[234]

The US measure at issue was a general one, restricting de jure the establishment of foreign Mexican investors in trucking services. The expression "like circumstances" was analysed not only in relation to arts 1102 and 1103 but

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[231] ibid 167.
[232] ibid 173 (emphasis added).
[233] August Reinisch, 'National Treatment' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos/Hart 2015) 859.
[234] *Re Cross-Border Trucking Services (Mexico v US)* NAFTA ch 20 arb trib Case No USA-MEX-98-2008-01, Panel Decision, Final Report 2 (6 February 2001) (*Trucking Services*) [292] <www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=18355&lang=1> accessed 15 August 2018 (emphasis added). For an acute analysis of the decision, see Puig, 'The Merging of International Trade and Investment Law' (n 30) 19–23.

also to arts 1202 and 1203, quoted in the previous section. In this NAFTA case, the non-acceptance of investments affected the provision of international services. This is evidence of the relation between concepts of investment law and international law of trade in services. In relation to arts 1202 and 1203, the chosen basis of comparison was between the treatment by US regulatory authorities of *US domestic trucking service providers* and the treatment of *Mexican providers seeking operating authority*.[235] The reason for the choice of that basis of comparison was the following. While US and Canadian-owned companies could apply for a permit, Mexican companies that sought to provide or invest in those services could not even consider an individual application, regardless of their qualifications.[236]

In addition, the tribunal stated that the prohibition was a violation of art 1102, "even if Mexico cannot identify a particular Mexican national or nationals that have been rejected."[237] Hence, there was no need to identify a factual situation where an investor had been effectively discriminated after the request. All in all, the comparison was between current providers and potential non-identified providers. Also, one can notice that there were no signs of a competition analysis. This is perhaps because it was clear from the beginning that the situation involved a comparison in the same business sector. Before moving to the following case, it is worth highlighting that *Trucking Services* was brought in a state-state context. It is submitted that, apart from issues of jurisdiction, the interpretation of the substantive treaty standards should produce the same results, irrespective of who brought the claim. Thus, the interpretative tests should not be substantially different in cases brought as investor-state claims, as shall be developed in chapter III.

An analogous situation occurred in *Clayton and Bilcon v Canada*.[238] The investor brought a national treatment claim because its project of expansion of a quarrying activity was not approved in the environmental review of a provincial joint panel in Canada. The tribunal refused to submit to the narrow range of comparators argued by Canada and instead gave a broad reading to art 1102, in light of the

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[235] *Trucking Services* (n 234) [253].
[236] ibid [247]-[248].
[237] ibid [292].
[238] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada*, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) (*Clayton and Bilcon v Canada*).

NAFTA objective to increase investment opportunities.[239] It stated that, since the mode of review of new investments can involve varied procedures such as screening, comprehensive study, federal review panel or joint review panel, "Confining the choice of comparators … appears to unreasonably limit the examination of comparisons that are relevant in light of the objects of Chapter Eleven."[240]

The result was that the *Occidental* approach described above, that is, of comparing investors in completely different sectors, and subject to different procedures, was apparently followed in *Clayton and Bilcon*. The tribunal expressly referred to *Occidental* and declared that the examples brought were "sufficiently similar", but avoided to state that all enterprises subject to environmental assessment are in like circumstances.[241] Therefore, the tribunal undertook a comparison in relation to the approval of projects in the oil and gas industry. One might argue that expressions such as like situations and like circumstances would accommodate this kind of cross-sector comparison. In turn, in international trade law, as will be seen, a more competition-oriented approach would be justified. However, this would be hard to reconcile if one adopts the view that investment treaties care for the equality of competitive opportunities.

Another aspect is that the prospective investor may, at the time of the attempted entry, be developing the same activity in other foreign markets. Conversely, it may not be in the same "business or economic sector" in the territory of the host country, at least before it starts its activities. A test that focuses solely on *actual* competition perhaps does not serve the purpose of avoiding discrimination. Given that a *potential* competitor can be indeed discriminated, the test should accommodate this aspect. On the other hand, this should not go as far as comparing across industries, since governmental policies should be capable of differentiating across sectors by setting up different regulatory conditions.

As to the appropriate domestic comparator, it is true that the "most favoured domestic investor" approach mentioned in the last section would be a way for a prospective investor to show discrimination more easily, especially in case of national champions. Imagine that, in the *Trucking Services* case, there was no

[239] ibid [690]-[692].
[240] ibid [701].
[241] ibid [695].

blanket refusal, but almost all Mexican applicants had been systematically rejected. Suppose the reason given for the rejections was that the Mexican regulatory system for transportation was different (less rigid) than the American or the Canadian system. This hypothesis would arguably still be a violation of art 1102, in the terms of the tribunal's decision, given that if "the regulatory systems in two NAFTA countries must be substantially identical before national treatment is granted, relatively few service industry providers could ultimately qualify."[242] Moreover, the fact that a few Mexican service providers had been in fact granted access was no excuse for a finding of a breach of the obligation to provide less favourable treatment to other trucking services.[243] *A contrario sensu,* this could support the group-to-group comparative approach: if only a few Mexican applicants had been denied, there would be no violation.[244]

On the other hand, a reading that applicable legal standards cannot be considered favourable treatment unless there are factual situations where they have been applied would make the threshold high or impossible for prospective investors. The foreign investors may not yet be subject to any standards. What is more, they would need to identify a specific investor in their own sector, which has been treated better. Suppose that the entry of a foreign investor into a *new* economic market is blocked or hindered. Since there are no domestic investors in that sector in the host state, it would be very hard to either establish the appropriate foreign or domestic comparator. It would be also difficult to establish favourability, given that there has been no comparable treatment. This may call for a test that compares hypothetical scenarios, but in relation to segments that are under competition. Thus, it would be unwise to discard *prima facie* the possibility that the applicable legal standards in domestic laws or in IIAs might be the basis for more favourable treatment.

As stated in *Clayton and Bilcon v Canada*, "Discrimination in respect of the assessment of a major component of a project can amount to a material breach of Article 1102."[245] Projects are investments to be made, and regulatory assessment procedures *constitute* treatment. The comparable treatment would arguably be the

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[242] *Trucking Services* (n 234) [259].
[243] *Trucking Services* (n 234) [256].
[244] This appears to be in line with an approach based on the differential impact between foreign and domestic investors, see Kurtz (n 27) 118.
[245] *Clayton and Bilcon v Canada* (n 238) [703].

probable assessment that a domestic investor would have had in light of the applicable legal standards. However, to analyse which proceedings (screening, joint review, comprehensive study …) are the most favourable to an investor may invite us to incorporate the perspective of objective favourability.[246] This would not prevent that, as an element of the analysis, the tribunal takes into account the assessment of projects in different economic sectors. Nevertheless, the tribunal should use this only as an analytical tool. The correct comparison should be made between procedures to which companies in the same market – competing for the same *economic* opportunities – would have been subject. Chapter VI will elaborate more on the features of screening procedures.

Both disputes raise several other reflections and are further discussed. The essential point at his stage is that there are in fact some peculiarities in the analysis of contingent standards in cases of establishment, involving prospective investors. This tends to be more evident in light of the trends described in the next section.

iv. Return of Establishment Rights

As underlined, in a post-colonial setting, states were initially reluctant to confer establishment rights in IIAs. Explaining the political economy reasons on why entry rights have been initially excluded from treaties, Vandevelde observes that the BIT's ideology was one of economic "nationalism behind the liberal façade" whereby both developed and developing states symbolically embraced liberalism but for nationalist reasons.[247]

The establishment clause is grounded on the principle of free circulation of investments.[248] The background is that entry commitments are closely linked to domestic regulatory policies.[249] Since these commitments translate into rights and obligations, they require a change or maintenance of national regulation. It appears though that it is politically more difficult to grant access to a large number of investments than to protect them.[250] A way to accommodate the great political

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[246] Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Review 14, 49–54.
[247] Kenneth J Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 AJIL 621, 635.
[248] Carreau and others (n 94) 622.
[249] UNCTAD, 'World Investment Report' (United Nations 2015) UNCTAD/WIR/2015 163.
[250] Pollan (n 114) 42.

challenges involved in investment liberalisation is the introduction of flexibilities. They allow for regulatory space for legitimate regulation but also breathing space to garner political support.[251]

The requirement to negotiate reservations towards specific investments or certain measures is generally costly to countries.[252] This is typified by the discussion on the right of establishment in the Organisation for Economic Cooperation and Development (OECD) draft Multilateral Agreement on Investments (MAI). In a traditional North-South BIT, investment flows are one-directional between a net capital importing state and net capital exporting state. The latter can be more selective in crafting the agreement and less reluctant in granting these establishment rights since few will benefit in exchange of the protection of their nationals in the host state.[253] In turn, for some higher income states, the introduction of establishment rights in the MAI would mean the opening of sensitive sectors for other equally developed states; to the extent that this was probably not in their interest, the negotiations stalled.[254]

A stronger liberalisation effect is reached when national treatment is applied to the conditions to make an investment.[255] This corresponds to a regulation of the competitive opportunities for access. The extension of national treatment to admission, providing access for foreign investments and liberalising restrictions, has been linked to increases in the levels of foreign investment.[256] The conferral of national treatment at the pre-establishment phase signals openness for prospective investors. International commitments towards entry arguably attracts investors also because companies have an interest in strengthening GVCs and in incorporating further services to expand already established investments. In addition, as already mentioned, large countries, well-endowed in terms of natural resources and with burgeoning consumer markets, may also use entry rights in the bargain to obtain benefits in other areas during negotiations.

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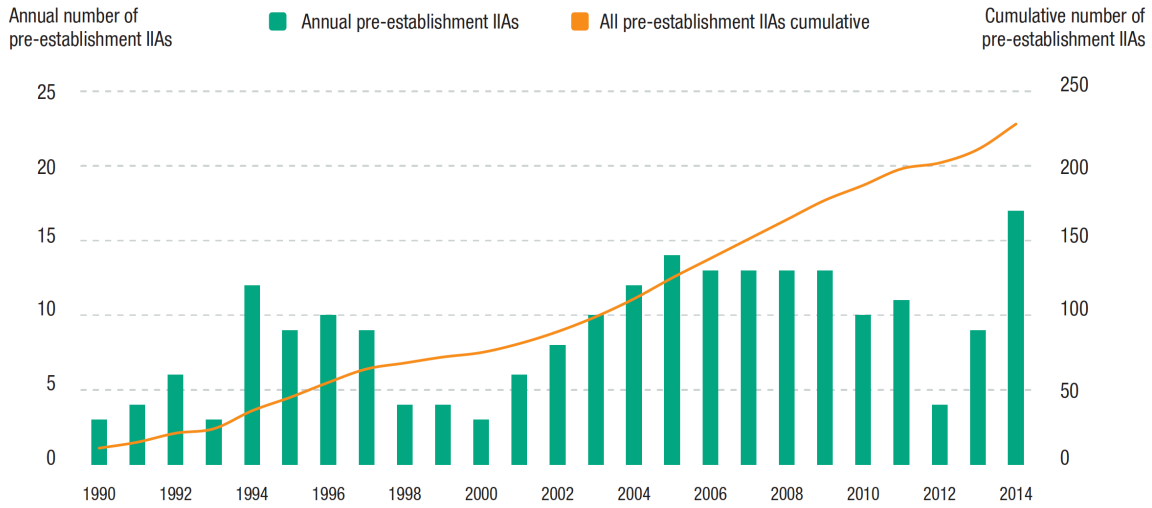
[251] Jürgen Kurtz, 'On the Evolution and Slow Convergence of International Trade and Investment Law' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 107.
[252] Friedl Weiss, 'Trade and Investment Law: What Relations?' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 91.
[253] Susan Rose-Ackerman, 'The Global BITs Regime and the Domestic Environment for Investment' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009) 320.
[254] ibid.
[255] Vandevelde, *Bilateral Investment Treaties* (n 113) 414.
[256] Kurtz (n 27) 74.

In this regard, while ten years ago commentators claimed that the liberalising effects of BITs were small,[257] now the trend has started to reverse.[258] There is a recognition of the rising number of IIAs providing for establishment rights (228 by the end of 2014), which represents an increasing percentage of the total number of BITs, as shown in the table below:

Table I – International Investment Agreements with Entry Rights[259]



Source: UNCTAD, World Investment Report 2015

In fact, unilateral FDI liberalisation is on-going in many states.[260] This may translate into liberalisation commitments in legal terms. As domestic liberalisation often precedes the assumption of commitments, the gain is that the treaty will ensure that the liberalisation measure will not be reverted in the future. At the same time that these commitments increase attractiveness for host states, they tie in the level of openness for investments, from the viewpoint of home states.[261] There is a valid claim that increasing competition for investments by means of an image of openness explain why countries choose to incorporate liberal clauses unilaterally.[262] Some countries even choose an open admission model.[263]

The statistics illustrate how recent treaty practice has dealt with establishment rights. The US, Canada, Japan, Finland, Peru, Singapore, South Korea, Chile and Costa Rica, for example, have each at least 10 IIAs containing

[257] Pollan (n 114) 74–75; Vandevelde, 'The Economics of Bilateral Investment Treaties' (n 178) 493.
[258] Weiss (n 252) 93.
[259] UNCTAD, 'World Investment Report' (n 249) 110–112.
[260] ibid 103.
[261] ibid 111–112.
[262] Pollan (n 114) 78–79.
[263] ibid 194–195.

these obligations.[264] Norway also incorporates entry rights provisions.[265] The Dominican Republic-Central America FTA (CAFTA-DR) investment chapter contains national treatment in the establishment phase as well.[266] China has granted establishment rights on an MFN basis to several partners.[267]

According to the UNCTAD database, in 2015, of the 34 IIAs that were concluded, at least 17 contained some sort of establishment rights either in the national treatment and the MFN clauses or in the form of provisions in converged services and establishment chapters. This is equivalent to half (50%) of the treaties signed that year. In 2016, while the text of the majority of the BITs is still not mapped,[268] two major treaties with establishment rights were signed: the CETA, between the European Union and Canada, and the TPP. The latter, due the withdrawal of the US, has recently led to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – CPTPP. The combined economies of CETA and CPTPP states roughly correspond to at least one third of the world economy, which gives a magnitude of the potential impact of the rights.[269] In 2017, at least 7 out of 18 (almost 40%) of the concluded agreements contained establishment rights.[270] Finally, almost all the IIAs concluded in the first semester of 2018 granted establishment rights.[271]

From the point of view of new emerging states, increasing capacity to export capital, coupled with an aggressive strategy to engage in outward FDI, may be

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[264] UNCTAD, 'World Investment Report' (n 249) 111.
[265] Molinuevo (n 188) 86–87.
[266] Pollan (n 114) 101.
[267] See China-Tanzania BIT (signed 24 March 2013) art 4; China-Uzbekistan BIT (signed 19 April 2011) art 3(1); China-Korea BIT (signed 7 September 2007) art 3(3) [replaced by the China-Korea FTA (signed 1 June 2015) see art 12(4)1]; China-Finland BIT (signed 15 November 2004) art 3(3).
[268] The following treaties contain some sort of establishment rights: Canada-Hong China SAR BIT (signed 10 February 2016); Japan-Kenya BIT (signed 28 August 2016); Canada-Mongolia BIT (signed 8 September 2016); Rwanda-Turkey BIT (signed 3 November 2016); Chile-Hong Kong China SAR BIT (signed 18 November 2016).
[269] According the nominal Gross Domestic Product (IMF 2017), excluding the US, which has withdrawn from the TPP. Available at: <www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx> accessed 15 August 2018.
[270] Israel-Japan BIT (signed 1 February 2017); PACER Plus [Australia, New Zealand and the Pacific Islands] (signed 14 June 2017); China-Hong Kong CEPA Investment Agreement (signed 28 June 2017); Rwanda-United Arab Emirates BIT (signed 01 November 2017); Argentina-Chile FTA (signed 02 November 2017); Colombia-United Arab Emirates BIT (signed 13 November 2017) although only concerning expansion; EU-Armenia Comprehensive and Enhanced Partnership Agreement (signed 24 November 2017).
[271] Up until 1st August 2018, these are: EU-Japan Agreement (signed 17 July 2018); Brazil-Suriname BIT (signed 02 May 2018) in the MFN provision; Brazil-Ethiopia BIT (signed 11 April 2018) in the MFN provision and only in relation to expansion; CPTPP (n 88); Korea-Central America FTA (signed 21 February 2018) and Australia-Peru FTA (signed 12 February 2018).

behind the incorporation of establishment rights.[272] It is true that in the context of the backlash again international investment arbitration, as explored in chapter III, states such as Brazil, India, South Africa and Indonesia have taken a back seat in terms of the assumption of investment obligations, including entry. With some exceptions, establishment rights are not an essential component of the recent model BITs or treaty practice of those states. However, it is still to be seen if their stance will attract an array of interested treaty partners capable of shaping the new features of the investment regime. Investors from those countries might at least profit from the access to investment in services in other states through the operation of MFN clause in the GATS, as will be seen in chapter V.

One cannot naturally predict how states will behave: it is uncertain to what extent the adoption of more protectionist policies described in the Introduction will affect this trend in treaty making. Nonetheless, some factors are worth noticing. Of the more than 2,600 BITs in force, more than 1,300 – half of the total – involve at least one member of the EU.[273] Excluding the UK, which is about to leave the European Union, at least 180 of these treaties are intra-EU BITs. In turn, the extra-EU BITs cover at least 130 different partners. Not only will the extra-EU BITs be progressively replaced by EU IIAs,[274] but also the intra-EU BITs will be terminated, as they have deemed to be incompatible with EU law.[275]

Assuming that the new EU investment treaty model is likely to contain investment liberalisation commitments, as suggested by the investment chapters of the agreements with Canada, Singapore, Vietnam, Japan and Mexico, this feature will shape the re-negotiation of all those BITs.[276] The result is a sharp reduction in the number of BITs, coupled with a larger proportion of the world market covered by some sort of establishment rights. Moreover, it is expected that the extension of certain establishment rights will be a key component of the future

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[272] David Collins, 'National Treatment in Emerging Market Investment Treaties' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014) 169–170.

[273] According to the UNCTAD Database, available at <http://investmentpolicyhub.unctad.org/IIA>.

[274] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40

[275] Case C-284/16 *Achmea v Slovakia* (6 March 2018) EU:C:2018:158.

[276] The negotiation approach to be taken by the EU to keep negotiation leverage in light of its competences has to ensure that "EU investment agreements, where deemed necessary, should in principle be negotiated in parallel to FTAs"; see Council of the European Union – Draft Council Conclusions on the Negotiation and Conclusion of EU Trade Agreements (8 May 2018) (8622/18) para 4.

European Union-UK post-Brexit framework. It is finally observed that any inconsistency between the domestic policy practices and the entry commitments enshrined in new IIAs may result in more litigation.

c. CONCLUSION

The chapter showed the extent to which general international law applies to state acts regulating entry. It reaffirmed that in the absence of international commitments, the space for sovereign acts is very wide. This space is perhaps tempered by *jus cogens* or principles such as good faith and estoppel. The chapter has described how the situation differs in the presence of international treaties regulating access for investments. IIAs generally restrain regulatory space regarding entry in exchange for more investments in the host state's territory. This takes place whenever the treaties cover the process of admission of investments or provide for national treatment or MFN treatment in the establishment phase. One may say then that they confer what is called here entry rights, in other words, the permission for unrestricted entry or entry under specific conditions set out in international commitments. As shown, several treaties, including some under negotiation and ratification, increasingly encompass these situations.

In short, both admission and establishment express the idea of entry and access for investments. One must recognise that, in comparison to admission, the ordinary meaning of the establishment brings the nuanced element of the permanence of presence. Also, the concept has been traditionally accompanied by a reference to national treatment, unlike the mere reference to the state's own laws. These two features emphasise that establishment bears more than a passing resemblance to concepts in trade law, particularly to the notion of commercial presence, as will be seen.

Most importantly, different from the admission in accordance with the host state's own laws, the conferral of entry rights means that a discriminatory denial of entry is a violation of the treaty. As seen above, this is irrespective of the national legislation, but subject to reservations and justifications in the treaty. In this regard, it is true that there has been a trend for establishment rights to be excluded from

investor-state dispute settlement.[277] But this fact, far from representing a move in the direction of divergence, actually indicates a trend towards common types of enforcement mechanisms, which will be dealt with in chapters III and IV.

[277] UNCTAD, 'World Investment Report' (n 249) 148.

CHAPTER II – REGULATION OF ENTRY BY INTERNATIONAL TRADE LAW

a. SERVICES: WTO REGULATION

i. Commercial Presence

The GATS concept of "commercial presence" is the initial point to understand the application of international trade law to the entry of investments. In general terms, it represents the "connecting factor" between the GATS and investments.[278] Before turning to the definition itself, one might benefit from analysing its emergence as a concept.

The most pressing questions during the Uruguay Round regarding the definition of services were how trade in services should be distinguished from foreign investment in services and whether it should include the movement of labour.[279] While the coverage of the former topic interested the developed countries, the latter issue was of interest to the developing world.[280] Despite the recognition that some sort of right of establishment was essential to ensure the liberalisation of service sectors, WTO members wanted to avoid the impression that the right was unqualified and absolute; the term was avoided as the primary concept, given the particular connotation to the European Union and the opposition of developing countries.[281] In fact, EU law has developed a specific approach to the liberalisation of services in which several legal arrangements related to

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[278] Vandevelde, 'The Economics of Bilateral Investment Treaties' (n 178) 497; Martín Molinuevo, 'Foreign Investment in Services and the DSU' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008) 319; Bart De Meester and Dominic Coppens, 'Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?' in Zdenek Drabek and Petros Mavroidis, *Regulation of Foreign Investment*, vol 21 (World Scientific 2013) 99.

[279] Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (OUP 2011) 277.

[280] ibid 279. Note that the dichotomy developing/developed states, once analytically useful, no longer reflects the dynamics of interests between states.

[281] Ansgar M Wimmer, 'The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment' (1995) 19 World Competition 109, 113; Eric M Burt, 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization Notes and Comments' (1997) 12 American University Journal of International Law and Policy 1015, 1031.

services and establishment intertwine.[282] In the WTO, the solution was to describe a specific mode for the delivery of services – mode 3, defined in the GATS.[283] In that sense, in mode 3 (and also in mode 4 – service supply by the presence of individuals),[284] commitments are seen as a way to liberalise FDI.[285] This context gave rise to the formula of commercial presence in the GATS:

> "commercial presence" means *any* type of business or professional *establishment*, *including* through (i) the *constitution, acquisition* or maintenance of a juridical person, or (ii) the *creation* or maintenance of a branch or a representative office, within the territory of a Member *for the purpose of supplying a service*;[286]

While the term "establishment" is used at the beginning of the definition, it is the second part that contains the key features. In this light, the concept of "commercial presence" encompasses *any* type of establishment and includes not only the constitution of a new juridical person but also the acquisition of an existing one.[287] Besides, it comprises other forms of presence, such as the creation of branches and representative offices. The juridical person is accorded the treatment under the agreement through such types of presence.[288] The definition of "juridical person of another member"[289] is complementary to this understanding. It is well noted that:

> The 'constitution of a juridical person' under the GATS is not limited to the administrative procedures of registering a juridical person. Indeed, the GATS defines 'juridical person' in broad terms, de facto equating it with the more general concept of 'company' or even 'investment'. … As such, *there seems to be no difference between the GATS concept of 'constitution of a juridical person', complemented by the reference to the 'creation of a branch or representative office', and the BIT's and PTA's general notion of the investment's 'establishment'*.[290]

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[282] For an analysis and a comparative approach with WTO law, see Marcus Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (CUP 2014).
[283] GATS art I.2(c): … [the supply of a service] "by a service supplier of one Member, through commercial presence in the territory of any other member."
[284] GATS art I.2(d): … [the supply of a service] "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member."
[285] Puig, 'The Merging of International Trade and Investment Law' (n 30) 12.
[286] GATS art XXVIII (d) (emphasis added).
[287] Meester and Coppens (n 278) 102.
[288] GATS art XXVIII (g) fn 12.
[289] GATS art XXVIII (l), (m)(i) and (ii) and (n).
[290] Molinuevo (n 188) 90 (emphasis added).

Nevertheless, one may underline the narrower meaning of commercial presence compared to asset-based definitions of investment. The approximation of the concept of commercial presence to FDI is evident: despite the lack of uniformity in the definition of FDI, all the elements of the definition of commercial presence cover traditional aspects of investments in services.[291] It is not clear though whether the term includes other categories, but certainly not bonds and portfolio investments.[292] In any case, if an asset amounts to "establishment" and it is used in the provision of the service within the territory, this presence should arguably be accorded the treatment provided for in the GATS.

Early analysis of the GATS already argued that economic activities prior to the establishment of a business in services are covered by the commercial presence definition.[293] The reference to the constitution of a juridical person encompasses all the procedures related to the setting-up of the company that will be engaged in services in the host member state.[294] The presence of the words "constitution", "acquisition" and "creation" in the definition suggests that the very process of establishment is covered.[295] This appears to be the reading of the Panel Report in *China – Publications and Audiovisual Products.*[296]

In this vein, one can say that measures that *prevent* the possibility of commercial presence are covered by the GATS standards.[297] It follows that the GATS covers measures affecting *investors that have not yet made an investment*. This includes situations involving investors which are not *yet* a service supplier and seek to become one by acquisition, since they will be service suppliers at the moment of the investment.[298] It is important to recall that the existence of trade

[291] Wimmer (n 281) 114–115.
[292] Pierre Sauvé, *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003) 302, 319. The Understanding on Commitments on Financial Services defines commercial presence more broadly, including agencies, franchising operations, sole proprietorship and others.
[293] Wimmer (n 281) 114 citing OECD: The General Agreement on Trade in Services (GATS): An Analysis (OECD Paris 1994) 7-8.
[294] Molinuevo (n 188) 90.
[295] ibid 79.
[296] WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel* (12 August 2009) WT/DS363/R [7974].
[297] Meester and Coppens (n 278) 102.
[298] ibid 106.

flows is not required for the GATS to apply. This is because the flows may have been prevented, though this has to be based on an examination of relevant facts.[299]

As underlined in the previous sections, the expressions "seeks to make" and "seeks to provide" in the NAFTA and in other BITs can be interpreted as giving rise to international obligations to grant access to investors. The same occurs in relation to commercial presence. In its own right, the WTO Appellate Body (AB) already recognised that WTO law is clearly concerned with the position of investors.[300] Note also the expression "for the purpose of supplying a service", highlighted in the definition of commercial presence.[301] Its occurrence reinforces the conclusion that measures interfering with the attempt to make an investment also affect the supply of services. The reason is that, as acutely noted by Feinaugle, "in the case of commercial presence, establishment in the territory of a Member must take place first *before the services supply can start*"; so, in this phase, there is "only the *plan to supply the service* [by] the *future service supplier* …"[302] The key issue is that the emphasis on the plan to supply a service bears a similarity with the definitions of investor and service provider in several IIAs.

Finally, as underlined before, essential complements for the establishment and operation of commercial presence are mode 4 commitments on the temporary presence of physical persons, which deal with key personal and management and intra-corporate transferees.[303] Issues related to mode 4 are closely interrelated with the questions discussed here. In fact, the term "entry" is widely used in treaties to describe host state`s obligations towards the access of individuals for business purposes.[304] While the relevance of this dimension should be recognised, the complexity and range of the questions posed would not fit in the limited discussion of this work.

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[299] Eric H Leroux, 'From Periodicals to Gambling: A Review of Systemic Issues Addressed by WTO Adjudicatory Bodies under GATS' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008) 271–272.

[300] WTO, *China – Publications and Audiovisual Products AB Report* (n 77) [227]: "Thus, for example, *restrictions imposed on investors* … have been found to be inconsistent with … the GATT." See also Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (n 24) 4.

[301] See the expression in the context of the definition of GATS art XXVIII(d) (n 286).

[302] Clemens Feinäugle, 'Article XXVIII' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 549 (emphasis added).

[303] Pierre Sauvé, *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003) 303, 319.

[304] See eg CPTPP ch 12 "Temporary Entry for Business Persons" and CETA ch 10 "Temporary Entry and Stay of Natural Persons for Business Purposes".

In any case, what matters most are the commonalities between both regimes. There is indeed conceptual identification between commercial presence and establishment. It is also recognised that the provisions in both regimes deal with the situation of investors that seek to invest, that is, covering the very process of making an investment. The last section will elaborate more on this issue, emphasising the connections of the likeness test of service suppliers with the concept of investors.

ii. Re-evaluating Market Access for Investments in Services

While there seems to be no major difference between the liberalisation aspect of investment agreements and of the GATS, those treaties may vary in the general scope and in the drafting of the clauses.[305] An investment measure is only covered by specific GATS obligations if a Member has scheduled mode 3 commitments in the service sectors to which the measure applies. This is the case of the obligations on "domestic regulation" (art VI)[306] and also of those obligations subject to qualifications: "market access" (art XVI) and "national treatment" (art XVII).[307]

In a nutshell, the schedules consist of documents in which there are inscriptions of commitments in columns corresponding to the sectors subject to the obligations together with terms, limitations and conditions. In the context of investments, if a state does not wish to offer commitments for commercial presence (mode 3) in a sector, it includes the inscription "unbound".[308] If a state desires to offer full commitments in relation to the obligations concerning commercial presence (mode 3) in that sector, it should include the inscription "none". There are also horizontal commitments that may impose limitations to investments, which apply throughout the schedules. As an integral part of treaty text, the schedules create legally binding commitments.[309]

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[305] Molinuevo (n 188) 90.
[306] There is a GATS mandate to develop the disciplines on domestic regulation; see Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) 20 EJIL 575, 586–587.
[307] On the other hand, the MFN treatment (GATS art II) applies to all services and service suppliers, irrespective of scheduling and will be more thoroughly analysed in chapter V.
[308] WTO Council for Trade in Services 'Guidelines for the Scheduling of Specific Commitments under the GATS' (adopted 23 March 2001) S/L/9228.
[309] GATS art XX.3.

Having presented the concept of commercial presence and its relations with the entry of investments, it is natural to move on to the interpretation of the provisions on market access (in this section) and on national treatment (in the next section). These provisions have constitutional-type features and functions: they employ general indeterminate concepts containing the fundamental principles of the system of regulatory schemes affecting trade in services.[310] Adjudication under the GATS has generated a few cases, containing technical, but essential elements for the interpretation of the agreement. The following sections also provide background for the analysis of GATS cases affecting the entry of foreign investors, such as *China – Publications and Audiovisual Products,*[311] *China – Electronic Payment Services*[312] and *Argentina – Financial Services*[313], which will be further analysed in Part B.

At first sight, a provision entitled "market access" such as GATS art XVI seems to constitute the main and only provision dealing with the *entry* of foreign investments in services when related to commitments in mode 3. This notion might have been in the mind of some negotiators and may have guided the scheduling of commitments.[314] But market access is, in essence, a legally defined concept, containing a list of six kinds of prohibited measures to scheduled services and "each member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for *under the terms, limitations and conditions* agreed and specified in its Schedule."[315] While most prohibited measures are of a quantitative numerical nature [GATS art XVI(2) (a) to (d)], the most relevant and challenging provisions for the overall argument of convergence are GATS art XVI(2)(e) and (f), as follows:

> GATS art XVI …
> 2. *In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt* either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

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[310] Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (n 24) 8, 11.
[311] (n 296) and (n 300).
[312] WTO, *China: Certain Measures Affecting Electronic Payment Services – Report of the Panel* (31 August 2012) WT/DS413/R.
[313] WTO, *Argentina: Measures Relating to Trade in Goods and Services – Report of the Panel* (30 September 2015) WT/DS453/R and *Report of the Appellate Body* (14 April 2016) WT/DS453/AB/R.
[314] Aaditya Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora Box' (1997) 31 JWT 107, 115–116.
[315] GATS art XVI(1) (emphasis added).

> …
> (e) measures which *restrict or require specific types of legal entity or joint venture* through which a service supplier may supply a service; and
> (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of *individual or aggregate foreign investment*.[316]

Full market access under the GATS just means that none of the six measures are present, but it is far from openness to investments.[317] In any case, the principle of progressive liberalisation is reflected in the structure of the GATS.[318] The market access provision touches upon one of the main pillars in the process of the liberalisation of services: the removal of barriers that apply to both domestic and foreign providers.[319] In this context, the obligation applies also to non-discriminatory measures that concern or limit both domestic and foreigners (as well discriminatory ones) provided that they *affect* foreign services supplies.[320] This encompasses, for example, national quantitative restrictions including public monopolies. The feature means that the GATS goes beyond traditional liberalisation BITs, being complementary to national treatment.[321] Therefore, the market access provision is essential but does not exhaust all the GATS regulation on access or entry, as will be shown in the next section.

A general measure that makes it impossible for an investment to take place in a scheduled sector violates art XVI.[322] For this purpose, it does not matter whether the investment occurs through the acquisition of an existing enterprise or by the creation of a new one (greenfield). This reading is supported by *US-Gambling*, which reveals that in sectors where commitments have been undertaken, full exclusions are not allowed.[323] As an analogy in investment treaties, if you confer establishment on a national treatment or MFN basis, outright prohibitions are not possible if a domestic or a third-country like investor, respectively, is allowed to establish. On the other hand, full exclusions for certain

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316 (emphasis added, fns omitted).
317 Molinuevo (n 188) 84; Martín Molinuevo and Panagiotis Delimatsis, 'Article XVI' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 377.
318 *China – Publication and Audiovisual Products AB Report* (n 300) [394].
319 Lang, *World Trade Law after Neoliberalism* (n 279) 293.
320 Molinuevo and Delimatsis (n 317) 392.
321 Molinuevo (n 188) 92.
322 Meester and Coppens (n 278) 114.
323 WTO, *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R [251]-[252].

types of investments are not a breach of those IIA standards if the other investors are also subject to the prohibition.

Among the several non-allowed measures, the two worth noticing are those transcribed above. In art XVI.2(e), the requirement of local presence is considered one of the prohibited restrictions.[324] In the NAFTA context, this is also present in art 1205. The requirement to set up a branch or a representative office or to create a subsidiary as a new juridical person means more control and regulation by the host state. Thus, the WTO members chose to disallow those measures under the GATS. These different ways of supply under commercial presence will be relevant in the analysis of financial services in chapter VIII. Rather than an investment restriction, a measure like that would be an *obligation to invest* in order to supply a service, which is prohibited in a scheduled sector.

It is also essential to note that art XVI.2(f) contains one of the few references to the expression "investment" (and not "commercial presence" or "services suppliers")[325] in the whole set of WTO agreements.[326] According to Molinuevo and Delimatsis, the use of the word "investment" might suggest a broad coverage of the expression.[327] This reading would encompass all measures that limit the total value of investments in the capital of companies. That would include measures limiting foreign equity, even if it does not amount to a 50%, which would configure control, and, thus, commercial presence. As a consequence, this provision might regulate any other levels of participation of foreign investment.

Others, however, sustain a narrower interpretation. If no control is acquired, the measure would not *affect* trade in services in mode 3 at all.[328] This means that the GATS, as a whole, would not be applicable. Some even ponder about the independent need for art XVI.2(f), as measures limiting the participation of foreign capital would be already inconsistent with the national treatment.[329] In that regard, *China – Publications and Audiovisual Products* seems to reveal that only if a *clear* quantitative limitation is used would there be a breach of the article.[330] This issue

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[324] Sauvé (n 292) 304.
[325] Molinuevo and Delimatsis (n 317) 389.
[326] The others are in the section of definitions in the GATS Annex on Financial Services (art 5(a)(xiii) and (xvi)), which mention investments in "collective investment management" and "investment and portfolio research and advice".
[327] Molinuevo and Delimatsis (n 317) 390.
[328] Meester and Coppens (n 278) 106.
[329] Mattoo (n 314) 116.
[330] *China – Publications and Audiovisual Products Panel Report* (n 296) [7.1392]-[7.1394].

is not settled there, but will be relevant to the discussion of the case studies.

There is another sign that there is more investment regulation in the WTO than commonly recognised. It is the obligation to allow the movement and transfers of capital essential to commitments made in mode 3 (and also in mode 1),[331] expressed in the following terms: "If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory".[332] The provision contains a loose requirement of capital transfers "related" to the service (or investment). This is justified since "a commercial presence will often entail incidental capital transfers (for instance, *for the establishment of the presence* or the repatriation of gains) even if the service to be provided does not itself involve a capital transfer."[333] This provision is important given that, irrespective of the service involved, "the entry phase … is almost always a capital movement, as it typically requires a transfer of the financial resources necessary to set up the service."[334]

To sum up, the most distinctive aspect of the market access provision is that it potentially applies to the entry of investments in services even if the measures are not discriminatory. This stands in contrast even with the classical content of liberalisation BITs, as seen above. However, states are progressively incorporating this provision in investment treaties or investment chapters, and this will be explored in the analysis of CETA. Finally, depending on how adjudication in the GATS develops, the scope of the provision on market access might be larger than ever thought in relation to investments. The potential connections between the regimes will then become more evident.

iii. National Treatment: Likeness and Investors

This section deals with another constitutional concept in the GATS: the provision on national treatment. It highlights important aspects related to the entry

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[331] Steger (n 32) 160.
[332] In the second part of fn 8 of GATS art XVI:1.
[333] Benedict Christ and Marion Panizzon, 'Article XI' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 250 (emphasis added).
[334] Federico Lupo-Pasini, 'Movement of Capital and Trade in Services: Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account' (2012) 15 JIEL 581, 598.

of investments and investors to provide context for the upcoming chapters. The comparison with IIAs in this regard paves the way for the question of whether substantive convergence is taking place.

In a cross-regime comparison with international investment law, it is known that the distinct languages of the standards in the GATS and IIAs lead to slightly different substantial scopes of treatment and consequences.[335] As seen in chapter I, in IIAs, the analysis of regulatory or legitimate objectives is at times undertaken in the evaluation of like/similar circumstances/situations or in the justifications to the different treatment.[336] In the GATS, as will be explored, the analysis typically starts with likeness of service/suppliers, moving to the test of *less favourable treatment*. It is then followed by the analysis of closed regulatory justifications, such as general exceptions, security exceptions and prudential measures, and, finally, if it is the case, the chapeau of GATS art XIV (unjustifiable discrimination).

Direct language conferring entry rights is arguably unnecessary when national treatment is granted in relation to entry.[337] That is the technique used in GATS art XVII, as follows:

> National Treatment
> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.[338]

While the WTO AB has not yet set a complete test to interpret this provision,[339] it is generally accepted that art XVII can be breached by both de jure

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[335] Molinuevo (n 188) 105, 118.
[336] McLachlan, Shore and Weiniger (n 213) 339–342.
[337] Molinuevo (n 188) 79.
[338] (emphasis added, fns omitted).
[339] Jorge A Huerta-Goldman, 'Cross-Cutting Observations on National Treatment' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013) 236.

and de facto discrimination.[340] In any case, the national treatment obligation applies to "measures that restrict investment entry or admission to the host state" by recognising the "right of entry, as long as a service sector is open to domestic operators."[341] It is noted that the language of GATS art XVII (and also GATS art II) includes not only "like services" but also like "service suppliers". A service supplier in mode 3 is most likely considered an investor in the language of investment treaties.

For some time, panel and AB reports interpreted the concept of likeness of service suppliers as exclusively related to suppliers that provide like services.[342] This has been heavily criticised,[343] since this narrow reading would be contrary to the ordinary meaning of the expression "service supplier" and against the negotiation history.[344] There is a recognition of the inseparability between services and their suppliers but the practical difference among them matters in the analysis of likeness.[345] Some comment that in those cases the decisions did not undertake a separate like supplier analysis because the differential treatment related to the object of the services.[346] Beyond the lack of authority, there are several deficiencies in adopting the approach of "mutually dependent determination of likeness"".[347]

In fact, there has been a much richer discussion in academic literature on how to best address the likeness test of services and service suppliers. The so-called cumulative approach involves checking first if the measure treats services less favourably, then doing the same with service suppliers.[348] A broad cumulative

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[340] For an argument reaffirming the possibility of de facto breaches, not as result of the language of art XVII, but as a characteristic of the standard per se, see James Flett, 'National Treatment under the General Agreement on Trade in Services' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014) 75–78, 86–90.

[341] Federico Ortino and Audley Sheppard, 'International Agreements Covering Foreign Investment in Services: Patterns and Linkages' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 203 (fn omitted).

[342] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel* (22 May 1997) WT/DS27/R/USA [7322] [*Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R]; WTO, *Canada: Certain Measures Affecting the Automotive Industry – Report of the Panel* (11 February 2000) WT/DS139/R, WT/DS142/R [10.248] [*Report of the Appellate Body* (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R].

[343] Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS' (1999) 2 JIEL 295, 333.

[344] Markus Krajewski and Maika Engelke, 'Article XVII' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 408.

[345] Diebold (n 200) 177, 186–187.

[346] ibid 196–197.

[347] ibid 198–203.

[348] Krajewski and Engelke (n 344) 408.

approach calls for the analysis of whether the measure affects either like services or like service suppliers, which results in more liberalisation.[349] The latter has also been named as an alternative combined approach, requiring less favourable treatment to be found by the WTO between like services *or* between like service suppliers; it leads to a finding of non-discrimination in cases of unlike service suppliers providing like services.[350] In a narrow cumulative test, there is a need to show likeness of both services *and* service suppliers, resulting in more regulatory leeway for states.[351]

Finally, a disjunctive test involves checking whether the measure *concerns* a service or service supplier, to then establish likeness.[352] While the alternative disjunctive approach focuses on the likeness of services or services suppliers, the problems are more evident when the measure affects partially the service and the service supplier.[353] Diebold also develops and advocates for a merged test, which considers services and service suppliers as a merged concept to be analysed under likeness.[354]

All in all, it seems that there are arguments to support that likeness should be analysed separately for services and service suppliers, such as those that support a broad cumulative approach. In turn, there may be valid reasons for host states to treat differently suppliers of like services (eg a bank and an insurance company), without the need to resort to justifications.[355] *China – Publications and Audiovisual Products* apparently started to attribute to the service supplier a special analysis.[356] The Panel had found that some of the Chinese measures related to the distribution of reading materials and audiovisual products, including by foreign-invested entities, were in breach of the market access and national treatment provisions.[357] But since the Panel found discrimination de jure, no deeper analysis of likeness was necessary. In any case, this is a small but welcome development.

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[349] ibid.
[350] Diebold (n 200) 209–210.
[351] Krajewski and Engelke (n 344) 408–409.
[352] ibid 409.
[353] Diebold (n 200) 211–215.
[354] ibid 217–219, 240.
[355] ibid 199.
[356] ibid 195.
[357] *China – Publications and Audiovisual Products AB Report* (n 300) [413].

In Modes 3 and 4, it is the supplier that is generally subject to the host countries' regulations.[358] If WTO Members want to be able to differentiate suppliers without resorting to the GATS exceptions, they should favour an interpretive test that allows them to do so. This would support a test in which more weight and importance should be given to supplier characteristics in cases where the subject matter of the measure under analysis relates to an investor.[359] For the reasons spelled out, it seems that tests that engage in a detailed analysis of likeness of service suppliers – regardless of whether they are actually supplying like services – are the most defensible approach.

There are some specific cases affecting entry that are worth exploring before moving on to the next section. A host state can grant incentives, such as direct transfers or tax reductions, for investors to supply services in mode 3. It may also impose local content requirements for investors, as a condition to the access into the territory or to the receipt of those incentives. This imposition may take place upon or after establishment. This would be a strategy for states willing to boost their value chains in services, benefitting from the presence of foreign investors. In this line, different legal outcomes arise from the situations described below, all of them assuming that the member state has scheduled commitments in the related services.

A more straightforward situation relates to incentives to domestic investors in services. They can decrease the interest of the foreign investors to enter the host state. To the extent that they modify the conditions of competition between domestic and foreign investors, the incentive measures are a breach of GATS art XVII, if not justified by the exceptions in art GATS XIV and others.[360] A second situation refers to a measure which obliges or induces a foreign investor in services to purchase local inputs (goods).[361] Even if this obligation is also imposed on domestic investors, the measure will be against GATS art XVII, as *de facto* discrimination, if the conditions of competition are modified such that it is easier for

[358] Diebold (n 200) 202.
[359] ibid 241 (emphasis added).
[360] Lise Johnson, 'Regulation of Investment Incentives: Instruments at an International/Supranational Level' in Ana Teresa Tavares-Lehmann and others (eds), *Rethinking Investment Incentives: Trends and Policy Options* (Columbia UP 2016) 280.
[361] This will naturally involve issues related to the GATT, TRIMS and ASCM, but since they are not the object of this thesis, the focus is exclusively on the GATS.

the domestic supplier than for the foreign investor to comply with the measure.[362] A third situation occurs when the measure requires or induces the foreign investor (in this case, either a producer or a service supplier) to hire local services; in this case, the measure could constitute de jure discrimination, against foreign services, in violation of GATS art XVII.[363] Finally, even if the related services are not scheduled, there could be a violation of GATS art II if there is discrimination between foreign services providers or investors based on origin.[364]

iv. Non-Discrimination on Entry: Potential Investors?

Another essential aspect, closely connected to the discussion in the last section, is the treatment of potential service suppliers, in this context, either established investors or, as seen before, prospective investors. It has been shown that the broad scope of the term "commercial presence" implies that the GATS covers the situation when an investor is *seeking* to make an investment in services. Companies with the capability and opportunity to provide services have been considered potential service suppliers, and therefore are also covered by the GATS art XVII in an analysis of competition conditions.[365] Those companies naturally benefit from national treatment, conferred to like national service suppliers, thus, domestic investors.[366] This proposition is not exempt from criticism,[367] but it is true, as warned by Zdouc, that:

> The possible exclusion of many *potential service suppliers* from the enjoyment of GATS rights as a result of an exceedingly narrow 'likeness' definition of service suppliers could undermine the liberalizing effect of the GATS which derives from the creation of market access opportunities for foreign service suppliers.[368]

It has also been noted that there are blurred lines to differentiate measures that affect the right to enter or access a country and that affect the supply of the service.[369] When it comes to services, all kinds of regulation can affect and hinder

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[362] Holger P Hestermeyer and Laura Nielsen, 'The Legality of Local Content Measures under WTO Law' [2014] JWT 554, 588–589.
[363] ibid 241. See also Johnson (n 360) 282.
[364] Johnson (n 360) 279–280.
[365] *EC-Bananas Panel Report* (n 342) [7.320]; Krajewski and Engelke (n 344) 406–407.
[366] Diebold (n 200) 185.
[367] *Canada Autos AB Report* (n 342) [164]-[165]; Feinäugle (n 302) 553–54.
[368] Zdouc (n 343) 333 (emphasis in the original).
[369] Diebold (n 200) 214.

trade in services, so "the distinction between border measures and internal regulation *is not on the whole a useful classification*, due to the non-physical character of service transactions", as highlighted by Eeckhout.[370] Diebold acutely provides the following framework concerning the two different moments where a measure subject to the GATS could apply:

> (i) at the stage the supplier *enters* the importing country or *establishes himself* on the territory of the importing country; or (ii) at the stage of service supply. In simple terms, the former are aimed at *preventing the supplier from entering or staying on the territory* and the latter try to prevent the supplier from providing the service on the territory of the importing country. … *Concerning the mode of supply through commercial presence (mode 3), a measure on entering and establishing* could take the form of more burdensome capital requirements, limitation of foreign capital, allowing only specific legal entities or joint ventures or an outright prohibition for foreign suppliers to set up an office, or any other legal entity. At the stage of supply, the restriction could occur, for example, *in the refusal of a licence that is required to provide the service* or by imposing unfavourable or additional supply conditions.[371]

At the same time, this shows the artificial divide between discrimination or market access at the border and discrimination in national regulation. In several cases, the measure at issue will apply both to the entry of investments and to the actual supply of the services. Think of licences that require specific capital or financial requirements. It arguably makes sense to interpret the GATS national treatment standard as including treatment to potential service suppliers that could be providing the services, even if they are not yet established investors. In other words, potential investors that would have established themselves, were it not for the measure. This is in consonance with the aim of the progressive expansion of trade and economic opportunities.[372] Such an approach would also benefit prospective investors with entry rights.

Having addressed likeness, the analysis moves on to less favourable treatment. Since the focus is on investors, therefore, in mode 3, it is of interest whether this involves an impact test including other modes of supply. The challenge would be how to properly establish a group comparator. As seen above, domestic regulation of investments in services generally applies to the supplier; supplier-based discrimination is more effective in relation to services supplied in

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[370] Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (n 24) 11 (emphasis added).
[371] Diebold (n 200) 213 (emphasis added, fns omitted).
[372] See GATS Preamble, Recital 2.

modes 3 and 4, in contrast to modes 1 and 2.[373] In the case of investors, the comparison is easier to establish: foreign mode 3 suppliers have generally a counterpart, which is a like domestic company.[374]

However, since a mode-fragmented approach to the national treatment obligation may lead to unwanted results, some advocate the use of the criteria of competitive relationship in the definition of the group of comparators. Diebold suggests that "national treatment must be interpreted such that it protects the competitive opportunities of *all* foreign services and suppliers – regardless of the respective mode or method of supply …".[375] A textual hook for a competition-based analysis can be found not only in GATS in art XVII(3) but also in GATS art XVII(1) fn 10, which reads:

> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

The following example clarifies the meaning of the provision. Imagine a foreign investor trying to establish in a certain state an accountancy firm in competition with a domestic incumbent. The host state may set the requirement that all internal procedures, operational guidelines and intra-firm internal documents are redacted into the national language. This will indeed impose extra costs on the activities of the foreign investor, but since it is inherent in the foreign character, it is not a contravention of the national treatment, according to GATS art XVII(1) fn 10.

If national treatment commitments shall not be misused to compensate inherent competitive disadvantages, *a contrario sensu* it should compensate *all the non-inherent competitive disadvantages*. The latter disadvantages are exactly those resulting from measures taken by the host state when they modify the conditions of competition in favour of nationals. Some recognise that competition analysis is the appropriate method for a comparison between company service suppliers and between different modes of supply.[376] A competition-oriented analysis ensures that potential service suppliers in mode 3, either established or

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[373] Diebold (n 200) 178.
[374] ibid 221.
[375] ibid 230 (emphasis in the original).
[376] For a position that the presence of fn 10 of art XVII is meaningless to reach this conclusion, see Flett (n 340) 77.

prospective investors, are taken into account either in the analysis of likeness or in the phase of less favourable treatment. This interpretation also resembles the language of BITs that confer entry rights and define investors as those that seek to invest.

In the context of the GATS, some criticise the lack of reasoning for the WTO AB approach, since *EC-Bananas*, to take a solely *economic* approach to discrimination; this would mean that the legitimate effects of the measures, other than less favourable competitive conditions, could not be considered.[377] It is true that the crucial challenge in terms of treaty making is where to draw the line between what is legitimate and what is not. Specially in the context of services, many measures which impact on trade and investment flows pursue legitimate objectives. While the variety and relevance of those goals are beyond discussion, it is not always easy to identify the measures with protectionist intent and isolate them from the legitimate measures.[378] Sometimes the measure has its roots in both protectionist and legitimate pressures. In the face of multiple regulatory purposes, it is difficult, if not impossible, to ascertain one true goal.[379]

Evidence of protectionist intent is rare, so that circumstantial rather than direct evidence will be most likely to provide the basis for a claim.[380] This is why some advocate the return of the use of regulatory purpose in the analysis of discrimination, but with a nuanced objective orientation, which distances itself from the rejected "aims and effects" approach.[381] This is to be done paying "attention to factors such as text, structure, context, design and application" in order to discover the regulatory purpose.[382] This chapter does not take position on how to accommodate those views, which, rather than specific to the entry of investors in services, affect the whole set of GATS situations. However, this does not take out the merit of a competition-based approach at least to incorporate in the analysis potential service suppliers affected by the measures.

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[377] Mitchell, Heaton and Henckels (n 81) 119.
[378] Gari (n 15) 591.
[379] Mitchell, Heaton and Henckels (n 81) 19.
[380] Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 International and Comparative Law Quarterly 831, 859.
[381] WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 27-28.
[382] Mitchell, Heaton and Henckels (n 81) 171.

In any case, despite the differences, both the international trade law and international investment law regimes have tried to deal with the development of a national treatment test that prevents discrimination against foreigners and is balanced with regulatory sovereignty.[383] There have been some claims to use approaches from one system to the other, but the different expressions make it more difficult to justify.[384] Therefore, the definition of tests to deal with rules, justifications and exceptions and to adequately place the burden of proof will in the end define which measures will be accepted or not in the international arena.

It should be recognised that an indication of functional convergence in both systems is the common aim of the anti-discrimination standard represented by national treatment: to guarantee a level of equality and ensure the same competitive opportunities.[385] This characteristic is particularly more evident in the context of entry rights. Although it is recognised that language divergences are inevitable and will persist,[386] the signs of convergence between concepts and textual expressions in treaty-making initiatives are evident. This trend might be able to clarify the scope of commitments, reservations, exceptions and justifications.

b. TRENDS: NEW TRADE AND INVESTMENT AGREEMENTS

i. CPTPP: Attempt to Invest

The regulation of the process of establishment of investments concerning prospective investors merits further discussion, in particular the coverage of the attempt to invest in the new treaty-making initiatives. The CPTPP, which resulted from the re-negotiations of the TTP (Trans-Pacific Partnership) between the remaining eleven countries after the withdrawal of the US, contains an Investment Chapter (Chapter 9).[387] The provisions of interest here literally correspond to those

[383] DiMascio and Pauwelyn (n 81) 89.
[384] Krajewski and Engelke (n 344) 415–416; Eric H Leroux, 'Eleven Years of GATS Case Law: What Have We Learned?' (2007) 10 JIEL 749, 783; more generally, Weiss (n 252) 88.
[385] Kurtz (n 27) 84–85; Thomas Cottier and Lena Schneller, 'The Philosophy of Non-Discrimination in International Trade Regulation' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014) 7, 12–14.
[386] Cho and Kurtz (n 37) 203.
[387] CPTPP (n 88).

negotiated in Chapter 9 on Investment of the TPP Agreement.[388] The CPTPP typifies a recent plurilateral treaty conferring establishment rights. In this light, how does the CPTPP treat the attempt to make an investment?

Like the US Model BIT, CPTPP defines investment widely, but restricts covered investments to those already established, acquired or expanded.[389] However, similar to the US Model BIT and the NAFTA, the standards are applicable to measures relating to investors.[390] The national treatment and MFN provisions are identical to the US Model BIT, covering both investors and investments and the establishment, acquisition and expansion phases.[391] CPTPP also sets out non-conforming measures, which are exempt from the application of national treatment and MFN.[392] The definition of investor also covers an investor that "attempts to make" investments. The 2004 US Model BIT had introduced this language. Douglas expressed concerns over the use of the expression and pondered "whether the 'attempt' must be bona fide or reasonably capable of success" for example "when there was a clear prohibition of foreign investment in a municipal legislation".[393]

The CPTPP partially addresses the indeterminateness in the definition, criticised by Douglas. A provision clarifies that "an investor 'attempts to make' an investment when that investor has *taken concrete action or actions to make an investment*, such as channelling resources or capital in order to set up a business, or applying for permits or licenses."[394] This is drawn from the Chilean practice, expressed in investment chapters in the FTAs with Colombia,[395] with Peru,[396] and later with Argentina[397] and in Pacific Alliance Investment Treaty.[398] The CPTPP also brings innovative provisions related to enforcement, which will be dealt with in the next chapters.

The first example of actions that configure an attempt to invest in the CPTPP

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[388] TPP (n 11).
[389] CPTPP art 9.1. See 2012 US Model BIT.
[390] CPTPP art 9.2(1)(a).
[391] CPTPP arts 9.4(1) and art 9.5(1). See also art 9.4 fn 14.
[392] CPTPP art 9.12.
[393] Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 138.
[394] CPTPP art 9.1 fn 12 (emphasis added). This was also included in USMCA art 14.1 fn 3 (n 86).
[395] (signed 27 November 2006) art 9.28 fns 18-19.
[396] (signed 22 August 2006) art 11.28 fns 15-16.
[397] (signed 2 November 2017) art 8.1 fns 2-3.
[398] Additional Protocol to the Framework Agreement of the Pacific Alliance (signed 10 February 2014) art 10.1 fns 4-5.

(channelling resources to set up a business) bears some resemblance to what is necessary to configure commercial presence in the GATS. The second example (applying for permits) are acts generally taken by potential service suppliers, either established or prospective investors. In terms of criteria, for an investor to be qualified as a prospective investor and to benefit from the standards in the CPTPP, a certain level of evidence based on the concreteness of the attempt to invest needs to be shown. In turn, for a potential investor to benefit from the GATS, the identification of a competitive relation with a domestic investor and the evidence of the modification of the competitive conditions are enough, as seen in the last section.

In any case, some are cautious to conclude that there is more convergence from the fact that investment is being negotiated in trade treaties such as the CPTPP: in NAFTA, the archetype of such a model, both paths have remained separate.[399] In the case of CPTPP, there are indeed some references in the chapter of cross-border trade in services to the chapter of investments, as will be explored in the next section.[400] Nevertheless, other treaty initiatives have adopted a more integrated perspective, at least with regard to the entry of investors, as will be shown.

ii. Extending Market Access and Common Flexibilities

The issue of the coverage of investments in services in PTAs has been solved in several different ways.[401] The starting point are treaties that, like the GATS, do not contain an investment chapter and cover investments in the service chapters.[402] Sometimes the obligations overlap and are contained in both the investment and the services chapters.[403] In other cases, there is an exclusion of

[399] Wu (n 35) 208.
[400] See eg CPTPP art 10.2(2)(a).
[401] Carsten Fink and Martín Molinuevo, 'East Asian Free Trade Agreements in Services: Key Architectural Elements' (2008) 11 JIEL 263, 279–286.
[402] Such as the EFTA-Chile FTA (signed 26 June 2003). See also Ortino and Sheppard (n 341) 204.
[403] An example is the Japan-Singapore Economic Partnership Agreement (signed 13 January 2002) chs 7 and 8.

services from the investment chapter,[404] or an exclusion of investments in services from the services chapter.[405]

The solutions adopted by the CETA might illustrate an evolving international treaty-making practice. First, it is noticed that the CETA investment chapter replicates the wide definition of investment, clarifying though that covered investments are those that are made in accordance with the applicable law at that time.[406] Second, the investment chapter standards are also applied to investors. The investor's definition includes also those who "seek to make" an investment, similar to NAFTA, in the following terms: "investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, *that seeks to make*, is making or has made an investment in the territory of the other Party."[407] Third, whereas arts 8.6 and 8.7 extend national treatment and MFN to establishment and expansion,[408] art 8.18 excludes the former from investor-state dispute settlement (ISDS). This is the main difference from the CPTPP's approach, which provides a role for ISDS, as will be explored in chapters III and IV. It is important to note that the competence to negotiate treaties with establishment rights was already within the remit of the European Union, exercised, though, in a fragmented manner.[409]

Besides, apart from sector exclusions, the CETA Chapter provides for the possibility of non-conforming measures, which is common in IIAs that follow the negative list model.[410] In a context of negative lists, the outcome of a case can

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[404] An example is the EFTA-Chile FTA (n 402) arts 22 and 32, which regulates FDI in services within the Services Section; also, the investment chapter of the Argentina-Chile FTA (2 November 2017), arts 8.5 and 8.6 and the PACER Plus agreement (n 270) art 4.1. See Federico Ortino, 'Public Services, Investment Liberalization and Protection', *Regulation of Foreign Investment*, vol 21 (World Scientific 2012) 397.

[405] An example is the US-Singapore agreement (6 May 2003) ch 8. See art 8.1(2), which excluded from the services chapter mode 3 type of provision, regulated by the ch 15 (Investment).

[406] CETA art 8.1 (Definitions) Covered investment. As to measures affecting both the moment of establishment and afterwards, it is worth mentioning art 8.2, fn 4: "For greater certainty, a Party may maintain measures with respect to the *establishment or acquisition of a covered investment* and continue to apply such measures to the covered investment *after it has been established or acquired*." (emphasis added).

[407] CETA art 8.1 (Definitions) Investor (emphasis added). See also the definition of "entrepreneur" and "establishment" respectively in the EU-Japan Agreement (n 271), arts 8.2(h) and 8.2(i).

[408] See also EU-Japan arts 8.8 and 8.9.

[409] Filippo Fontanelli and Giuseppe Bianco, 'Converging towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States' (2014) 50 Stanford J Intl Law 211, 225.

[410] CETA art 8.15.

depend solely upon the interpretation of reservations and exceptions.[411] To illustrate, CETA art 8.15 provides that certain standard provisions will not apply to existing non-conforming measures and to their continuation or amendment, provided that the conformity of the measure is not decreased.

Establishment or acquisition of investments in certain air services are not subject to the market access or non-discrimination provisions, according to CETA art 8.2(2). Besides, art 8.2(3) carves out investments in audiovisual services for the European Union and cultural industries for Canada from the same obligations of market access and national treatment. The CETA Services Chapter 9 applies only to cross-border services, in order to avoid overlap. Both Canadian and European investors are aware of those exclusions and exceptions just by referring to one set of legal provisions. They do not need to also go through the services chapter of the agreement.

Most importantly, the establishment of an investor is regulated using a structure of market access commitments. The following language is used: "Neither Party shall adopt or maintain *with regard to market access through establishment by an investor of a Party*, …, measures that: … "[412] As already mentioned, a focus on market access constitutes a trend that moves away from discrimination. It has been pointed out that European Union judicial decisions have gone "beyond discrimination" towards an analysis of whether a measure prevents or impedes market access: neutral non-discriminatory regulation may be considered a restriction to trade in services, unless justified.[413] The CETA approach suggests a move in that direction and this is a sign of convergence between international trade and investment law.

Some larger economic agreements already extended market access obligations contained in the services chapter to the investment chapters and the US-Singapore FTA is illustrative in this regard.[414] The reference that market access obligations also apply to investments is similar to what is currently available in the

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411 *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No ARB(AF)/07/4 partial dis op of Arbitrator Philippe Sands (17 May 2012).

412 CETA art 8.4 "Market Access" in sec B "Establishment of Investments" (emphasis added).

413 Piet Eeckhout, 'Constitutional Concepts for Free Trade in Services' in Joanne Scott and Gráinne De Búrca (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart 2001) 216.

414 (n 405) see art 8.2(2), which provides that market access obligations will also apply to investments. See also the Nicaragua-Taiwan FTA (signed 23 June 2006) art 11.01(3) and the Panama-Singapore FTA (signed 01 March 2006) art 10.2(2).

CPTPP.[415] As service-specific obligations, such as market access, also apply to investment commitments, this reaps the "complementarity benefit associated with dual coverage".[416] It is true that international investment law is quite experienced in dealing with absolute standards, the large number of arbitral decisions on fair and equitable treatment (FET) being the prime example. The novelty is though that market access provisions apply to any quantitative measures concerning both domestic and foreign investments, which a priori expands the scope of coverage of investment rules.

The fact is that this move perhaps represents the new trend for treaties involving European countries. The investment chapters in trade treaties in the new European Union negotiations are explicitly including the GATS-type of language of market access.[417] Market access provisions inside investment or establishment chapters are a feature in some European treaties, such as the Cariforum-EU EPA,[418] the EU-Singapore FTA[419] and the newly concluded EU-Japan FTA.[420] Those treaties have adopted concepts such as "establishment" or "commercial presence" located in different sections of the treaties. In any case, this is an important turning point for investment regulation.

This trend has been coupled with the introduction of more flexibilities for investment regulation. One can note the incorporation of GATS art XIV into investment treaties and in investment chapters, such as in the China-New Zealand FTA,[421] in the Switzerland-Japan FTA[422] (this one specifically applicable to the process of making an investment) and in the EU-Singapore FTA.[423] Not only does

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[415] See eg the text of CPTPP art 10.2 (2)(a): "Article 10.5 (Market Access), Article 10.8 (Domestic Regulation) and Article 10.11 (Transparency) shall also apply to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment."

[416] Fink and Molinuevo (n 401) 281–283.

[417] Panagiotis Delimatsis, 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit' (2017) 20 JIEL 583, 596.

[418] Using the concept of "commercial presence", one may mention the Economic Partnership Agreement between the CARIFORUM States and the European Community (signed 15 October 2008) art 67.

[419] Using the concept of "establishment", one may mention the EU-Singapore Free Trade Agreement (authentic text as of 18 April 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 15 August 2018, arts 8.8(d) and 8.10.

[420] See EU-Japan (n 271) art 8.7. See also Agreement in Principle between EU and Mexico <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833> art 6.1 (subject to changes, 21 April 2018).

[421] (signed 7 April 2008) ch 17 art 200.

[422] (signed 19 February 2009) art 95.1.

[423] (n 419) art 9.3(3).

CETA art 28.3 provide that the exceptions of GATT art XX are incorporated but it also sets out exceptions equivalent to first three indents of GATS art XIV, which will apply to the CETA section on the establishment of investors (Section B).[424] This is somewhat replicated in the EU-Japan FTA: GATT art XX is incorporated through art 8.3(1) and the four indents of art 8.3(2) correspond to GATS art XIV.[425]

Nonetheless, some believe that a provision with closed exceptions does not seem necessary in IIAs, since national treatment can be subject to particular listed exceptions.[426] In addition, the absence of a specific provision has arguably given flexibility to tribunals in interpreting the standard of like circumstances, so that their role becomes more limited with such an inclusion.[427] A careless incorporation of the system of exceptions can lead to incoherence in the BIT framework of rights and obligations.[428] It is also debatable whether this practice also intends to import the WTO jurisprudence interpreting these provisions.[429] When treaty practice has consciously and clearly incorporated WTO trade provisions within investment agreements there is arguably a need for tribunals to refer to WTO dispute settlement decisions.[430]

While the objective is not to compile all the treaties which either include market access or GATS exceptions, this framework serves as an acute illustration of how concepts used in each of the regimes intertwine. The move of concepts from the multilateral arena back to the regional one is an interesting development in treaty making. When states avoid overlap between the regulation of trade in services through commercial presence and investments in services in their treaty-making initiatives, they can draft common and clearer exceptions and carve-outs.

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[424] CETA arts 28.3(1) and 28.3(2).
[425] For other examples, see Desierto (n 31) 62 fn 33.
[426] Barton Legum and Ioana Petculescu, 'GATT Article XX and International Investment Law' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 354.
[427] Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 367–70.
[428] Cho and Kurtz (n 37) 189, 199–200.
[429] Kurtz (n 251) 113.
[430] Desierto (n 31) 62–63; Marceau, Quinn and Hoyos (n 34) 292.

iii. International Negotiations: Techniques

Processes of negotiations, such as those in the Uruguay Round, resulting in the GATS and in the second half of the 90s, leading to the GATS Protocols – the Telecommunications and the Financial Services Protocols – generate novel treaty concepts and an array of commitments. The GATS has arguably resulted in limited scheduling of commitments in general, including in mode 3. On the other hand, it has been argued that a progressive, flexible and incremental approach[431] focussed on the GATS conceptual framework would be the most appropriate and pragmatic way to deal with investment liberalisation in the world trade law system.[432] While, as shown, the prevailing model in liberalisation IIAs is negative listing, mode 3 negotiations in several trade agreements have followed a positive or hybrid approach.

It is recognised that liberalisation BITs and negative list PTAs have a larger sectoral scope.[433] The level of obligations on the entry of investments of some BITs has exceeded what was covered by the GATS.[434] Careful analysis shows that the US has maintained consistency in the scope of exclusions from its BITs and the level of GATS commitments; on the other hand, its partners have undertaken more national treatment commitments in IIAs than in the GATS.[435] Whether this was a conscious choice or an error in assessment owing to bounded rationality[436] is open to debate and chapter V further discusses the legal consequences of this gap.

A point to consider is that the common difference between applied regulation and binding commitments (the so-called "water in services")[437] does not mean that negotiations are useless. While technology and unilateral actions have arguably done more for services liberalisation than negotiations, the risk of regulatory reversal is real, especially in light of new protectionist trends in

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[431] Jorge A Huerta-Goldman, 'Domestic, Regional and Multilateral Investment Liberalization', *Regulation of Foreign Investment*, vol 21 (World Scientific 2012) 87.
[432] Sauvé (n 292) 335–365.
[433] Molinuevo (n 188) 130.
[434] Wimmer (n 281) 116.
[435] Rudolf Adlung and Martín Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?' (2008) 11 JIEL 365, 372.
[436] Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015).
[437] Stephen Adams, 'Living with "Prudentialism": The Challenges of Building a UK Trade Policy for Financial Services' (2017).

investment highlighted in the Introduction.[438] At times, the use of 'locking-in' GATS plus commitments ("draining the water") can be considered a gain. To illustrate, Malaysia accepted to "lock-in" its current levels foreign equity caps in the context of the negotiations of the Malaysia-Australia Free Trade Agreement – MAFTA;[439] this was considered a gain to Australia, since the commitment was better than Malaysian's GATS commitment.[440]

The perspective above could lead to the conclusion that positive or negative listing of commitments, as a negotiation technique, would yield the same results. However, a behaviouralist take emphasises the complexities of negotiations in the light of the framing effects, status quo bias and compromise effects on the choice architecture of services and investment agreements.[441] For instance, the framing of the inclusion of a reservation in a negative list as a "gain" for the host state negotiator and the "stickiness" of default rules could perhaps suggest that negative lists are more liberalising.[442] Although this hypothesis is not definite, it certainly provides a useful perspective to explain the outcome of certain treaty choices and to help with its interpretation.

This discussion matters here because any negotiation in which trade in services and investments are regulated together would necessarily involve the discussion of the most adequate modalities for setting up commitments. The growing interrelationship between trade in services and investments may have significant impact on the choice architecture of agreements, as acknowledged by Broude and Moses.[443] On the other hand, the effect of the use of a positive list approach may be tempered by clauses such as the ratchet clause, which attaches the market access and national treatment commitments to the current levels of liberalisation and non-conforming measures. Several agreements illustrate this dilemma on the choice of modalities and use a mixed technique. The Japan-Philippines Economic Partnership has mode 3 commitments in services in a positive list coupled with national treatment reservations for investments in a

[438] Gari (n 15) 579.
[439] (signed 22 May 2012).
[440] Adams (n 437) 6.
[441] Tomer Broude and Shai Moses, 'A Look at the Trade in Services Agreement (TiSA) Negotiations' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016) 393–397.
[442] ibid.
[443] ibid 400.

negative list.[444] The Thailand-Australia FTA uses a positive list for pre-establishment investment obligations and a negative list for post-establishment.[445] This may give leeway to states undergoing a liberalisation effort, although lacking the technical skills to evaluate future regulatory needs.

Sometimes different approaches in the schedule of commitments help to drive consensus. To take another illustration, the Association of Southeast Asian Nations – ASEAN opted to conduct the liberalisation of investments in services using a positive-list approach[446] under the older services agreement through successive packages of liberalisation under mode 3.[447] Hence, services are excluded from the liberalisation commitments of the Investment Comprehensive Framework. This option for a different approach between investment in goods and services allows for some flexibility of commitments. This is in fact a sign of convergence to the extent that it avoids the overlap of obligations. The entry of investments in services is covered only by the standards and commitments of the services chapter. There is, thus, a reduction of the non-shared characteristics between the trade in services and investment in services rules.

PTAs in which investment, services and other issues are negotiated together have been considered a relevant source of convergence and a laboratory of the interaction.[448] However, an analysis of textual similarity has sustained that investment chapters in trade agreements may lead to increased fragmentation of investment rules in the two fields, given the divergence in each of the bargains.[449] There is no reason to differentiate BITs and investment chapters in terms of scope and content: in relation to the treaty practice of Japan and US, there is evidence of alignment; in turn, concerning Australia's practice, there are significant divergences.[450]

At the same time, dormant initiatives such as Trade in Services Agreement – TiSA pose conceptual challenges related to the interaction with the current

[444] (signed 09 September 2016).
[445] Kurtz (n 251) 115.
[446] Pollan (n 114) 161–162.
[447] ASEAN Framework Agreement on Services – AFAS (signed 15 December 1995).
[448] Alschner, Seiermann and Skougarevskiy (n 90) 22.
[449] ibid 25.
[450] Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20 JIEL 217, 25.

framework.[451] The choice of modalities for the TiSA negotiations, which have included investments as mode 3, typifies these challenges and the different treaty-making approaches. The option for market access commitments scheduled under a positive list, while national treatment commitments are inscribed in a negative list has been described as a "nuanced hybridization to the positive/negative listing distinction".[452] This approach arguably means that parties reached consensus on a formula that allows for horizontal commitments with derogations, and selected opt-in market access commitments. While the former is the model of liberalisation BITs, the latter is the GATS approach to market access. This may justify the move towards convergence, which leads to the situation where the entry of investments is regulated more effectively.[453] The use of the ratchet clause to lock in liberalising investment measures in the service sector is to be noted.

In any case, it seems fair to accept that the positive or negative listings are mere technicalities, which, if carefully crafted, may provide the same level of regulatory flexibilities.[454] There is an argument that the introduction of establishment rights and market access regulation, no matter the form, is a move towards a more open approach on the entry of investments and arguably delivers more economic benefits to host states.[455] If this is coupled with carefully designed regulatory reservations and justifications, the outcome would provide a good parameter to the effectiveness of international economic law agreements.

c. CONCLUSION

To sum up, the two initial chapters have shown that international law regulates the entry of foreign investments using rules from different international

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[451] For the full argument, see Panagiotis Delimatsis, 'Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016*, vol 7 (Springer International 2016).

[452] Broude and Moses (n 441) 409–410.

[453] There are other signs of a progressive conceptual alignment of critical mass. The WTO Secretariat Division dedicated to the issue has been renamed: it is now the Trade in Services and Investment Division. This was far from unanimous, and did not appeal to everyone, but it may indeed provide a framing effect to negotiations in international economic law in the area. D Ravi Kanth, 'No Credible WTO Answers on "Investment" in "Trade in Services"' [2016] *Third World Economics, Issue No. 619/620, 16 June – 15 July 2016, pp6-8* <http://twn.my/title2/twe/2016/619-620/4.htm> accessed 15 August 2018.

[454] Fink and Molinuevo (n 401) 310; Rudolf Adlung and Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' (2014) 48 JWT 191.

[455] Vandevelde, 'The Economics of Bilateral Investment Treaties' (n 178) 501–502.

regimes. Chapter II has demonstrated that the WTO regulates the issue to a significant extent. A major part of this regulation is found in the GATS. This is the case when the international investment takes place in the services sector. Acts which discriminate between foreigners are not allowed. In addition, discrimination in favour of nationals is prohibited or restrained if the countries have undertaken specific commitments. Also, restrictions that affect the so-called market access, including in mode 3, are evaluated under an absolute standard, that is, they dispense with a discrimination analysis. There are nonetheless general explicit exceptions (art XIV and others) aimed at safeguarding legitimate regulation of the entry of investments.

By comparing the provisions in the regimes of trade and investment law, it was shown that there is more liberalisation content in investment treaties as well as there is more investment regulation in the GATS than commonly thought. Within the background of general international law, a wide array of languages have provided the content for conventional rules. As seen, they share common features and point to some conceptual convergence.

In fact, different clauses reflect the varied techniques used to regulate the entry of foreign investments and investors in services. Consequently, the clear-cut categorisation of investment treaties as protection-driven as opposed to liberalisation-driven may not describe with precision their character. But no matter how divergent the goals of trade and investment treaties may arguably be, in relation to the entry of investments and investors, the interpretation of the wording of equivalent provisions may lead to particularly similar results. For instance, the concept of commercial presence in the GATS includes aspects equivalent to the so-called establishment of foreign direct investments. Also, the interpretation of GATS rules as covering potential service suppliers bears a resemblance to concepts already present in BIT practice in relation to investors that seek to invest.

This chapter concludes that, at least in the provisions of entry of investments in services, there are some signs of an increasing conceptual and substantive convergence of rules in treaty-making initiatives. Yet one ponders whether some concepts still provide a useful taxonomy to explain the regulation of entry. The way the admission clauses evolved to establishment clauses in some IIAs shows that the difference between them, while less radical and of limited practical relevance, may indicate a step towards a convergence with international trade law. Moreover,

measures tend to equally apply to both the entry and the operation of investments, thus affecting new investments/investors and those already established.

Besides, there has been a trend towards treaty language granting more entry rights and commitments. This was done by the progressive introduction of national treatment for entry rights, the expansion of services coverage in mode 3 and the recognition and clarification of the rights to potential investors. The increasing number of IIAs containing establishment rights is noted especially in light of the new mega-regionals.

There has also been a disposition to include provisions related to the entry of investors coming from the international trade law world into the investment law arena. The introduction of the GATS founding concept of market access and GATS exceptions in the investment chapters of several economic agreements is the ultimate example. This has been carried out by a clear and almost literal adoption of GATS-style language. The open questions are to what extent the decisions of WTO panels and AB on the interpretation of the GATS would be resorted to in investment treaty adjudication with reference to provisions such as market access and justifications.

The substantive convergence of the rules related to the entry of investments in treaty making generates a new perspective on the interpretation of the agreements. While avoiding inconsistencies and allowing for clearer flexibilities. this may promote effectiveness by attaining the goals of investment liberalisation and the safeguard of the regulatory space in each of treaty bargains.

CHAPTER III – ADJUDICATION OF ENTRY RIGHTS AND OBLIGATIONS IN INTERNATIONAL ECONOMIC LAW: JURISDICTION[456]

a. INTRODUCTION AND CONTEXT

Consider the following five hypotheticals. Not long ago, a certain state imposed special requirements that affected foreign companies willing to invest in the provision of electronic payment services in its territory. It granted privileges to a domestic company related to the issuing and marketing of credit cards and the operation of terminal equipment in specific transactions. The measures affected payment card transactions in local currency with bank cards issued or used in the country, changing the conditions of competition to the detriment of foreign providers. As a result, not only did the foreign companies face less access to the market but they also had their presence severely limited in operations in profitable areas of the territory. On the one hand, there was the right of the government to control investments and set conditions for foreign investors; on the other, the interest of domestic consumers to have access to better and broader supply of services and innovative facilities. Was the state exercising the sovereign right to accept investments and to impose conditions for their operation? Could the home state of the affected companies bring a claim under international law?

In another part of the globe, a government introduced extra and special conditions for reinsurance companies based in certain jurisdictions to be able to operate in the country. This included specific onerous requirements to establish offices and provide services inside the territory. It also prohibited some operations based on the origin of the provider. The tension is between the host state's right to regulate access in the public interest, against the right of companies to offer or acquire relevant services for the management of their risks. Is the state rightfully using its sovereign rights to adopt prudential measures affecting investors? Is there any basis for an international complaint?

For two decades, a state had banned companies from its southern neighbour to establish operations of trucking services in its territory and even to

[456] A previous version of this chapter will be soon published as Murilo Lubambo, 'Chapter 6: Entry Rights and Investments in Services: Adjudicatory Convergence between Regimes?' in Gáspár-Szilágyi Szilárd, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP forthcoming 2019).

own and invest in domestic companies providing those services. Companies from the northern neighbour, on the other hand, were not subject to those restrictions. The argument was that safety and environmental requirements were not sufficiently high in the southern state businesses. Some nonetheless attribute this delay to heavy lobbying of trucking associations. Now, trucking companies owned by the southern neighbour can apply to operate international long-haul trucking services and establish operations in that state. Were the measures taken during that period against any international investment liberalisation commitment? Is the southern state entitled to claim damages for more than twenty years of barriers?

Not far away, investors proposed the construction of a pipeline to transport gas from their home state to another state. This was one of several other pipelines that ran through the country. After seven years of deliberation and public acrimony, the prospective host state government decided to deny the investment based on national concerns, justified by the need for coherence with its environmental policy. One way to frame that is to emphasise the dichotomy between the host state's right to regulate and the right of recovery of expenses and lost profits to the investors. Is the host state within its sovereign right to control and accept investments? Could the home state or its investors contest the decision in an international forum?

Conversely, certain foreign investors in telecommunications services had applied to conclude the acquisition of the control of a wireless telecoms company. After a long delay in the investment screening by the government, they decided to withdraw the application and sell any remaining interests in the company. Some attribute the protracted review process to security concerns over the acquisition and doubts about who would be the ultimate owner. Is the state's inaction an internationally wrongful act? Are the investors and their home state entitled to any international claim related to the frustrated investment?

By answering the first set of questions posed in each of the situations, the previous chapters showed a trend towards substantive convergence in the coverage of investment entry issues in the new treaties. To recall, an indication of functional convergence in both systems is the common aim of the anti-discrimination standard represented by national treatment: to guarantee a level of equality and ensure the same competitive opportunities.[457] This is more evident

[457] Kurtz (n 27) 84–85.

when it comes to granting entry rights, which is an aspect of investment liberalisation. Moreover, investment treaties are progressively incorporating the GATS-type language of market access.

The following chapters establish a framework to help to answer the second set of questions in each of the situations. They show whether and how states can adjudicate and enforce the rights and obligations associated with the entry of investments. Chapter III analyses whether treaties potentially applying to cases like the ones described confer jurisdiction for international adjudication. Chapter IV then analyses available remedies and mechanisms to ensure the observance of the decisions. Both chapters evaluate whether this framework indicates a trend towards adjudicatory convergence. The term is used in the sense of the resort to the same or similar mechanisms, processes or remedies as a consequence of a breach of an international obligation.

The five situations described above have given rise to cases decided in different *fora*. The first two (respectively, Chinese measures in electronic payment services and Argentina measures in reinsurance services) were brought to the WTO dispute settlement mechanism. They resulted in reports adopted by the Dispute Settlement Body (DSB).[458] The following two were litigated under the NAFTA. Mexico brought a state-state arbitration claim against the US, decided in 2001, under NAFTA Chapter 20 for the restrictions in the trucking sector.[459] In January 2016, a Canadian investor, TransCanada, brought an investor-state arbitration case against the US claiming damages for the denial of the Keystone Pipeline XL, under NAFTA Chapter 11.[460] The fifth case has been the object of an arbitration request[461] in the International Centre for Settlement of Investment Disputes (ICSID), established by the ICSID Convention.[462]

Whereas the exact outcome of those cases will be described and analysed later, the point here is to show the connections of these apparently unrelated situations. Despite being raised in different international courts and arbitral tribunals, all the cases share a common aspect: they relate to the access of

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[458] *China – Electronic Payments Services* (n 312); *Argentina – Financial Services* (n 313).
[459] *Trucking Services* (n 234).
[460] *TransCanada Corporation & TransCanada PipeLines Limited v United States of America,* ICSID Case No ARB/16/21, Request for Arbitration (24 June 2016) (*TransCanada v US*).
[461] *Global Telecom Holding SAE v Canada*, ICSID Case No ARB/16/16 (pending).
[462] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

investments and investors into a state. It is true that some measures under scrutiny are more specific and others are more general. What matters is to analyse whether the mechanisms used to address some situations could, at least in theory, address the others. This might indicate whether convergence, in the sense of the reduction in the non-shared systemic characteristics of adjudication in both regimes, is something desirable.

International adjudication, that is, the determination of the outcome of a case by a third party, eg arbitral tribunals and international courts, is a way to interpret legal norms and solve conflicts in the international arena.[463] It is considered a legal or adjudicatory means of dispute settlement as opposed to diplomatic means, as it depends on the existence of jurisdiction given to a specific entity. Among the ways to assign jurisdiction *ex ante*, one may cite the consent of the parties expressed in bilateral or multilateral treaties; also, consent can be given through a specific agreement relative to a concrete dispute.[464] Finally, there is the unilateral consent expressed by declarations or international unilateral acts.

The international adjudication of disputes is an important way to invoke international responsibility and assert whether it has been engaged.[465] This comes with the assumption that the decision will have a binding character. The instrument whereby jurisdiction is conferred contains the type of dispute that can be dealt with, namely, the material scope of the jurisdiction. Therefore, this section analyses whether disputes regarding access of investments and investors into a state can be internationally adjudicated. Also, it describes the ways to activate this jurisdiction *ex post* and evaluates the aspects of the disputes that can be brought to decision. The discussion comes in the context of certain suspicion against international courts and tribunals, driven by claims of judicial activism and bias, coupled with the growth of populist ideologies and concerns with sovereignty costs.[466]

The mechanisms to be evaluated are: treaty-based investor-state arbitration, state-state dispute settlement, the recourse to the dispute settlement body of the WTO and the resolution mechanisms in the larger economic

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[463] Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 7.
[464] ibid 10.
[465] Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1203.
[466] Pauwelyn and Hamilton (n 12).

agreements. The idea here is not to exhaustively cover all the mechanisms, but to offer a typology of the various types of measures that can be brought to adjudication. The spectrum spans from very specific, even individual measures related to a particular investor or investment in a defined moment to rather general measures affecting all the investments or investors as a whole.

Moreover, this section briefly describes the criteria for the admissibility of claims related to cases involving the entry of investments and investors. It is known that some grey areas exist as to whether an issue pertains to jurisdiction or admissibility.[467] Some suggest that the issue is one of jurisdiction when the conclusion is that the claim should not be brought in a particular forum; the issue is one of admissibility if the outcome is that the claim should not be brought at all (or at least, not in that moment).[468] One could argue that admissibility constitutes a more nuanced, circumstantial and context dependent layer of analysis by courts, dealing with their institutional interests and the utility of adjudication.[469] Each mechanism and situation requires specific criteria for a claim to be admitted. As an illustration, one could cite the previous recourse to other means of settlement, the exhaustion of local remedies and the nationality of the claims.[470] Procedural impediments to the recourse to adjudication may be present in the treaty that confers jurisdiction and in the special agreements. This exercise is mostly a general exposition of how the issues will affect the adjudication of investment access cases, rather than an attempt to correctly categorise them.[471] All these issues have an important impact on cases involving entry of investors.

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[467] Compare eg the classification of the local litigation for a certain period as jurisdictional in *Kiliç* and as admissibility in *İçkale*, respectively *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award (2 July 2013) [6.3]; *İçkale v Turkmenistan* (n 226) [234]-[247].

[468] Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005).

[469] Shany (n 463) 10–12.

[470] Paulsson (n 468) 616 fn 47.

[471] For a claim that the distinction is not important or necessary, see *Giovanni Alemanni and Others v The Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) [257]. See also *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos v Uruguay,* ICSID Case no ARB/10/7, Decision on Jurisdiction (2 July 2013) [142].

b. ENFORCEMENT OF ENTRY RIGHTS USING INVESTOR-STATE TREATY ARBITRATION

i. Jurisdictional Clauses

Treaty-based investor-state arbitration (ISA) is triggered with the acceptance by the investor of the consent expressed by the host state in investment treaties. This consent confers the right of an investor to bring a claim directly against the host state. The investor-state jurisdictional clause is the clause that defines the scope and extent of this possibility. The clause also sets out which mechanisms of dispute settlement will be used and defines general rules on the composition and functioning of the arbitral tribunal. Most treaties give the choice to the investor as to the appropriate forum to bring a claim.

To find out whether the ISA jurisdictional clause includes issues related to entry rights, it is necessary to check whether it covers the substantive clauses in IIAs that generally confer these rights. As emphasised in chapters I and II, IIAs grant or expand entry rights under the MFN or national treatment related to establishment or under market access provisions in investment and trade treaties. Thus, if the jurisdictional clause is broad and general or if it explicitly mentions or refers to any of these provisions, a prospective investor could foresee the possibility of bringing a claim for the violation of the treaty.

However, it is possible that the jurisdictional clauses contain exceptions. More specifically, even though entry rights are protected by the treaty, ISA will not be available in situations where there are substantive or procedural carve-outs. For example, no matter how widely national treatment is covered, the clause may exclude ISA when the dispute is related to establishment. In fact, in the context of the critiques against ISA, this is an aspect of the movement towards a more careful drafting of those provisions in order to limit access to the mechanism.[472] Some recent treaty practice reflects the changes. For instance, in the CETA, currently under ratification, there is a general exception to exclude any dispute related to establishment. To illustrate, CETA art 8.18(1) provides:

> 1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty- Nine (Dispute Settlement), an investor of a Party may

[472] UNCTAD, 'World Investment Report' (United Nations 2016) UNCTAD/WIR/2016 111–113.

> submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:
> (a) *Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; o*r
> (b) Section D:
> where the investor claims to have suffered *loss or damage as a result of the alleged breach*.[473]

Hence, CETA excludes by implication entry rights from the jurisdiction of ISDS. This is evident by the omission of the word "establishment" and "acquisition" in art 8.18(1)(a). The provisions on market access (art 8.4) and performance requirements (art 8.5) are also excluded, since they are part of *Section B* of the treaty, which is not mentioned. In fact, Canada has adopted this approach since its first BITs.[474] The EU-Singapore Agreement does not provide for investment arbitration in relation to establishment or expansion, the regulation of which is dealt in a separate part of the agreement.[475] In the same line, the EU-Vietnam Agreement only offers investment arbitration in relation to the operation of investments, not for establishment and admission.[476]

Another way to exclude entry rights from the ISDS is by imposing conditions for the processing of a claim, that is, procedural impediments. If the treaty only offers monetary compensation as a remedy or requires that the investor prove damages to its investment, a frustrated investor, whose main interest is accessing the territory of the state, will not be able to use ISA. The arbitral tribunal will not admit the claim. The US model BIT, for instance, requires that the investor suffer loss or damage, as a condition to resort to ISA.[477] This was introduced in the 2004 model version, apparently to prevent the submission of disputes that are not yet ripe.[478] In addition, there must be a link between the breach and the loss. The initial notice of the claim requires the exposition of the relief sought and the approximate

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[473] (emphasis added).
[474] Carreau and others (n 94) 622. See Canada-Russia BIT (signed 20 November 1989) art 2(3).
[475] In the EU-Singapore FTA (n 419), compare ch 8 sec C (Establishment) and ch 9 art 9.2: "This Chapter shall apply to covered investors and *covered investments made in accordance with the applicable law*, whether such investments were made before or after the entry into force of this Agreement" (emphasis added).
[476] EU-Vietnam Free Trade Agreement (concluded January 2016, in the process of ratification) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1875> accessed 15 August 2018. See ch 8 subch 2 sec 3 art 1(1)(b). The EU-Japan agreement on investments protection standards and dispute resolution has not been concluded.
[477] US Model BIT (2012), arts 24(1)(a)(ii) and 24(1)(b)(ii).
[478] Kenneth J Vandevelde, *US International Investment Agreements* (OUP 2009) 598.

amount of damages.[479] The CPTPP, identically to the US model BIT, provides that in order to use the investor-state system, the investor must show a breach of an obligation (or of an investment authorisation or agreement) and also loss or damage due to the breach.[480]

ISA decisions suggest that the loss must take place in the territory of the host state.[481] However, the claimant does not need to know in advance the specific amount, if it is uncertain.[482] An ISA award can be limited to restitution of property or monetary damages.[483] This reveals to some extent that the ISA option is less attractive or even unavailable to investors that want to enter a host state and have not yet suffered quantifiable losses. In turn, a case for damages based on lost market opportunities could possibly be envisaged, but this is subject to a high degree of speculation, as will be shown. In the light of this treaty practice, one might query about the role for ISA in these cases. This is what the next section deals with.

ii. Prospective Investors: Case for ISA

It is fair to say that if the treaty does not provide for any special qualification whatsoever in relation to ISA, no immediate procedural impediment to the claim exists. Nevertheless, there are no published awards concerning the breach of an obligation during the pre-investment phase, related to BITs following the entry (establishment) model, according to Douglas.[484] At least in theory, a prospective investor that fits the treaty definition could opt for this kind of adjudication. However, the question is: what would ISA offer to the prospective investor? The hypothesis here is that using the investor-state mechanism in IIAs may not offer much to address problems faced by those investors. If this is true, then the treaty practice observed above is nothing more than an adjustment of the jurisdiction clause to the lack of usefulness of this alternative. On the other hand, if there is a residual

[479] US Model BIT (2012), art 24(2)(d).
[480] CPTPP ch 9 art 9.19 1(a)(ii).
[481] *United Parcel Service of America Inc v Government of Canada,* UNCITRAL, Award on Jurisdiction (22 November 2002) [121].
[482] *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9 Decision on Jurisdiction (22 February 2006) [92].
[483] US Model BIT (2012) art 34 and NAFTA art 1135.
[484] Douglas, *The International Law of Investment Claims* (n 393) 140–141. See also Collins (n 272) 171–172.

role for ISA, then the change is an obvious limitation for the investor and indirectly affect the liberalisation of investments.

Some features of IIAs might explain the absence of litigation concerning prospective investors. First, many treaties require that a claim is brought with reference to a substantial breach of a standard that applies to an "investment" or a "covered investment". However, prospective investors have yet to make an investment. Furthermore, ISA adjudicatory institutions – the ICSID, for instance – can also set limitations for prospective investors. ICSID Convention art 25(2) clearly states that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment". Hence, a full analysis of an ISA's jurisdiction must take into account not only clauses in the original IIA but also those related to the rules of the chosen dispute settlement mechanism. This problem will not arise if the issue is brought to the ICSID Additional Facility, to the Stockholm Chamber of Commerce (SCC) or to arbitration institutions and ad hoc arbitrations using the UNCITRAL rules. These cases will not rely on the language of an institutional treaty but on rules drafted or chosen by the parties or the institutions themselves.

Second, as shown, the IIA may require that in order to use ISA, damages or losses must have occurred. This generally translates into a monetary value. A host state decision that denies an investment or that imposes conditions contrary to international commitments, constitutes a barrier to an investment. The kind of damages arising from the impossibility of making an investment are different from the damages occurring when an investment is already made. In case of the former, there is harm to business plans and investment strategies, something not easily translated into the language of compensation or restitution.

Third, most investment restrictions to entry affect a group of investors; for example, an ownership restriction on land affects all prospective foreign projects on tourist services, such as hotels and restaurants. Such prospective investors would need to coordinate themselves to characterise the situation as resulting in collective losses/injury. However, some jurisdictional or institutional rules may

restrict the possibility of bringing class claims. It is true that there have been cases where class claims were accepted,[485] but this was not without controversy.[486]

Finally, the long duration of the disputes[487] and the consequences of an ISA claim might affect investors' incentives to trigger the mechanism. If the interest of the investor is to have access to a country in the short term, it will think twice before bringing a claim against the host state. The claim might strain its relationship with the host state even more and diminish the prospects for entry. A large investor though may be able to use the threat of litigation as an effective stick. In any case, a protracted claim may be costly for the investor and the practical result, which is actual entry, may not be achieved. Hence, engaging in ISA may not compensate in the end.

Thus, there is possibly a trend to design more narrowly the jurisdictional and admissibility requirements for the claims. Seemingly, this is a response to the critiques against procedural aspects of investor-state arbitration. In the CETA, apart from what was mentioned in section 2(b)(i), Canada has explicitly drafted a carve-out related to investment screening.[488] It provides:

> Annex 8-C Exclusions from Dispute Settlement
> A decision by Canada following a review under the Investment Canada Act … *regarding whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions under Section F*, or to Chapter Twenty-Nine (Dispute Settlement). For greater certainty, this exclusion is without prejudice to the right of a Party to have recourse to Chapter Twenty-Nine (Dispute Settlement) …".[489]

One may think first that this is some sort of clarification, since these acts have never been arbitrable. A more convincing explanation comes from the *a contrario* argument: when such a carve-out is absent with reference to an ISA clause, investment screening measures could be challenged without

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[485] *Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011); *Ambiente Ufficio SpA and Others v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013); *Giovanni Alemanni and Others* (n 471).

[486] *Abaclat* (n 485) dis op of Arbitrator George Abi-Saab.

[487] UNCTAD, 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010) UNCTAD/DIAE/IA/2009/11 18.

[488] A similar provision had been included in the Canada-China BIT (signed 9 September 2012), annex D.34 "Exclusions 1. A decision by Canada following a review under the *Investment Canada Act*, … *shall not be subject to the dispute settlement provisions under Article 15 and Part C of this Agreement*." (emphasis added).

[489] (emphasis added). See RSC, 1985, c 28 (1st Supp) (Canada).

impediment.[490] Therefore, the clarification was deemed to be essential and illustrates a practice that ensures more sovereign control and the safeguard of the host state's regulatory space, as will be seen in chapter VI. In any case, the idea that there might be a residual role for ISA is reinforced in the analysis of expansion in the next section.

iii. ISA and Expansion of Investments

In fact, a more nuanced analysis should be made when the investment is an *expansion* of a current one. This is also the case when a subsequent investment that does not amount to an 'expansion' is somewhat linked to a previously made investment. These situations may provide channels to evade the procedural impediments. The investor can easily bring a claim related to the denial of access to licenses to an expansion arguing that the case arises out of an existing investment.

This seems to have been the case of the NAFTA arbitration in *Clayton and Bilcon v Canada.*[491] As explained in chapter II, the decision involved the procedure of application for an environmental authorisation to carry out quarrying activities. The denial of licenses to new quarrying rights gave rise to a FET claim against Canada. The majority found that both the minimum standard of treatment (NAFTA art 1105) and national treatment (NAFTA art 1102) were breached.[492]

Since the claim was brought under the UNCITRAL rules, the jurisdictional requirement of an existing investment was not an issue. As shown, NAFTA applies in a broad manner and does not require the existence of an investment, given that art 1102 also relates to establishment and acquisition. The arbitral award affirmed, though, without further discussion that the claim was related to an investment, apparently the original one. This was done notwithstanding the fact that the case dealt with a newly proposed activity.[493] One wonders whether the case led to the inclusion of CETA art 8.18(2), which provides:

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[490] See the analysis in the context of *GTE v Canada* (n 461) Procedural Order n 1 (13 June 2017) (pending).
[491] (n 238).
[492] For a critique of the decision, see Cory Adkins and David Singh Grewal, 'Democracy and Legitimacy in Investor-State Arbitration' (2016) 126 Yale LJ Forum 57.
[493] *Clayton and Bilcon v Canada* (n 238) *Memorial of the Investor* [408]-[411].

> Art 8.18
> …
> 2. Claims under subparagraph 1(a) *with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment* and the investor has, as a result, incurred loss or damage with respect to the covered investment.[494]

The provision permits a claim concerning expansion provided that the measures relate to existing operations. *A contrario*, measures related to other aspects of an expansion cannot be challenged. This limits jurisdiction in line with the trend to narrow down the possibilities of ISA. On the other hand, such carve-outs are absent from the previous Canada-Korea Free Trade Agreement [495] and from the Canada-Mongolia BIT,[496] both of which cover establishment and expansion. In the Canada-China BIT, since its national treatment clause does not include establishment but only expansion, it was necessary to include a substantive carve-out to expansion whenever approvals are needed. The provision states:

> Art 6
> National Treatment
> …
> 3. The concept of "expansion" in this Article applies only with respect to *sectors not subject to a prior approval* process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements.[497]

Finally, there is the case when an investor is already investing in a sector different from the sector in which it seeks to enter. Should the fact that the investor is already present in a country matter when the investment is in a completely different activity? This situation is rather unclear: depending on how the new investment is structured, the barrier to ISA could be circumvented to some extent. An investor that is already present in the host state can argue that the new investment in a different sector is an *expansion*. Also, it can try to prove that the denial of this expansion affects the value and prospects of its *existing operations,* at least financially. An investor from outside the host state cannot put forward those arguments and will not have access to ISA.

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[494] (emphasis added).
[495] (signed 22 September 2014).
[496] (n 268).
[497] (n 488) (emphasis added).

In conclusion, there is recent treaty practice that sets limits to the use of ISA for the enforcement of entry rights by including various jurisdictional and admissibility hurdles. One can also note a restriction of the indirect ways to bring claims affecting new investments, such as framing the investment as an expansion. In this latter case, ISA might have some residual role. This suggests, as will be later argued, a reduction in the non-shared characteristics between the investment and the trade regimes. One could observe some signs of convergence between the two adjudicative mechanisms. Whether this is a welcome development depends on the analysis of the possibilities to resort to other mechanisms, handled in the next section.

c. STATE-STATE INVESTMENT ARBITRATION: NEW APPROACHES

i. General Concepts

It is natural then to proceed to the analysis of state-state arbitration in foreign investment (SSIA) under the current practice of international law. This provides the framework to discuss if it is an available alternative to enforce establishment rights granted by investment provisions. Before that, it is essential to describe what state-state investment arbitration consists of. With the theoretical and practical development of treaty-based investor-state arbitration, the debate around SSIA had been progressively put aside. Any attempt to refer or return to it was considered outdated and a backlash. But the new context justifies a fresh analysis of the mechanism, so that a revival of the conceptual foundations of this "old" kind of dispute settlement should not be dismissed.[498] In addition, state-state cases (*Peru v Chile,*[499] *Italy v Cuba,*[500] and *Ecuador v US*[501]) may indicate a resurgence of the practice in the area.

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[498] For a more extensive account, corresponding to previous versions of this Section C, see Murilo Lubambo, 'Is State-State Investment Arbitration an Old Option for Latin America?' (2016) 34 CRQ 225; Murilo Lubambo de Melo, 'Host States and State-State Investment Arbitration: Strategies and Challenges' (2017) 14(2) Revista de Direito Internacional 80.

[499] *Peru v Chile* arbitration related to the preliminary objections in *Empresas Lucchetti, SA and Lucchetti Peru, SA v The Republic of Peru*, ICSID Case No ARB/03/4.

[500] *Italian Republic v Republic of Cuba*, ad hoc State-State Arbitration Award (1 Jan 2008).

[501] *Republic of Ecuador v United States of America,* PCA Case No 2012-5.

The introduction of ISA has substituted the recourse to diplomatic protection to a large extent.[502] As seen above, host states have been directly challenged by investors and home states have seen their role in arbitration progressively diminished. However, state-state dispute settlement mechanisms persist in BITs or IIAs. In fact, one should note the existence of state-state jurisdictional clauses in virtually all the BITs. Throughout history, state-state arbitration was occasionally used in disputes related to property; but the FCN treaties began to include jurisdictional clauses more frequently only from the beginning of the 20th century.[503] The first BITs, from 1959 onwards, inherited the clause, which remained even after the introduction of unqualified consent to ISA, starting in 1969.[504] The recourse to state-state arbitration has nonetheless remained rare.[505]

The analysis of jurisdictional clauses in IIAs providing consent to SSIA is a good point of departure. According to Douglas, from the inter-state perspective, the BITs contain: "international *obligations opposable by one contracting State to another*, and the general rules of State responsibility for international wrongs regulate the consequences of any breach thereof".[506] The adjudication of those international obligations can be done through SSIA. In the current practice, a typical state-state clause in an IIA, this one from the Argentina-Qatar BIT, reads:

> Article 15 – Settlement of Disputes between the Contracting Parties
> 1. The two Contracting Parties shall strive with good faith and mutual cooperation to reach a fair and quick settlement of *any dispute arising between them concerning interpretation or application of this Treaty.* In this connection the two Contracting Parties hereby *agree to enter into direct objective negotiations to reach such settlement.*
> If the disagreement has not been settled within a period of six months from the date on which the matter was raised by either Contracting Party, *it may be submitted at the request of either Contracting Party to an Arbitral Tribunal* composed of three members and under the UNCITRAL Arbitration Rules (2013), which shall apply except as otherwise mutually agreed by the disputing parties.
> … [507]

[502] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections Judgment) [2007] ICJ Rep 582 [88]; *CMS Gas Transmission Company v Argentina,* ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) [45].
[503] Vandevelde, *Bilateral Investment Treaties* (n 113) 24–25, 504.
[504] Dolzer and Schreuer (n 96) 7.
[505] ibid 13.
[506] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 British Ybk Intl L 151, 189 (emphasis added).
[507] (signed 06 November 2016) (emphasis added).

Some observations are necessary. First of all, it could be claimed that the clauses are dysfunctional remainders of the old FCN treaties. However, if they persisted, the clauses should be given meaning and purpose; otherwise they "would be rendered almost completely ineffective (an unacceptable result as a matter of treaty interpretation)".[508] Second, one could assume that the main purpose of an IIA is to give direct access to an investor. However, there are parallel purposes of investment agreements, apart from the limited coverage of ISA.[509] In this regard, there is, in fact, the "possibility of *two different procedures arising from the same claim*: one under ICSID between the investor and the host State, *the other between the two States based on the alleged violations of the investment treaty***.**"[510] Thus, these clauses are not merely subsidiary to ISA, but are in reality complementary to it.

Third, it could be argued that there is a narrower scope in an SSIA clause – for example, the US Model BIT [2012] art 37 and the Energy Charter Treaty art 27 – which generally refers to the interpretation and/or application of the treaty, in comparison to the investor-state clause, which encompasses *any* dispute concerning an investment.[511] However, it should be recognised that the clauses frequently also have an all-encompassing broad language,[512] with expressions such as "any" or "a" dispute, without qualification. Therefore, it is to be accepted that the text, object and purpose and also the history[513] of BITs show that state-state arbitration should not be restricted in any way and that its co-existence, without priority, is a fact.[514] Fourth, one could say that ISA is always a more effective mechanism than SSIA. Nevertheless, states, as repeat players in the international arena, have long-term relationship concerns. Thus, when systemic interests come into play, the state-state path may be more attractive.

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[508] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 296.
[509] Frank Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in BIICL (ed), *Investment Treaty Taw: Current Issues. 2, Nationality and Investment Treaty Claims; Fair and Equitable Treatment in Investment Treaty Law* (BIICL 2007) 82.
[510] Christoph Schreuer, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd ed, CUP 2009) 416 (emphasis added).
[511] Vandevelde, *Bilateral Investment Treaties* (n 113) 499.
[512] Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard Intl LJ 1, 6–7, 11–12.
[513] VCLT (n 103) arts 31(1) and 32.
[514] Roberts (n 512) 5.

In turn, this is not a contention that SSIA is always a good substitute to ISA in terms of effectiveness to enforce investors' rights or in terms of protection of the sovereign right of host states. From a practical perspective, one could argue that if a treaty only includes the option of SSIA, the politically connected or economically robust companies would probably be the only ones able to convince the states to endorse their claims.[515] The greater risk is for the small and medium enterprises, which are less connected. Since they are the ones which should be benefitting from the investor-state system,[516] a change to SSIA would not be more efficient for them.

Given that the jurisdictional clause had always been available, a legitimate question is: why has the mechanism not been more frequently used? Several explanations are possible. One may argue that after the rise of investor-state dispute settlement, there has been a misunderstanding as to the real scope or extension of state-state clauses. The most common view was that the clause was limited to deal with the interpretation of the institutional part of the treaties or the general provisions related to entry into force and termination. Second, the possibility of using it as a defence by a host state is something that has only been tried recently. Finally, the requirements of certain aspects of diplomatic protection (nationality, exhaustion of local remedies) are rather burdensome, as will become apparent. In this regard, recent treaties cast new light on the clause, by changing the criteria of nationality, regulating exhaustion and establishing the transfer of compensation to private entities, as will be shown.

The recurrent question, however, is whether leaving the decisions to the states means re-politicising. The question assumes that depoliticisation is a useful way to describe the development of investor-state arbitration, which has been aptly challenged.[517] In fact, the contentious potential of certain high-profile investor-state arbitrations and the concerns about pro-investor bias in some arbitral awards have a political background. Besides, to some extent, all disputes involving a state have a political character: they affect essential interests in the relations with other

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[515] Kurtz (n 27) 281–282.

[516] Pauwelyn, 'At the Edge of Chaos?' (n 28) 404.

[517] Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration', *Select Proceedings of the European Society of International Law*, vol 3 (Hart 2011) 271–282; Geoffrey Gertz, Srividya Jandhyala and Lauge N Skovgaard Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?' (2018) 107 World Development 239.

states.[518] In the domestic or international arena, politics will play a role in the decisions to bring a claim, negotiate, settle or fulfil international obligations. Thus, one should not consider the return to SSIA as a backlash based on an improper characterisation.

It is true that the involvement of states in the correct interpretation of their investment treaties can always take place apart from state-state arbitration.[519] Alternative dispute settlement between states for the resolution of economic conflicts includes negotiation and consultations,[520] mediation, fact-finding and other mechanisms accepted in international law.[521] One could attest that all of them leave room for SSIA - for example, when the obligation to consult is frustrated and where the parties, the administrative commissions or technical committees cannot agree on an interpretation. Some believe that, because facts and norms are sometimes difficult to separate from each other, tribunals should be expressly delegated with the final interpretive task.[522] This seems to be precisely the role of SSIA. Having set the context, the next step is to analyse how SSIA can be used to enforce entry rights.

ii. Entry Rights and Declaratory Claims

The first immediate possibility for adjudication under SSIA is the case of merely interpretative claims, especially in declaratory requests. International courts can be called upon to resolve merely interpretive questions, without claims of treaty violations and can recognise jurisdiction to make declaratory awards on the correct interpretation of a provision.[523] A declaratory judgment is not always to be

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[518] Lauterpacht (n 69) 153–156.

[519] Wolfgang Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 309–316, 321–324; Taylor St John and Geoffrey Gertz, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (Oxford University 2015); Tomoko Ishikawa, 'Keeping Interpretation In Investment Treaty Arbitration "on Track": The Role of State Parties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 146.

[520] UNCTAD, 'Dispute Settlement: State-State' (2003) UNCTAD/ITE/IIT/2003/1 16–17, 30–33 <http://unctad.org/en/Docs/iteiit20031_en.pdf> accessed 15 August 2018.

[521] UN Charter (n 104) art 33(1).

[522] Anne Van Aaken, 'Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 41.

[523] *Rights of the National of the United States of American in Morocco (France v United States of America)* (Judgment) [1952] ICJ Rep 176; *Right of Passage over Indian Territory (Portugal v India),*

considered a form of satisfaction and thus does not require an international wrongful act.[524] The request for a declaratory decision by the home state will be within the mandate of most SSIA jurisdiction clauses, since this generally involves an exercise of interpretation or application of the treaty.

State-state arbitration in a BIT seems to be an adequate avenue for home states to ask for declaratory decisions which affect entry rights. The context is one of interpretation and application of the provisions related to entry, such as national treatment and MFN on the establishment of an investment and market access, as well as non-conforming measures and schedules of liberalisation, highlighted in chapters I and II. Home states may be interested in ensuring that their negotiated bargains to open up investment sectors were not in vain. This is particularly relevant in the context of prospective entry, since the home state may be seeking the correct interpretation of a treaty obligation, without claiming a breach regarding one of its investors. Chapters VII and VIII analyse situations potentially affecting certain investors where the key question was the interpretation of treaty commitments.

An example of a clarification that the SSIA clause applies to entry rights is a provision in the Australia-China trade agreement: "For greater certainty, the State to State Dispute Settlement mechanism in Chapter 15 (Dispute Settlement) of this Agreement applies to this Chapter *including pre-establishment obligations* under Article 9.3."[525] It is generally necessary to set out the existence of a "dispute", a problem discussed in the *Ecuador v US* case.[526] Different views of the home and host state as to the meaning of obligations can amount to a dispute. In any case, a broad definition by the parties in their treaties of the term "dispute" would be the natural solution to enlarge the role of SSIA.[527] The practical result of the

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(Judgement on Merits) [1960] ICJ Rep 6; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgement) [2009] ICJ Rep 213, 270-271 [156].

[524] Eric Wyler and Alan Papaux, 'The Different Forms of Reparation: Satisfaction' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010); Juliette McIntyre, 'Declaratory Judgments of the International Court of Justice', *Hague Yearbook of International Law* (Martinus Nijhoff 2012) 156.

[525] Australia-China FTA (signed 17 June 2015) Investment Chapter art 9.12(1) fn 5 (emphasis added).

[526] (n 501) Award and dis op of Arbitrator Raul Vinuesa (29 September 2012).

[527] Nathalie Bernasconi-Osterwalder, 'State–State Dispute Settlement in Investment Treaties' (International Institute for Sustainable Development 2014) 21 <www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> accessed 15 August 2018.

adjudication would be to "clarify and stabilize the legal relations of the parties".[528] This is an option when there are several unnamed potential investors, which may not have even decided to invest. In disputes regarding the abstract interpretation of provisions, SSIA would be the only option of redress.

In addition, the home state could argue that a tribunal has jurisdiction to accept a declaratory claim concerning the *application* of the treaty to a concrete situation affecting a prospective investor.[529] While in an investor-state context, prospective investors could fear reactions of the host state against them,[530] through the SSIA path the tensions are arguably filtered. Declaratory relief using SSIA could involve the power of the tribunal to make recommendations, but not orders, to cease certain conducts or carry out measures to achieve compliance, as will be further explained.[531] In any case, a declaratory award related to a specific situation may be useful redress for some investors.

iii. Entry Rights and Diplomatic Protection

The traditional possibility offered by international law would be to resort to SSIA in the context of diplomatic protection. Diplomatic protection has been described as involving the use of diplomatic action or any other means of dispute settlement by a state in response to an injury to its nationals in face of a wrongful act of another state.[532]

One should not forget that, in the absence of an investment treaty with consent to ISA, or other PTAs, the recourse to diplomatic protection remains the sole international alternative to the investor.[533] In a treaty context, the obligations owed to another state and its investors in an IIA may constitute the primary

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[528] *Nuclear Tests (Australia v France)* (Joint dis op of Judges Oneyama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock) [1974] ICJ Rep 321 [21].

[529] A declaratory claim related to a concrete measure towards an investor, despite its resemblance with diplomatic protection, may also involve direct rights of the treaty parties. The criteria of preponderance of the claim is difficult to apply. See Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 314.

[530] Theodore R Posner and Marguerite C Walter, 'The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015) 383, 392.

[531] Bernasconi-Osterwalder (n 527) 14.

[532] Berman (n 509) 68.

[533] *Elettronica Sicula SPA. (ELSI) (United States of America v Republic of Italy)* (Judgment) [1989] ICJ Rep 15. It was based on the US-Italy FCN treaty (n 126).

obligations, the breaches of which provide the grounds for a diplomatic protection claim.[534] Furthermore, in this context, the state-state clause of a treaty may constitute the jurisdictional basis on which the diplomatic protection will further proceed.[535] Hence, a SSIA can ultimately deal with a diplomatic protection claim.

It is well established that the admissibility of a claim to determine state responsibility in the context of diplomatic protection requires the fulfilment of certain criteria. These are the nationality of claims and the exhaustion of local remedies.[536] The latter is an important principle of international law but the possibility of its explicit waiver by treaty is widely recognised.[537] The ad hoc arbitration *Italy v Cuba* is instructive in this regard.[538] The case involved claims of expropriation and mistreatment of Italian foreign investors in Cuba. It reaffirmed the possibility of a dispute based on diplomatic protection with reference to an IIA and its SSIA jurisdictional clause.[539] It also applied the presumption that the exhaustion of local remedies had not been waived. Moreover, it recognised Italy`s right to apply for a declaratory decision that the rights contained in the BIT were breached or violated with reference to a specific set of facts affecting their investments. In this case, it could be argued that *Italy v Cuba* united a systemic interest with a low monetary damage.[540]

It appears to be legally possible that home states bring diplomatic protection claims supporting its investors as a class with the objective of ensuring more consistent results in the litigation[541] provided that the admissibility criteria are fulfilled (nationality of claims and exhaustion of local remedies). This claim would be based on the jurisdiction conferred by state-state clauses of the IIA. In general, home states would only have been barred to include, in their diplomatic protection

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534 ILC, 'Draft Articles on Diplomatic Protection', Commentary on Article I, para 4, p 25-26; 'Report of the International Law Commission on the Work of its 58th Session' (2006) UN Doc A 61/10 (ILCDP 2006).
535 *ELSI Judgement* (n 533) [48].
536 ILC ARSIWA 2001 (n 104) art 44.
537 Also, while a waiver is not to be presumed, this is rebuttable, so the possibility of an implicit waiver should not be excluded. ILCDP (n 534) reference art 15(e), paras 12-16. See also James Crawford, 'The ILC's Articles on Diplomatic Protection' (2006) 31 South African Yearbook of International Law: Suid-Afrikaanse Jaarboek Vir Volkereg 29, 48–49.
538 Michele Potestà, 'Republic of Italy v. Republic of Cuba' (2012) 106 AJIL 341.
539 Matilde Recanati, 'Diplomatic Intervention and State-to-State Arbitration as Alternative Means for the Protection of Foreign Investments and Host States' General Interests: The Italian Experience' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 438–439.
540 Posner and Walter (n 530) 392.
541 Roberts (n 512) 4.

claim, investors which had already begun ICSID arbitration, due to ICSID Convention art 27.[542] Some treaties can also provide for such an impediment.[543]

While diplomatic protection claims may take place without any publicity and are generally underreported, prospective frustrated investors can and do request their home state for diplomatic protection. If there is SSIA jurisdiction, an international claim can be brought. This is typified by a case in late 1970s, involving the de facto termination by the Australian government of certain sand mining concessions to American corporations in Fraser Island.[544] The US intervened diplomatically and threatened to bring a case to the ICJ, but in the end this did not take place.[545] The case is relevant to the extent that Australia offered a lump sum compensation on account of loss of expected profits of the company for the consecutive year after the termination of the concessions, topic to be explored in chapter IV.

Another reported diplomatic protection initiative, this one involving the establishment of investors, was taken by Italy. It was a dispute between Italy and Switzerland in the early 90s about the right of Italians to acquire property in the Swiss territory. A Swiss measure restricting foreign control of land affected Italian land owners and investors. Italy argued that a treaty with Switzerland granted the right of establishment and of property acquisition in equality with Swiss nationals, under reciprocal conditions. Italy intervened on behalf of its nationals and the case was settled.[546] Italy could have resorted to a bilateral treaty of conciliation and judicial settlement of 1924, which provided for recourse to the International Court of Justice.[547]

The SSIA decision can have a declaratory nature and provide the basis for future ISA claims, or less persuasively, could include compensation to the home

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[542] On a contrary view, Jarrod Wong, 'The Subversion of State-to-State Investment Treaty Arbitration' (2014) 53 Columbia Journal of Transnational Law 6.

[543] Some UK BITs include the suspension of the right to engage in diplomatic protection whenever an investor-state claim is brought eg UK-United Arab Emirates BIT (signed 8 December 1992) art 8.4 and UK-Burundi BIT (signed 13 September 1990) art 8.4.

[544] Sornarajah (n 10) 135.

[545] Donald Greig (ed), 'International Economic Law Australian Practice in International Law 1978-1980' (1983) 8 Australian Ybk Intl Law 341, 350–353.

[546] For a full description of the case, see Giorgio Sacerdoti and Matilde Recanati, 'Approaches to Investment Protection Outside of Specific International Investment Agreements and Investor-State Settlement' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos/Hart 2015) 1843–1847.

[547] See also Establishment and Consular Convention of 1868 between Italy and Switzerland (signed 22 July 1868, entered into effect 1 May 1869) available at <http://itra.esteri.it/vwPdf/wfrmRenderPdf.aspx?ID=45862> accessed 15 August 2018.

state for the companies' losses, subject to the common-sense approach of prohibition of double recovery.[548] In fact, the possibility of compensation in a state-state context was present in the OECD draft MAI, which contained a SSIA clause. According to the abandoned draft, an award in a SSIA claim could include restitution or a pecuniary compensation for any loss or damage.[549] It is not clear what elements would constitute the loss or damage for the state. In any case, this is a sign that an institutionalised, *lex specialis* system of diplomatic protection was envisaged (ILCDP art 17[550]) and that is acceptable as an opt-out from general international law,[551] as will become apparent in the description of the WTO regime. Nevertheless, there are few investment treaties that specifically address the issue of compensation in a state-state context, which goes beyond the traditional mandate of SSIA tribunals of interpretation and application.[552] When it comes to prospective investors, compensation will be somewhat restricted, as will be developed in chapter IV.

It is sometimes the case that the financial burden of bringing a claim is a barrier for an investor, especially if it is an individual or a small company. In this situation, resorting to its state may be the most appropriate conduct,[553] even in the presence of investor-state provisions.[554] Also, the possibility of settlements may safeguard some interests of the home state.[555] Therefore, a diplomatic protection claim may fit well with the interests of small prospective investors.

iv. Entry Rights and General Measures

A specific feature of declaratory claims is that they can focus on measures of general application. This would encompass a scenario with different

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[548] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 300.
[549] Peter Malanczuk, 'State-to-State and Investor-to-State Dispute Settlement in the OECD Draft Multilateral Investment Agreement', *Multilateral Regulation of Investment* (Kluwer Law International 2001) 144–145.
[550] (n 534)
[551] Bernasconi-Osterwalder (n 527) 9.
[552] See also Brazil-Mexico BIT (signed 26 May 2015) art 19.2; Brazil-Colombia BIT (signed 9 October 2015) art 23(14) a, b, c, d; Brazil-Ethiopia BIT (n 271) art 24(11) a, b, c; Brazil-Suriname BIT (n 271) art 25(13) a, b, c; Southern Africa Development Community (SADC) Model BIT, art 28.3(a). See also Canada-China BIT (n 488) art 15.8, in which in case of failure to agree on the enforcement of the state-state award, compensation is due although not explicitly related to the investor's damages ("compensation of equivalent value to the arbitral tribunal's award").
[553] Roberts (n 512) 14; Berman (n 509) 71–72.
[554] Pauwelyn, 'At the Edge of Chaos?' (n 28) 404.
[555] Recanati (n 539) 430, 440.

characteristics compared to diplomatic protection and the mere interpretation of treaty provisions. In fact, generalised practices or policies denying entry rights to foreign investors may constitute a general situation without a specific injury to an investor but affecting a whole class of investors.[556] They can be, on their own, a breach of an international obligation. To illustrate, according to Douglas, "one contracting State might seek a *declaration from an international tribunal on the compatibility of domestic legislation* enacted by another contracting State with the minimum standards of investment treatment in the BIT."[557] Paparinskis also acknowledges the possibility of a "claim for a declaratory award that a piece of domestic legislation is contrary to substantive investment protection rules, *even though not yet applied to any particular investor."*[558] It might make more sense from the perspective of the effectiveness of the remedy that the treaty parties address the situation using the state-state settlement provision.[559]

The rank of the measure in the state's legal order does not matter. The highest measure one could think of would be a general restriction contained in the state's constitution that violates international entry commitments. The reservation by law of specific sectors to domestic providers could also be a breach of investment liberalisation rules. The reversal of privatisation measures of a former government by a newly elected one and the reestablishment of a monopoly are the immediate examples. While the limitation of foreign investments in a certain sector depends on the priorities of each country, the mere adoption of an investment restrictive measure might constitute a breach of an international obligation.[560] The measures could, for instance, go against market access provisions.

Another possible case is a general measure (law, decree, ministerial regulation) that discriminates against prospective investors based on their origin, which would breach the national or the MFN treatment under the IIA. When restrictive regulations (such as foreign ownership limitations and conditions to

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[556] Berman (n 509) 72.
[557] Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (n 506) 189 (emphasis added).
[558] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 314–315 (emphasis added).
[559] Berman (n 509) 72.
[560] See commentaries to the ILC ARSIWA 2001 (n 104) 57 art 12, para 12: "Certain obligations may be breached by the mere passage of incompatible legislation. Where this is so, the *passage of the legislation without more* entails the international responsibility of the enacting State ..." (emphasis added).

investments) or administrative hurdles (eg licensing delays) are present, other investors might be facing the same situation.[561] The NAFTA arbitration involving Mexican investments in the US,[562] referred to in the introduction of this chapter, is an example of a state-state arbitration directly dealing with general measures affecting entry. The tribunal decided that the US had breached the national treatment obligation towards Mexican investors by passing legislation restricting their presence in US territory, which conflicted with US scheduled obligations in NAFTA. The main objective of claims such as those would be the repeal of the discriminatory or restrictive norms and not the compensation for damages.[563] This would arguably fit into the jurisdiction of state-state jurisdictional clause, as seen above.

A more nuanced approach is to be taken when the breach consists of the way the general measure is implemented.[564] Another example would be the imposition by decree of burdensome requirements for entry that were not present in the non-conforming measures or negative lists in IIAs. As seen, much of the litigation is likely to focus on the interpretation of non-conforming measures.[565] With the progressive trend towards more establishment rights, an array of international legal issues may be expected to relate to those negative lists. The litigation tends to explore the differences between investment treaty commitments and GATS commitments.

Nevertheless, it is possible that entry rights are completely excluded from any dispute settlement provision. The concept of "legal inflation", defined by Horn, Mavroidis and Sapir,[566] may be helpful to describe this situation. The term refers to the phenomenon of introducing non-clear or non-enforceable obligations in trade agreements. It is a case of non-justiciability of rights. While it seems that vagueness of treaty language is not an issue, legal inflation would occur if some substantial

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[561] Posner and Walter (n 530) 392.
[562] *Trucking Services* (n 234).
[563] Alschner (n 519) 331.
[564] See commentaries to the ILC ARSIWA 2001 (n 104) 57 art 12, para 13: "[T]he enactment of legislation may not in and of itself amount to a breach, especially *if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question*." (emphasis added, fns omitted).
[565] In that regard, see *Mobil v Canada* (n 411). The arbitrators had to look at whether the non-conforming measures included the restriction under analysis.
[566] Henrik Horn, Petros C Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' in David Greenaway (ed), *The World Economy: Global Trade Policy 2010* (Blackwell Publishing 2011).

entry rights are excluded even from state-state dispute settlement, as shown in the Canadian practice.[567]

All in all, the mere presence of SSIA clauses means that they need to be given meaning and purpose. SSIA can be useful to home states to enforce entry rights with a broader scope than, but not excluding, diplomatic protection. In addition, it may serve as a complement to ISA, in the face of procedural impediments to the latter. In sum, the limitation of the possibility of direct claims from prospective investors in this area might make the investment regime closer to the regime for trade enforcement, as will be seen. This is perhaps a sign of adjudicatory convergence in the sense adopted here.

d. ADJUDICATING ENTRY RIGHTS IN WTO DISPUTE SETTLEMENT

i. Main Features

Chapter II has described and evaluated how concepts in the GATS relate to investments and investors. This section deals with the adjudication of those rights and obligations. The trade regime encompasses obligations to ensure the effectiveness of its substantive provisions.[568] An effective trade regime requires that the rules are adjudicated and applied in predictable, similar, and consistent manner.[569] Besides, to the extent that the WTO adjudication attains investment liberalisation goals while preserving the member state's regulatory space, this specifically furthers the effectiveness of the rules in relation to the entry of investments.

The dispute settlement system of the WTO is regulated by the Dispute Settlement Understanding (DSU),[570] to which all WTO members are a party. Security and predictability are two of the normative values that underpin the DSU and help thus to ensure the effectiveness of the regime.[571] There is no opt-out from

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[567] See (n 488).
[568] Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (CUP 2007) 13.
[569] ibid 148.
[570] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 2 1869 UNTS 401 (DSU).
[571] DSU art 3.2. Note also that DSU art 4.1 calls for effectiveness of the consultations; DSU art 3.3 refers to the effective functioning of the WTO; and DSU art 21.1 mentions the effective resolution of disputes.

the DSU and this characteristic makes it attractive. The DSU provides for a state-state system, whereby a WTO member can bring a dispute against other members. No private parties or investors can invoke the mechanism. In this sense, it shares much more characteristics with SSIA than with ISA, despite significant differences. Despite not having direct access, private parties play a role in triggering the disputes by raising the issues with the states and providing information throughout the dispute. Yet their interests are translated into state's claims whenever a case is brought to the WTO. According to DSU art 3(2), the WTO dispute settlement "serves to preserve the rights and obligations of Members under the covered agreements". Therefore, the question must always be framed as a matter of rights and obligations of the members.

The WTO mechanism has exclusive jurisdiction over the disputes arising from the agreements.[572] A claim is within the jurisdiction of the mechanism if it is covered by a WTO agreement. Thus, to the extent that the regulation of the establishment of investments in services is covered by the GATS, it is subject to the DSU. For the dispute settlement to be invoked there must be a violation or breach of an obligation or the nullification or impairment of benefits.[573] Thus, if a WTO member has violated an obligation affecting investors in services or if the benefits of the GATS were impaired or nullified, a member has the possibility of invoking the DSU and requesting a panel to rule on the issue.

The invocation of the mechanism is automatic, exclusive, mandatory and non-general.[574] It is automatic to the extent that the jurisdiction is automatically activated by any member that brings a claim, without the need for further consent.[575] It is exclusive since parties cannot bilaterally establish a mechanism to resolve their WTO disputes among themselves.[576] It is the only forum to resolve issues related to the WTO agreements.[577] It is mandatory to the extent that the finding of a breach must always be preceded by a statement of the DSB. It is non-general because only claims related to the covered agreements can constitute the basis for jurisdiction.

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[572] DSU arts 2.1 and 3.2.
[573] DSU arts 3.5 and 10.4.
[574] Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009).
[575] DSU art 6.1.
[576] DSU art 23(2)a.
[577] Except perhaps for the resort to DSU art 25.

Moreover, the member cannot unilaterally impose countermeasures that will breach other rules of international law.[578] Also, the defending party cannot claim that the breach was, in itself, a countermeasure, preventing the finding of a wrongful act. In that regard, the WTO system has been described as an opt-out from the regime of international responsibility (*lex specialis)*.[579] Another aspect is that any member has the right to invoke the system, even if it is not the one that is affected. In this vein, members may have systemic interests towards the fulfilment of the obligations and may also be involved as third parties.[580]

Panels have jurisdiction to entertain the matter, within certain limits: they shall make an objective assessment and identify the applicable WTO law. The Appellate Body, which reviews the legal issues of the cases, has the ultimate responsibility for conferring security and predictability to the decisions, according to art 3(2) of the DSU. It has the power to complete the analysis if the panel failed to do so. In that sense, it has broader powers than most appeal courts.[581] It has established a practice whereby its decisions are expected to be followed by future panels that decides on the same issues.

As suggested in the Introduction, security and predictability are a key aspect of the effectiveness of international economic law regime. This is because the guarantee of security and predictability is a way to ensure that international economic law rules shape state's behaviour towards the realisation of the goals of the regime. The notion of effectiveness has been referred to by the AB in several occasions: as an objective of international trade,[582] as an objective of the dispute settlement,[583] and as object and purpose of the WTO Agreement in general and of the GATT 1994 in particular.[584] It has also been alluded to in the context of the

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[578] Martins Paparinskis, 'The Schizophrenia of Countermeasures in International Economic Law: The Case of the ASEAN Comprehensive Investment Agreement', *International Economic Law After the Global Crisis* (CUP 2015) 267.
[579] Piet Eeckhout, 'Remedies and Compliance' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 457.
[580] DSU art 10.
[581] Van Damme (n 574).
[582] *EC Bananas AB Report* (n 342) [432]-[433].
[583] WTO, *US: Tax Treatment for "Foreign Sales Corporations" – Report of the Appellate Body* (24 February 2000) WT/DS108/AB/R [166]; WTO, *European Communities: Trade Description of Sardines* – Report of the Appellate Body (26 September 2002) WT/DS231/AB/R [139]; WTO, *Canada: Continued Suspension of Obligations in the EC: Hormones Dispute – Report of the Appellate Body* (16 October 2008) WT/DS321/AB/R [308], [317].
[584] WTO, *European Communities: Customs Classification of Certain Computer Equipment – Report of the Appellate Body* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R [82].

GATS, with an emphasis on the importance of clearly scheduled commitments.[585] In fact, security and predictability can only be achieved if WTO rules are interpreted in a clear and coherent way.[586] While some member have expressed concerns,[587] the emphasis on the precedential value of AB rulings goes in that direction.[588]

How do these characteristics affect the issues discussed here? It is probable that the interested party of a claim is the home state of the investors that are subject to the measure contrary to the GATS. Anyway, a member does not need to show that it is connected to an investor or to investments (in the form of mode 3 type of services provision) affected by the breach. Nor does it need to show, in face of a violation, that local remedies were exhausted or that the affected investor bears its nationality. The scenario is different in the nullification claim, when the member needs to present evidence that it is affected.[589] In the specific case here, the GATS will be the applicable WTO law. If the violation relates to market access or national treatment, the scheduling of commitments is naturally part of the applicable law. Hence, mode 3 commitments that states have undertaken are most likely to be taken into account by the panels in their task.

As shown in chapter II, obligations similar to those included in the GATS can also be expressed in investment treaties, though in a slightly different language. A positive commitment in the GATS to give national treatment to mode 3 type of service supply (commercial presence) can be equivalent to national treatment under an IIAs, which is provided to establishment without the exception of non-conforming measures. Generally speaking, the same situation can be brought in parallel forums if it constitutes a breach of more than one treaty with equivalent norms. As seen, parallelism in adjudication is not uncommon in international economic law. A treaty may well provide jurisdiction for a claim similar

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See also WTO, *European Communities: Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body* (12 September 2005) WT/DS269/AB/R WT/DS286/AB/R [246].

[585] WTO, *US: Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan – Report of the Appellate Body* (15 December 2003) WT/DS244/AB/R [82]; *US-Gambling* (n 323) [188]-[189].

[586] Shany (n 75) 192.

[587] Note though the current criticisms by the US of expansive interpretations reached by the WTO AB, which suggests that there may be considerable disagreement about how the normative considerations are implemented in practice. See eg Shea, Dennis, 'Statement Delivered at the WTO General Council in Geneva' (8 May 2018) <https://geneva.usmission.gov/2018/05/16/ambassador-dennis-sheas-statement-at-the-wto-general-council/> accessed 15 August 2018.

[588] Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9, 42. See WTO, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, Appellate Body Report (30 April 2008) WT/DS344/AB/R [160]-[161].

[589] GATS art XXIII(3) and DSU art 22. Note that DSU art 3.8 is of no relevance to GATS cases.

to that arising from the WTO agreement. Therefore, a relevant question to this section is whether the WTO jurisdiction is affected by the fact that the same situation is being analysed in another forum. The answer depends on the understanding of nature of the WTO jurisdiction. One way to put it is to say that the WTO jurisdiction is not affected, since it is the exclusive forum to deal with WTO law. Moreover, a violation of the DSU occurs when another treaty provides for the jurisdiction to decide WTO claims.[590] WTO panels will not decline jurisdiction based on the fact that the same issue is discussed in another forum.[591] Whereas a WTO panel may refer to a parallel or to a former decision, it is unlikely that it alters its procedure or take those decisions into account. That would be the case even if the very same obligation is being analysed.

It is underlined nonetheless that in the DSU there is no provision of an admissibility phase, which would deal with the matter of whether a case *should* be heard.[592] Some argued that the WTO panel seised of the matter could decline its jurisdiction if it considers that the WTO obligation was superseded by bilateral obligations.[593] However, the WTO AB in *Peru-Agricultural Products* suggested that WTO obligations cannot be modified between the parties.[594] In any case, currently, there is no solution for the coordination of overlapping jurisdictions, short of institutional reforms. A possible solution comes from the references in the new mega-regionals to the prominence of the forum first seised, such as in CETA art 29.3.[595] Therefore, if a GATS provision is considered to be substantially equivalent to an investment obligation under the CETA, the party must opt for one of the mechanisms. This interesting but overarching question goes beyond the scope of

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[590] Van Damme (n 574) 303.

[591] WTO, *Argentina: Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel* (19 May 2003) WT/DS241/R [7.38] referring to MERCOSUR, *Application of Antidumping Measures Against the Exportation of Poultry from Brazil – Decision of the ad hoc Arbitral Tribunal of MERCOSUR* Decision n 4 (21 May 2001). <www.tprmercosur.org/es/sol_contr_laudos_br.htm> accessed 15 August 2018; WTO, *Mexico: Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R [46]-[57].

[592] Van Damme (n 574) 310–343.

[593] Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 JWT 1081, 1130.

[594] WTO, *Peru: Additional Duty on Imports of Certain Agricultural Products – Report of the Appellate Body* (31 March 2015) WT/DS457/AB/R [5.111]-[5.113].

[595] Techniques and rules of staying proceedings and declining jurisdiction in private international law reflect different policy options and have at times a judicial management character. For an overview, see Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, OUP 2016) 116–49.

this work. In any case, chapters VII and VIII discuss some situations of potential overlap.

ii. Entry Rights and GATS Commitments

Both panel and AB reports have had the opportunity to deal with issues related to the entry of investors. Most of the cases involved the interpretation of schedules, focusing on general measures taken by the state that go against their commitments. Two of these WTO cases were described in the introduction to this chapter and are detailed further in chapters VII and VIII.[596]

An unsettled issue is whether concrete measures, affecting a specific investor or a group of investors in services, are under the jurisdiction of the WTO dispute settlement mechanism. Put differently, could a state request the initiation of a panel claiming that an individual measure affecting an investor in services is against a GATS commitment? This is the case, for example, of investment screening activities, whereby a governmental decision denies, imposes conditions for, or authorises an investment. Could the individual decision to allow or deny the establishment of a financial institution in the territory of a state be challenged? Another example is a measure which disallows or denies a regular competitive bid by a prospective investor for a concession of public services. If there are discriminatory criteria between foreigners or in favour of national companies against GATS scheduled commitments, a case could be arguably put forward.

An analogous issue is the screening of competition authorities to deny or impose conditions on mergers or acquisitions made by a foreign investor. This affects services if the object of the decision is, for instance, a financial institution or a public utilities company. It would not matter if the company is domestic or already foreign. In most countries, competition law authorities have the power to act and take administrative decisions or to recommend them to higher bodies.[597] These decisions are justified by concerns related to consumer welfare and economic efficiency and tackle specific acts or proposals. There is no doubt that internal decisions are internationally attributable to the state.[598] But could those decisions be challenged in the WTO?

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[596] See (n 458).
[597] See Enterprise Act 2002 (UK).
[598] ILC ARSIWA 2001 (n 104) arts 4, 5 and 11.

Since the GATS is a covered agreement, the matter is under the WTO dispute settlement jurisdiction if it concerns GATS rights and obligations. The response to the question initially involves an evaluation of whether the decision is a "measure" which possibly violates the GATS or impair its benefits. In this regard, not only is the expression "measure" very broad, as shown in chapter II, but also the term "decision" is present in the definition of measures in GATS art XXVIII(a). Thus, the GATS potentially covers individual and specific situations, such as screening procedures.[599] This would be *prima facie* sufficient for a case to be under the DSB jurisdiction. The assessment of a violation by the panels would have to go through all the elements described in chapter II. In this line, the fact that the expression "service suppliers" is used in plural in the market access provision (GATS art XVI) does not mean that a decision concerning *a* service supplier is not covered; it can be the prominent or the only supplier of that service.[600] It has been shown that individual decisions by regulators to allow the provision of services are within the coverage of the GATS and that this is more evident in the market access provision.[601]

On the other hand, it may be more difficult to use the non-discrimination provisions (GATS arts II and XVII) to challenge an individual decision: a claim related to a particular investor might arguably not satisfy the requirement of discrimination towards a group of investors.[602] In any case, as will be suggested in chapter VI, screening decisions for investments could arguably violate national treatment under the GATS if the imposed conditions were not likewise applied to a domestic service supplier.[603] This is relevant if states have undertaken national treatment commitments in mode 3, which could be a breach of the GATS, actionable under the DSU. It is to the content of the final determination of panels when it comes to remedies that the next chapter turns.

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[599] Meester and Coppens (n 278) 112.
[600] ibid 117.
[601] Bart De Meester, *Liberalization of Trade in Banking Services: An International and European Perspective* (CUP 2014) 227–228.
[602] Meester and Coppens (n 278) 120–122.
[603] ibid 120.

e. CONCLUSION

Based on the foregoing analysis, there are indications that the effectiveness of investor-state arbitration, as currently implemented in IIAs, is limited in cases of entry. This is because access disputes generally relate to measures affecting several potential investors or to individual decisions denying or limiting an investment to be made. Recent treaty practice has narrowed down the jurisdiction of investor-state arbitration, thus leaving the adjudication of entry rights to the scope of state-state dispute settlement systems.

The rights and obligations related to entry can be enforced by resorting to different mechanisms, such as ad hoc state-state investment arbitration under BITs, the Dispute Settlement Understanding of the WTO or in the state-state systems of PTAs. Each of the mechanisms will differ in relation to the processes, scope of jurisdiction and criteria for admissibility but they share the common patterns of state-state third party mechanisms. The mechanisms also offer an array of remedies, which will be discussed in the next chapter.

CHAPTER IV – ENFORCEMENT OF ENTRY RIGHTS AND REMEDIES FOR BREACHES

a. NON-PECUNIARY REMEDIES

i. Power to Impose Remedies

After the analysis of issues related to the jurisdiction for international claims, it is necessary to assess the practical results of the adjudication process. Put differently, one should analyse the possible remedies in each of the proposed adjudicatory scenarios. This is essential to evaluate which remedies offer the most adequate responses for the issues involving the entry of investments from the perspective of potential investors and their home states. This framework sets the ground for the evaluation of whether convergence in enforcement promotes effectiveness by attaining liberalisation goals coupled with the safeguard of host states' regulatory space.

The power to impose remedies is implicit and generally comes within the jurisdiction of the court or tribunal.[604] The outcome of international investment arbitration has always been though a synonym of awards expressed in monetary terms. Parties generally seek pecuniary remedies, that is, a sum of money related to the compensation for the injury suffered, to the detriment of non-pecuniary remedies, that is, all the other remedies not directly translated into money.

It is true that non-pecuniary remedies in international investment law are rarely sought, but it does not mean they are not available, as some have improperly argued.[605] They are contained in the broader mandate offered by courts, as pointed out by Paparinskis in the ICSID context.[606] In general, if there is no express limitation,[607] the power is broad.[608] While ICSID Convention art 54(1) only deals with the enforcement of pecuniary remedies, this does not mean that other

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[604] *LaGrand Case (Germany v United States)* (Judgement) [2001] ICJ Rep 466 [48].
[605] Douglas, *The International Law of Investment Claims* (n 393) 140.
[606] Martins Paparinskis, 'Chapter 2: Inherent Powers of ICSID Tribunals: Broad and Rightly So' in Ian A Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law*, vol 5 (JurisNet 2012) 37–40.
[607] See eg NAFTA art 1135 and *Mobil v Canada* (n 411) [414], [481].
[608] Martin Endicott, 'Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Bilingual edition, BRILL 2007) 522.

remedies are not available.[609] Ordering non-compensatory remedies is arguably within the mandate of an ICSID tribunal as an expression of its inherent powers.[610] As seen above, the ICSID Convention requires the existence of an investment, so that less or no cases regarding entry would be brought. These conclusions are also applicable to non-ICSID contexts: under ad hoc arbitration in other rules, such as UNCITRAL, there is no impediment to the recognition of broad powers.[611]

However, it is still not entirely clear whether ISA is effective when the available remedy is non-pecuniary, such as the withdrawal of a measure or specific performance. In the investor-state context, despite the practical impediments to non-pecuniary remedies, investors have sought, seek and keep seeking these types of relief in the form of a declaration or injunction.[612] This is especially welcome in the context of entry. In these cases, non-pecuniary remedies, analysed in the following sections, may play a relevant role. After this analysis, it will be possible to evaluate which mechanisms are the most appropriate to deal with breaches and violations related to entry rights.

ii. Satisfaction and Restitution

The analysis of remedies can profit from the framework of remedies in the ARSIWA, considered as a codification of customary international law.[613] The principle of full reparation is a recognised principle in general international law.[614] It is enshrined in ARSIWA art 31, which makes explicit the obligation of reparation for the injury, including damages. ARSIWA art 34 further details this framework.

In the case of mere interpretative claims, the declaration of the legal issues may be the relief sought by the claimant.[615] The practical results would be the

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[609] Thomas Sebastian and Anthony Sinclair, 'Remedies in WTO Dispute Settlement and Investor-State Arbitration: Contrasts and Lessons' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013) 283.

[610] Paparinskis, 'Chapter 2: Inherent Powers of ICSID Tribunals: Broad and Rightly So' (n 606) 37–40.

[611] See the UNCITRAL Revised Arbitration Rules (2010) arts 3(3)(f), 4(2)(e), 20(2)(d) and 34. SCC Rules (2017) arts 6.iii, 9.1(ii), 29.1(i), 29.2(ii).

[612] Sebastian and Sinclair (n 609) 281–283.

[613] ILC ARSIWA 2001 (n 104).

[614] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17 [47].

[615] *Continental Casualty* (n 482) [64]; *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No 2009-23, 3rd Interim Award on Jurisdiction and Admissibility (27 February 2012) [4.20].

application of the interpretation of a specific provision – of a liberalisation treaty, for instance – to a factual pattern in the context of a dispute. When the case is one of assessment of the legality of certain acts or conducts, the remedy would be the declaration of the breach and the consequence is the cessation of the conduct and guarantees of non-repetition.[616] Even in the absence of a material breach, the declaration confirms the respondent state's obligations to cease the wrongful act and, possibly, to offer assurances and guarantees, which follow from the breach of the primary rule.[617] This is the case when a court or tribunal decides that a restrictive investment measure is a breach of international law.

In this context, the declaration of the breach and the cessation of the conduct can constitute proper satisfaction, in line with *Quiborax v Bolivia*.[618] In *Rompetrol v Romania*, the arbitral tribunal considered that a request for declaratory relief in the form of a determination of the treaty breach retained its "independent existence" from the compensation request.[619] Concerning the entry of investments, this might be the most valuable remedy sought in a state-state arbitration context, as suggested above. Even when the ISA alternative is available, the state-state route may be more appropriate. It may better address disputes involving investments of reduced value with less significant individual harm or with damages hard to quantify.[620] That is the case when the entry of the investor in a market is prevented, with access rights granted by treaty: the quantification of damages might be unfeasible and proof thereof, rather difficult.[621] If an investor prefers to remain in the market, it might, instead of receiving monetary damages, opt for the withdrawal of a problematic measure.[622] This could be done via SSIA.

The home state could also seek satisfaction by means of apologies,[623] but states have not often made such requests.[624] Satisfaction in the form of acknowledgment of breach, expression of regret or apology do not constitute

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[616] ILC ARSIWA 2001 (n 104) arts 30(a) and (b).
[617] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 315 (emphasis added, fns omitted).
[618] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia* ICSID Case No ARB/06/2 Award (16 September 2015). [554]-[562]. See also ILC ARSIWA 2001 (n 104) art 37 and commentary to art 28(1) 87-88.
[619] *The Rompetrol Group NV v Romania,* ICSID Case No ARB/06/3, Award (6 May 2013) [294].
[620] Posner and Walter (n 530) 392.
[621] ibid.
[622] ibid 383.
[623] ILC ARSIWA 2001 (n 104) art 37(2).
[624] In the context of counterclaims, Cuba has sought apologies in the investment claim that Italy brought against it, as seen in section 2 (n 504).

diplomatic protection and therefore do not prejudice the home state's position, as clarified by Paparinskis.[625] The home state of an investor can seek a formal apology for bad treatment regarding entry or for a wrongful denial of access. It could perhaps seek a formal explanation for the denial of entry as proper satisfaction, which is related to the discussion developed in chapter I of how general international law deals with admission.

It is true that the power to order non-pecuniary remedies is being restricted and some see the trend to restrict it as a way to better control arbitral tribunals.[626] In any case, one of the possible remedies is restitution, that is, the reestablishment of the situation that existed before.[627] The US model BIT provides for the possibility of "material restitution", which is the material restoration of persons or property.[628] Moreover, claimants in some reported cases have asked for it[629] and some tribunals have affirmed their powers to do so,[630] or even granted restitution as the main remedy.[631] Nevertheless, in the context where an investment was not made, it does not seem to make much sense, as it would do in other contexts such as in expropriation cases.

In the context of the entry of investments, the concept of "juridical restitution" is more relevant. This is because the conditions for entry are generally set out in legal instruments. According to the ARSIWA:

> restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or *amendment of a constitutional or legislative provision enacted in violation of a rule of international law,* the rescinding or reconsideration of an *administrative* or judicial measure unlawfully adopted in respect of the *person or property of a foreigner* or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[632]

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[625] Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (n 108) 315 (emphasis added, fns omitted.
[626] Endicott (n 608) 520–521, 552.
[627] ILC ARSIWA 2001 (n 104) art 35.
[628] US Model BIT (2012) arts 5(5), 34(1)(b) and 34(2)(a) and NAFTA art 1135(1)(b).
[629] Dolzer and Schreuer (n 96).
[630] *Ioan Micula, Viorel Micula, SC European Food S.A, SC Starmill SRL and SC Multipack SRL v Romania,* ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) [166]-[168].
[631] *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) [570]-[572]; *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15 Award (28 July 2015) [1020].
[632] ILC ARSIWA 2001 (n 104) (emphasis added, fns omitted).

In cases where there is no investment, juridical restitution seems to be the most immediate remedy in SSIA. There have been thoughtful suggestions to increase its use as a remedy to avoid large compensation claims.[633] Moreover, as will be seen, it is, above all, the remedy available in the WTO dispute settlement mechanisms for those kinds of breaches.

iii. Specific Performance and Individual Measures

Another way to conceptualise non-pecuniary remedies concerns the idea of performance of specific acts. The power to order injunctions or measures of performance has been recognised by some authorities.[634] It is true nonetheless that specific performance as such has "little history in international law".[635] Particularly, the idea of specific performance is borrowed from international commercial arbitration in the context of international contracts.[636] In this sense, it means the very execution of the obligation in the contract instead of receiving compensation. It is equivalent to an obligation to do something. Obligations *to do* or *not to do* are generally defined as opposable to the obligations to give.[637]

In the context of treaties, a more appropriate approach would be to focus on the performance of the treaty obligation itself, mandated by the tribunal.[638] A treaty provision may bring an implicit obligation *not to do* something. For instance, the obligation to refrain from frustrating the entry of the investor in the established conditions. The remedy for the breach of that provision would be the withdrawal of any restraining measures. Likewise, a treaty provision may impose the obligation *to do* something, for example, the obligation to permit entry and give the necessary licences to operate. The remedy for the breach would be then the "specific performance" of granting the permission or the licenses to an investor.

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633 Endicott (n 608) 540.

634 *Antoine Goetz et consorts v République du Burundi,* ICSID Case No ARB/95/3 Award (10 February 1999) [135]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3. Decision of Jurisdiction (14 January 2004) [78]-[81]; Chevron (n 615) [3.240], [4.20].

635 Endicott (n 608) 543.

636 Miguel Ángel Adame Martínez, *Specific Performance as the Preferred Remedy in Comparative Law and CISG* (Aranzadi 2013).

637 ibid 585.

638 See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 [142], [144].

The issue is when the case involves more abstract obligations such as to provide national treatment. Different from domestic courts, international courts will not frame their decisions as an order to host states, but as a declaration of which measures or aspects of a measure would constitute a breach of international law. Some cleverly point out that calling something a declaration or a mandatory order is a subtle choice of semantics, in which the former constitutes less affront to sovereignty.[639] The arbitral decisions in *TOPCO,*[640] *LIAMCO*[641] and *BP*[642] have adopted a cautious approach, considering that the nullification of internal regulations is undue interference.[643]

More specifically, both a state-state and an investor-state arbitral tribunal would have the power to suggest which obligations *to do* or *not to do* something would be in compliance with the state's commitments. A tribunal could certainly say that specific domestic requirements or certain administrative decisions are against the national treatment to be accorded to a prospective investor. While a tribunal can perhaps indicate which conducts would be in compliance with the decision, it cannot order the plain withdrawal of the measure within a time limit, unless the treaty parties have set out specific powers for that. Thus, it appears that specific performance is an imprecise term to describe what courts do in treaty-based investment arbitration.

Connected to the discussion of specific performance is the discussion of individual measures. It is to be borne in mind that the initial interest of the prospective investor is to have unrestrained access to invest or at least access in the conditions guaranteed by the treaty. This will guide their request for remedies. The home state, in its own right, is interested in preserving the rights in the treaty and may have broader concerns as to generalised market access. This differentiation would lead to the conclusion that what may constitute proper satisfaction in one context may not be the same in other contexts.

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639 Endicott (n 608) 542–543.
640 *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*, ad hoc Award (19 January 1977).
641 *LIAMCO v The Government of the Libyan Arab Republic*, YCA 1981, ad hoc Arbitration, Award (12 April 1977).
642 *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, Award (10 October 1973).
643 Endicott (n 608) 548.

In treaty-based arbitration, a tribunal might possibly rule that the conditions of a specific international bidding procedure or the decisions taken throughout the process were discriminatory against an investor in favour of a domestic one. It is hard though to believe they could order a state to annul the procedure. Another issue that needs to be highlighted is that of enforceability. The non-pecuniary aspect of arbitral awards may not be enforceable in some jurisdictions, similar to what occurs in relation to some types of judgements.[644] In a scenario where the host state discriminates investors in a tender process, while an injunction to prevent the tender being awarded to the company that profited from the discriminatory rules would be the most appropriate remedy, there is no mechanism of enforcement.[645]

The international tribunal could not adjudicate a concession or a contract to perform an investment to an investor against whom discrimination is found. But, since an international wrongful act is found, the claimant can seek for assurances or guarantees of non-repetition.[646] Translated into the context of the entry of investments, this would mean that the host state could be required to promise that future denials of entry or discrimination would not occur. Also, the state could say that it will treat the request for the establishment of an investor in an expedited manner or that it will not include discriminatory criteria in their future bid procedures. Finally, in addition to its characterisation as juridical restitution, the repeal of the restrictive legislation is an assurance and can also constitute a way of satisfaction.[647]

All these examples may arise in practice. As shown in chapter I, if an investor has applied for an investment authorisation and there is nothing preventing the investor from getting it, the omission to give a positive answer may constitute an international wrongful act. The adjudicator would nonetheless exceed its powers if it explicitly *obliges* the state to grant the authorisation, even though such an obligation can be inferred by implication in the decision. It might also declare that a specific regulation is unduly limiting market access to some providers in breach of international commitments. The court or arbitral tribunal could not, however,

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[644] Eg in England, judgements can only be enforced under the common law if the order is for a fixed sum of money; specific performance and injunctions are not entitled to enforcement. Hill and Shúilleabháin (n 595) 180–181.
[645] Douglas, *The International Law of Investment Claims* (n 393) 140.
[646] ILC ARSIWA 2001 (n 104) art 30(2).
[647] ILC ARSIWA 2001 (n 104) 90 commentaries para 11.

strike out a regulation that limits access to specific companies. The takeaway from this is that non-monetary remedies are permitted in international investment arbitration and are especially useful when it comes to investment access cases. The conditions set out by each investment treaty may limit their availability for specific cases.

b. PECUNIARY REMEDIES

i. Context

It has been argued that private standing is important to enforce obligations in situations involving contribution of capital, such as an established investment, and that the availability of money damages would be the best way to induce compliance.[648] The idea behind is that only when there is money committed in the form of an investment would it make sense to have investor-state arbitration. This aspect is not always present in an international trade transaction. To some extent, that explains why international investment law developed access to private parties while this was not the option of the WTO, where market access commitments prevail.[649] The particularity here is that international investment agreements also include access commitments, as seen in chapter I. Thus, a more accurate description of this hypothesis is that states tend to prefer access commitments to be enforced through a state-state system and for money damages not to be offered.

The peculiarity of entry cases is that there is no investment yet. Nevertheless, even in the absence of an investment, issues related to contribution to capital and assessment of risk may arise and could justify the recourse to pecuniary remedies. In that regard, two examples come to mind. The first one concerns pre-entry costs and will be analysed in the next section. The other one relates to lost profits of a prospective investment and will be the object of the last section. Both issues can be raised directly by the investors using ISA. Alternatively, they could provide the basis for a claim by the home states in SSIA in the exercise of diplomatic protection, as shown above.

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[648] Sykes (n 74) 642–644.
[649] ibid 645–647.

ii. Entry Costs: Reassessing Arbitral Decisions

One possibility of redress to justify compensation for an internationally wrongful act is related to pre-entry costs. In other words, they relate to the expenses that the investor made in preparation to or in the process of making an investment. They generally take the form of professional, legal and consultant's fees and travel expenses. They may refer to the costs of contracting lawyers, auditing and engineering companies and the costs of assessment, of preparation of studies and of the bidding processes. To exemplify, in the petroleum and mining industries, pre-exploitation costs are a critical element of what is considered an investment since substantial resources are committed and sometimes a final investment agreement is not reached.[650]

The common issue is that the investors were frustrated that their final investments did not take place, in spite of the expenses. Some suggest that investors may use these types of claims more as a leverage in the negotiation with host states.[651] However, in certain cases, their main interest is perhaps not to carry on with the investment, but only to recover their expenses and invest elsewhere. In fact, investors have indeed used investor-state arbitration for that purpose. The question is: do treaties provide for this possibility of redress? To answer that, one needs to go through cases of investor-state arbitration involving prospective investors and pre-entry costs.

At first sight, arbitral tribunals seem to be reluctant to accept the idea of compensation for pre-investment costs. The outcome in most of the cases was that the claims failed to meet the jurisdiction requirement of the existence of a covered investment. This was what happened in *Mihaly v Sri Lanka*.[652] The case was raised in the ICSID under the US-Sri Lanka BIT, which confers pre-entry rights in the national treatment clause,[653] but this aspect was not referred to in the award. Yet,

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[650] Walid Ben Hamida, 'The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the Status of the Pre-Investment Expenditures' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 66.
[651] Douglas, *The International Law of Investment Claims* (n 393) 140.
[652] *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka,* ICSID Case No ARB/00/2, Award and dis op (15 Mar 2002).
[653] art II(1) (signed 20 September 1991).

the argument of the majority opinion mentioned that, in other circumstances, pre-investment expenditures could be considered investments.[654]

The *Mihaly* concurring opinion also casts additional light on the issue. It recognised that project development costs would have become investment had the contract been signed.[655] Moreover, the test of ICSID Convention art 25 would have been met had the costs been attributed to an entity in which the investor had shares.[656] This goes in line with Parra's observation that "in cases where the dispute is over the denial of admissions … since there is in fact no investment, the dispute could not be said to arise out of one, and hence would fall outside the scope of ICSID Convention".[657] In other fora, the claimant would have a sound basis for the claim.[658]

Despite not being a treaty-based arbitration, the *Zhinvali v Georgia* decision is worthy of mention.[659] The claimant sought compensation for development costs, moral damages and lost profits for frustrated negotiations over the investment in a power plant in Georgia. The majority considered there was no investment, therefore, no ICSID jurisdiction. The dissent recalled that development expenditures would have been covered in the investment cost and that Georgian law and fairness required that the claimant should be duly compensated.[660]

Generation Ukraine v Ukraine[661] arose in the context of United-States Ukraine BIT, which grants pre-investment rights. The award recalled that a claim that government officials made it difficult for a company to conclude an investment could give rise to the invocation of pre-investment protections. The tribunal mentioned that, "Such protections do exist in various international treaties (eg *the right to establish a business or tender for contracts without discrimination*) but no such right has been invoked here."[662] Since the dispute was raised in ICSID, the issue of art 25(1) had to be addressed. In the end, jurisdiction was established, but

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654 *Mihaly* Award (n 652) [48]-[49].
655 *Mihaly* dis op (n 652) [6].
656 ibid [8].
657 Antonio R Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 ICSID Review 287, 325.
658 ibid [9].
659 *Zhinvali Development Ltd v Republic of Georgia,* ICSID Case No ARB/00/1, Award (24 January 2003) 10 ICSID Reports 3.
660 *Zhinvali* (n 659) Separate Opinion of Andrew Jacovides (24 January 2003) 106-13.
661 *Generation Ukraine, Inc. v Ukraine* ICSID Case No ARB/00/9 Award (16 September 2003).
662 ibid [8.6] (emphasis added).

based on investments actually made.[663] In any case, the tribunal especially recognised the possibility of a pre-entry claim, even in the absence of an investment.[664]

The award in *Willy Nagel v Czech Republic* dealt with a claim related to a licence to operate a GSM mobile service. The claim, brought against the Czech Republic back in 2002 in the context of liberalisation efforts, involved an application by an investor to obtain a GSM licence. The investor – William Nagel – engaged in extensive talks with the Czech government and had received clear assurances that a contract with a specific governmental entity would be the way to get the licence. In the end, the government decided to promote a competitive bidding process and another provider acquired the licences. Nagel used the UK–Czech Republic BIT to bring an unsuccessful claim in an arbitration under the auspices of the Arbitration Institute of the SCC.[665] The BIT did not include pre-establishment rights and had an asset-based investment definition.[666] On the other hand, the case was brought under the SCC, the rules of which do not require the existence of an investment. The questions amounted to whether the investor possessed any right to the licence and what kind of damages could be obtained from the assurances. Nevertheless, the arbitral tribunal decided that the contractual rights derived from a cooperation contract did not amount to an investment in the terms of the BIT.[667]

In turn, it is worth emphasising the *PSEG v Turkey* case. The jurisdictional decision underlined that the investment made was a concession contract. This was distinct from the *Mihaly* situation, where no contract had been signed, and from the *Zhinvali* case, where parties acknowledged there was no investment.[668] The tribunal affirmed jurisdiction based on the fact that an investment was made in the form of a Concession Contract but highlighted that a "different question, again pertaining to the merits, is whether all or some of the *activities undertaken qualify as a part of the investment or are to be regarded as merely preparatory*."[669] In the

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[663] ibid [18.1]-[18.85].
[664] Cf Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 Chinese Journal of International Law 531, 549, fn 102.
[665] *William Nagel v The Czech Republic,* SCC Case No 049/2002, Award (9 September 2003).
[666] ibid [298]-[299].
[667] ibid [329].
[668] *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Decision on Jurisdiction (04 Jun 2004) [81] and Award on Merits (19 Jan 2007) [302].
[669] *PSEG* Decision on Jurisdiction (n 668) [104] (emphasis added).

case, mining and construction had not yet started, not even in terms of necessary preparations, but the investment was considered to take the form of the cost of negotiation and other preparatory works.[670] The tribunal eventually decided that there was a breach of the FET and granted compensation.[671] Interestingly, the case was brought under the US-Turkey BIT, which protects pre-entry rights on a MFN basis but not on a national treatment one.[672] Those facts apparently did not play a role in the decision.

It is not uncommon to include the costs of negotiation of a project as investment.[673] Most importantly, when an investment has been found, the pre-investment expenditures were included in the calculation of damages and recognised as part of the investment.[674] Development expenditures become investment retrospectively if there is an agreement to admit the investment, even more if the parties agree to consider so.[675] In this vein, the line of cases should not be understood as an impediment to recover pre-investment costs. As shown, the international investment law system is somewhat capable of dealing with those situations. All in all, the arbitral tribunals have been careful to state that the conclusions of no jurisdiction were limited to the facts exposed, which have particular contexts and different strengths.[676]

Moreover, the requirement that an "investment" is admitted before jurisdiction is sustained seems to be present only in the ICSID Convention. It would be interesting to analyse whether the outcome of those cases brought to ICSID would be the same had they been brought under UNCITRAL rules, in the SCC or in the Permanent Court of Arbitration – PCA. Also, it remains to be seen whether the outcome of the *Willy Nagel* case would be the same had the UK-Czech Republic BIT contained entry rights. Therefore, one could not a priori state that pre-investment costs are out of the scope of international arbitration. If states do not desire these costs to be covered, clear treaty language avoiding the protection of

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[670] *PSEG* Award (n 668) [304].
[671] ibid [238]-[256].
[672] arts II(1) and II(3) (signed 3 December 1985).
[673] *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela* ICSID Case No ARB/00/5, Award (23 September 2003) [263]; *PSEG* Award (n 668) [316]-[340].
[674] *PSEG* Award (n 668) [319].
[675] *Mihaly* Award (n 652) [51], [60]; Hamida (n 650) 74.
[676] ibid 75.

establishment is needed. India's model BIT provides for explicit language as to the complete exclusion of protection and claims related to the pre-investment phase.[677]

On the other hand, as emphasised in chapter I, a treaty may explicitly include pre-entry expenditures of prospective investors. The CPTPP covers damages related to investors that attempt to make an investment with actions "such as channelling resources or capital in order to set up a business, or applying for a permit or licence".[678] According to art 9.29[4], the "only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment provided that the claimant also proves that the breach was the proximate cause of those damages."[679] In the CPTPP, there must be a close, immediate causal connection between the attempt and the damages.

But, what kinds of damages could be claimed? In the case of an application for a licence, the outcome of which turns out to be unfavourable to the investor on grounds of non-justifiable discrimination, it would be sensible to include the cost of lawyers, the cost of the preparation of proposals and the cost of paperwork. In turn, damages related to the natural risk assessment, part of the very risk of evaluating business, would not be included. Anyway, one could expect an increase in the litigation of these aspects given the reach and scope of the CPTPP. The definition of the amount of compensation is nonetheless something that may generate discussion. This is the object of the next section.

iii. Compensation and Calculation of Damages

This section will evaluate aspects of the remedy of compensation concerning breaches towards prospective investors. This kind of assessment has a peculiarity: no investment was made, there was just an attempt. Also, it will briefly delineate the possible ways to calculate damages appropriate to this situation. As seen, entry-related cases will generally involve a breach of NT or MFN. In fact, while cases of compensation for those breaches in investment arbitration have not been numerous, the basic principle seems to be that the remedy should place the

[677] Indian Model BIT arts 1.4(iii), 1.11 and 2.2
[678] CPTPP fn 12. See also USMCA art 14.1 fn 3 (n 86).
[679] This corresponds to TPP Agreement art 9.29[4]. See also Australia-Peru FTA art 8.30[4].

investors in an equivalent position, considering the different treatment.[680] In this light, ARSIWA art 36(2) provides that, "The compensation shall cover any financially assessable damage *including loss of profits* insofar as it is established."[681] The particularity of granting compensation in cases involving entry is that there is no compensation for capital value:[682] it is all about *loss of future profits*.

Calculation of lost profits is difficult in long-term investment contracts. The generated income is not technically profit if it does not exceed the sunk investments, which are specific to the project and not recoverable.[683] Moreover, host states expect the investment to be amortised in the long run and then possibly to generate profits; in general, states are not contractually obliged to refund the investors of their initial expenses.[684]

Therefore, the usual limitations for the recovery of damages (causation, remoteness, evidentiary requirements and accounting principles)[685] are of greater practical relevance when it comes to lost profits. Profits must not be speculative and a causal link between the profits and the breach must be established.[686] Compensation for lost future profits has been granted "where an *anticipated income stream* has attained sufficient attributes to be considered a legally protected interest of *sufficient certainty* to be compensable."[687] In fact, compensation related to lost future income has been awarded in the context of concessions and other types of contracts,[688] and this may involve purely future investments. A United Nations Compensation Commission (UNCC) Panel report,[689] which dealt with future projects, recognised the necessity "to demonstrate

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[680] Facundo Pérez-Aznar, 'The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements' (2017) 20 JIEL 777, 801.
[681] (emphasis added)
[682] For the calculation of compensation based on the capital value, see ILC ARSIWA 2001 (n 104) 102-103 commentaries para 22-25.
[683] Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017) 103–104.
[684] ibid 104.
[685] ILC ARSIWA 2001 (n 104) 105 commentaries para 32.
[686] Marboe (n 683) 112.
[687] ILC ARSIWA 2001 (n 104) 104 commentaries para 27 (emphasis added).
[688] *Amco Asia Corporation and Others v The Republic of Indonesia,* First Arbitration (1984); Annulment (1986); Resubmitted case (1990), ICSID Reports (Cambridge, Grotius, 1993), vol 1. See also ILC ARSIWA 2001 (n 104) 105 commentaries para 31.
[689] UNCC, *Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" claims* (30 September 1999) S/AC.26/1999/14 [139]-[141] (emphasis added). All UNCC reports are available at <https://uncc.ch/reports-and-recommendations-panels-commissioners> access 15 August 2018.

by *sufficient documentary* and other appropriate evidence *a history of successful (i.e., profitable) operation*" to tackle the issue of remoteness.[690] It acknowledged that as "such evidence is often *difficult to obtain* … such claims will *only rarely be successful.'*[691] In this light, it is established that, though the level of uncertainty may require estimation, claimants have the burden to prove their losses of future earnings.[692]

One can note some reluctance to award damages for a beginning industry or unperformed work,[693] for example in *AAPL v Sri Lanka,*[694] but the request in principle remains possible. While the tribunal in Metalclad "did not award lost profits because the claimants *could not provide any realistic estimate of them*", it "recognized the *validity of the principle that lost profits should be considered* in the valuation of expropriated property."[695] In *Autopista Concesionada v Venezuela*, the Tribunal referred to the necessity of establishing with a "sufficient degree of certainty that the project would have resulted in a profit" but accepted that the compensation for lost profits is a principle of international law so that the claimant must be put in a position as if there had been no breach.[696]

The lack of clarity and certainty on the issue arises specially when the claimants truly desired to continue their business, which may result in a complicated causation analysis.[697] Owing to the difficult estimation, in *PSEG*, the tribunal did not accept loss of profits as a basis for compensation.[698] It considered nonetheless that it was possible to evaluate the expectancy of profits, even if there is no record of operations, based on the essential commercial terms of a self-contained and fully detailed contract.[699] The Tribunal in *Micula v Romania* mentioned that this level of certainty can be established "where the claimant benefitted from a long-term contract or concession that *guaranteed a certain level*

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[690] ibid [140] (emphasis added).
[691] ibid [141] (emphasis added).
[692] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation, Judgment) [2012] ICJ Rep 324 [40]-[49].
[693] Borzu Sabahi, 'The Calculation of Damages for Breach of International Investment Contracts' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Bilingual edition, BRILL 2007) 572–574.
[694] *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) [95]-[108].
[695] *Metalclad Corporation v The United Mexican States,* ICSID Case No ARB(AF)/97/1, Award (30 August 2000) [122] (emphasis added).
[696] *Autopista Concesionada v Venezuela* (n 673) [333], [351].
[697] Sabahi (n 693) 588.
[698] *PSEG* Award (n 668) [313]-[314].
[699] *PSEG* Award (n 668) [312].

of profits or where, as here, there is a *track record* of similar sales".[700] In turn, lost profits for the interruption of business have been awarded by the UNCC based on past performance[701] and historical production and costs.[702] In *LETCO v Liberia*, lost profits were granted based on several estimations and assumptions.[703] The tribunal highlighted the inherent uncertainty of dealing with future events and clarified that "it is sufficient for the Tribunal to use *reasonable and consistent criteria* in determining future profits."[704]

For the purposes of international arbitration, the practical problem is indeed how to quantify these damages. The double compensation problem arises if host states compensate investors for financial losses incurred both in their expenses (investments undertaken) and their expected income (lost future income), which should be avoided.[705] An adequate and interesting alternative in cases where investors would have continued with the investment is the following. It consists in not paying back the investment undertaken and calculating "damages only on the basis of the expected future income lost as a consequence of the breach …" deducting "future expenses necessary for the creation of these future profits".[706] In cases of denial of access, no investments were undertaken. Thus, the future expenses mean the initial capital that would have been spent and this should be arguably deducted from the future income.

When it comes to established techniques, one should mention in particular the discounted cash flow (DCF) method. It is a possible way to calculate the value of rights related to future income based on a mechanism that uses discounting

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[700] *Ioan Micula, Viorel Micula, SC European Food S.A, SC Starmill SRL and SC Multipack SRL v Romania* ICSID Case No ARB/05/20 Award (11 December 2013) [1010], [1033], which awarded lost profits for lost sales of finished goods.

[701] UNCC, *Saudi Arabian Texaco (SAT)* Second Instalments of "E1" claims (24 June 1999) S/AC.26/1999/10 [448].

[702] UNCC, *Kwait Petroleum Corporation* Fourth Instalment of "E1" claims (29 September 2000) S/AC.26/2000/16 [162]

[703] *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No ARB/83/2 Award (31 Mar 1986) 2 ICSID Reports 346; 'International Centre for Settlement of Investment Disputes: Arbitral Tribunal Award in Liberian Eastern Timber Corporation (LETCO) v. The Government of The Republic of Liberia (Recovery of Damages for Breach of a Concession Agreement)' (1987) 26 ILM 647, 670–674.

[704] ibid 670 p 42 of the decision, part 2 (emphasis added).

[705] Marboe (n 683) 105–108.

[706] ibid 109.

rates.[707] In *Biloune v Ghana*,[708] a case involving the intention to build and operate a hotel, the investor was frustrated by Ghana's government decision to cancel the permits, expropriate the area and destroy the unfinished building. Yet, the tribunal claimed it did not have the elements to award damages related to lost profits and refused to apply the DCF method. Wasted costs have been considered the sole basis of compensation in cases where the business never operated, as the DCF calculation for lost profits was not workable.[709] In *Tenaris v Venezuela,* the inability to project free cash flows also led to the rejection of the DCF.[710]

On the other hand, in *Gold Reserve v Venezuela*, the DCF method was the chosen one.[711] Arguably, the *Gold Reserve* decision set out a new paradigm by explicitly applying the DCF for the calculation of damages for new businesses, with a history of profitability.[712] This may be due to the nature of the sector in question. The Tribunal in *Khan Resources v Mongolia* considered that the DCF was "in the case of a mine with proven reserves … an *appropriate methodology* for calculating fair market value."[713] But it went to dismiss the method as unattractive and too speculative given the circumstances of the case.[714] Based on an analysis of the arbitral decisions, Marboe has compiled the following reasons why an income approach has been rejected: 1) lack of past record or for the lack of operations; 2) no future prospects; 3) divergence between amount of investment and expected profits; 4) divergence of submission by the parties; 5) financial situation of the company; 6) cost of valuation procedure.[715]

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[707] *Occidental v Ecuador* (n 217) [708], [779]; *EDF International SA, SAUR International S.A. and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) [1188], [1242].

[708] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana,* UNCITRAL ad hoc tribunal, Award on Jurisdiction and Liability (27 October 1989) 95 ILR 184; Award on Damages and Costs (30 June 1990) 95 ILR 211.

[709] *Arif v Moldova* (n 631) [577]-[582].

[710] *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/26, Award (29 January 2016) [527].

[711] *Gold Reserve Inc v Bolivarian Republic of Venezuela,* ICSID Case No ARB(AF)/09/1, Award (22 September 2014) [690]-[848]

[712] L Hoder, 'Compensation for Losses to New or Unfinished Business: A New Paradigm in the Making? A Case Comment on Gold Reserve v. Venezuela' (2016) 13 Transnational Dispute Management (TDM) 5 <www.transnational-dispute-management.com/article.asp?key=2340> accessed 15 August 2018.

[713] *Khan Resources Inc., Khan Resources BV CAUC Holding Company Ltd. v The Government of Mongolia,* UNCITRAL Award (2 March 2015) [391] (emphasis added).

[714] ibid [393].

[715] Marboe (n 683) 271–277.

A different way to frame the issue is to claim *lost opportunities* or *loss of a chance*. In the case of lost future projects, the UNCC has once pondered:

> How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. *If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant*?[716]

Some argue that in those cases the compensation should be limited to the expenses of the party to submit the failed bid: an assessment based on expected profits would be equivalent to a reversal of the host state's decision.[717] However, some investment arbitration practice indicates that the loss of a chance of possible profits in the future could be compensated.[718] *Micula v Romania* also discussed lost opportunities in the quantification of the compensation.[719] There is indeed a grey area where the probability of profits would be sufficient and *lump sums* have been awarded under this remit.[720] In the context of human rights, the ECHR has granted lump sum compensation based on lost opportunities to investors for the denial of the allocation of licenses to operate TV broadcasting,[721] the denial of registration of periodicals[722] and the confiscation of a publisher's books.[723]

In that context, some propose interesting alternatives. Think of how to calculate the lost opportunity of an investor that is frustrated in public bidding procedures. If the investor loses an investment, let us say a concession, to a corrupt competitor in a country:

> the cost is not the profits that it would have earned from the corrupt deal because, first, the firm can usually shift its business elsewhere … The

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716 UNCC (n 689) para 139.
717 Douglas, *The International Law of Investment Claims* (n 393) 140.
718 *Societé Ouest Africaine des Bétons Industriel (SOABI) v Senegal* ICSID Case No ARB/82/1, Award (25 February 1988) [7.13].
719 *Micula v Romania* (n 700) [981]-[988].
720 Marboe (n 683) 118.
721 *Centro Europa 7 Srl and Di Stefano v Italy* (2012) ECHR 974 App no 38433/09 (ECtHR, Grand Chamber Judgement, 7 June 2012) paras 218, 220 as follows: "218. ... As to the alleged loss of earnings, the Court finds that the applicant company *did indeed suffer a loss of this nature as a result of its inability to derive any profit whatsoever from the licence over a period of many years.* ... 220. In those circumstances, the Court considers it appropriate to award a lump sum *in compensation for the losses sustained and the loss of earnings resulting from the impossibility of making use of the licence*. …" (emphasis added).
722 *Gaweda v Poland* (2002) ECHR 2002-II App no 26229/95 (Judgment 14 March 2002) para 54 as follows, "[T]he applicant's claim for pecuniary damage *is based on alleged lost business opportunities.* … the court awards the applicant *compensation …. under this head*." (emphasis added).
723 *Ozturk v Turkey* (1999) ECHR 1999-VI App no 22479/93 (ECtHR, Grand Chamber Judgement 28 September 1999) para 80.

> loss to a firm, therefore, is not the value of a lost contract but rather *the marginal loss from operating in a potentially less profitable and less corrupt location*, taking into account the benefit of not paying a bribe.[724]

The observation above takes into account the opportunity cost. If an investment is not made, the value of the capital to be spent is employed elsewhere. So, in the end, the loss of opportunity is the difference in profitability between investments, which is difficult to measure. Investment arbitration awards have dealt with the issue of alternative investments in a different context: to set the value of pre-award interests. The idea is to evaluate the rate of interest the investor would have obtained if the funds it deserved had been invested elsewhere. Therefore, this notion can be applied in situations of lack of access. In this regard, arbitral practice has been inconsistent,[725] but it should be recognised that the investor would normally accept certain risks in return for higher interests, instead of investing in a risk-free alternative.[726]

A provision like CPTPP art 9.29[4] limits damages to those incurred in the attempt to invest. Thus, it appears to exclude any claims related to lost future profits that would arise if the attempt was successful. On the other hand, one could argue that if a similar limitation is not present, such claims would be possible. This is because the general international law rules of international responsibility would allow for full reparation, as shown. Therefore, the provision operates as a carve-out from the secondary rules of international law. This understanding is essential for the interpretation of dispute settlement mechanisms in current and future BITs with establishment rights.

In the light of the above, the remedy of compensation for prospective investors in investor-state arbitration is theoretically possible, in the absence of a restriction. It would be common in case of lost concession contracts, with sufficiently clear determination of the expected financial flows. The main issue is then one of evidentiary requirements. It is necessary to prove that an anticipated income is legally protected and not speculative. One could suggest that certain types of economic activities would have more certainty compared to others. The

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[724] Rose-Ackerman and Palifka (n 167) 477–479.
[725] See eg *Yukos v Russia* (n 153) [1684], which chose US Treasury bond rates; *Renta 4 SVSA and others v The Russian Federation*, SCC No 24/2007, Award (20 July 2012) [226], which chose Russian sovereign medium term rates [set aside by *Svea Court of Appeal* Judgement T9128-14 (18 January 2016)].
[726] Marboe (n 683) 356–360.

other issue is the proper method of calculation and the DCF offers an interesting avenue. The stringent criteria adopted by the arbitral and judicial decisions means that it is still to be seen a case where all the conditions are present.

A connected topic is whether the SSIA could provide the basis for compensation in the context of the entry of investors. It is recalled that NAFTA provides the possibility of damages in a state-state context, when removal or non-implementation of a measure is not achieved[727], but this has had no effect.[728] Also, it provides for state-state dispute settlement if an ISA award is not complied with by the parties.[729] The contours of the legal relationship between decisions on access to investments from the point of view of the home state and of its investors is not an issue devoid of any practical concerns. As seen above, declaratory claims are admissible for cases of denial of access in a state-state context. It is noted that there is no need to prove that specific investors had been affected in order for the claim to be accepted.[730] What is currently unsettled is whether the resulting ruling could be a basis for future, more individualised claims of damages.[731]

One example of the above is the *Trucking Services*[732] case discussed above and the pending *CANACAR v US* litigation.[733] CANACAR is the Mexican trucking association and gathers individual carriers, including Mexican investors in truck services in the US. CANACAR's notice of arbitration requested damages based not only on billions of dollars of lost opportunities for Mexican investors but also on the refusal of the US to comply with the state-state ruling.[734] It would be interesting to see how much the CANACAR investor-state case will draw from the *Trucking Services* SSIA decision. Also, whether and how much compensation for lost opportunities will be granted. Given the speculative nature in the estimation of damages in the absence of a concrete investor, one should not ignore the possibility to defer the analysis to a future tribunal. This has been aptly suggested

[727] NAFTA art 2018(2).
[728] Neufeld (n 209) 642.
[729] NAFTA art 1136(5).
[730] Bernasconi-Osterwalder (n 527) 15–16.
[731] Roberts (n 512) 66–68.
[732] (n 234).
[733] *CANACAR v United States*, Notice of Arbitration, UNCITRAL (NAFTA ch 11) (2 April 2009).
[734] As highlighted in the request, "the closure of the U.S. market carriers causes *billions of dollars in losses* to the Claimants. The Government of Mexico estimates that the *United States' breaches cost Mexico more than $2 billion a year*." ibid 16-17 (emphasis added).

in cases related to continuing breaches in international law.[735] It also remains to be seen how future treaty-making practice will deal with these issues.[736]

In short, two trends tend to materialise with regard to compensation in ISA. The CPTPP limits it to pre-investments costs carried out in connection to the attempt, leaving aside issues of lost profits. The CETA and the EU-Vietnam Agreement completely exclude ISA in relation to establishment, which has always been the Canadian BIT practice. This seems to point out a convergence towards limiting the use of ISA in these cases. It also reinforces the established practice in arbitral and judicial decisions of granting lost profits in rather limited circumstances. The remaining options for remedies would then be state-state treaty-based investment arbitration or the recourse to the WTO dispute settlement mechanism, if there are equivalent obligations in that regime, which will be analysed next. This conclusion also goes in line with the intuition regarding the current framework of private standing and remedies in both investment and trade law, as will become apparent in the next section.

c. INTERNATIONAL TRADE LAW ENFORCEMENT

i. Nature of the Remedies: WTO

One of the facets of the WTO regime is that the remedies available for the breach of obligations have generally a prospective nature. This means that whenever a breach is determined in a panel or an AB report, and adopted by the DSB, the usual determination is to bring the measures into conformity.[737] The fact that the breach had been taking place will not make a difference in most of the cases. There is, in general, no remedy against that, apart from some provisions in agreements such as the ASCM.[738] Some have argued that this does not prevent panels and the AB from analysing past actions to design remedies.[739] Thus, this

[735] Peter Tzeng, 'Deferring Future Damages to Future Tribunals: The Jurisdictional Obstacles' (2016) 31 ICSID Review 246.
[736] In the new USMCA (n 86), a claim similar to CANACAR`s claim will not be possible: breaches of MFN and national treatment related to establishment and acquisition are not subject to investor-state disputes, according to Annex 14-D, art 3(1)(a)(i)(A).
[737] DSU arts 11, 19(1) and 22.1.
[738] ASCM art 4.7.
[739] Geraldo Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 JIEL 505.

statement should be qualified, given the instances where the retrospective nature may be more evident.[740]

In any case, for the purposes of the situations analysed here, the remedy for the breach of GATS provisions related to mode 3 would be generally the withdrawal of the measure or its adaptation to eliminate the aspects found to be in breach of the agreement. For example, if a measure is deemed to be unjustifiably restraining access to investments, the WTO member state must change the measure to provide that access. This is equivalent to the remedy of juridical restitution, discussed above. This is because home states do not have the right to require reparation in the classic sense for the period throughout which the breach occurred. They cannot claim restitution of the specific amounts, except for some provisions in relation to subsidies, which are not yet fully regulated in the GATS.[741] Moreover, in the DSU, there is the determination of a reasonable time period for the decision to be implemented, which may range from some months to years.[742] In case there is no agreement on the period, the determination of a reasonable time is also a matter for the arbitrators to decide and there is even an established procedure for that.[743]

These features reinforce the fact that the WTO is a *lex specialis* system from general international law. The traditional principle of erasing all the consequences of the illegal act do not apply in these cases. While the self-contained nature of the WTO system does not allow for any parallel application of the international law of state responsibility, the latter may serve as a gap-filling or an aid to interpretation of remedies.[744] It appears that this aspect is part of the global bargain that led to the adoption of the WTO from the GATT and the quasi-automatic implementation of the reports. States would be willing to follow the binding determination of DSB if they had some flexibilities as to the enforcement procedure. This arguably conferred legitimacy to the WTO system of adjudication, which is currently being tested.[745]

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[740] Eeckhout, 'Remedies and Compliance' (n 579) 459, citing WTO,.*Australia: Subsidies Provided to Producers and Exporters of Automotive Leather – Report of the Art 21.5 Panel* (20 January 2000) WT/DS126/RW.
[741] GATS art XV.
[742] DSU arts 21(3) and 21(4).
[743] DSU art 21(3)(c).
[744] Eeckhout, 'Remedies and Compliance' (n 579) 457.
[745] Pauwelyn and Hamilton (n 12).

Some have pointed out the growing trend towards performance remedies and attributed that to the increasing institutionalisation and multilateralisation of courts.[746] However, it has been noted that in the process that led to the WTO, the DSU greatly limited the power of adjudicators. They can suggest conducts which will bring the measure into compliance, but the suggestions are by no means obligatory.[747] This is an expression of the principle whereby each state choose how to implement its international obligations and international decisions.[748]

On a comparative note, some put emphasis on the dichotomy between remedies in investment law, focused in cases when the investor-state relationship is "beyond repair", and those available in the WTO when there is an "ongoing relationship" between the trader and the state.[749] Direct access by the investor is arguably justified by the higher vulnerabilities in comparison to the limited risks by the trader.[750] One could argue for a focus on companies and not countries, when it comes to trade and ask if the international trade system is mature to deal with the possibility of compensation for traders.[751] Some even suggested a model of calculating damages in the WTO, but pointed out the enforcement problems in relation to cash remedies payments to the complainant.[752] The possibility of compensation for trade, or perhaps direct access to claims, is a mantra that could be revisited, but would substantially change the nature of the system.[753] However, if one considers that trade in services in mode 3 consists of investments, this recognition does not seem far-fetched at all.

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[746] Geraldo Vidigal, 'The Turn to Performance Remedies: Institutionalization, Multilateralization, and the Shifting Role of International Courts' (ESIL Annual Conference, Oslo, 10 September 2015) <http://papers.ssrn.com/abstract=2659185> accessed 15 August 2018.
[747] DSU art 19.1; WTO, *US: Continued Dumping and Subsidy Offset Act of 2000 – Report of the Panel* (16 September 2002) WT/DS217/R [8.6]; *WTO, Argentina-Poultry* (n 591) [8.4]-[8.7].
[748] *LaGrand Case* (n 604) [125] as follows, "This obligation can be carried out in various ways. The choice of means must be left to the United States"; *Jurisdiction Immunities of the State (Italy v Germany)* (Judgement) [2012] ICJ Rep 99 [137]; Van Damme (n 574) 301.
[749] Neufeld (n 209) 636.
[750] ibid 638.
[751] Eeckhout, 'Remedies and Compliance' (n 579) 447, 454.
[752] Joel P Trachtman, 'The WTO Cathedral', *Trade Law, Domestic Regulation and Development* (World Scientific 2015).
[753] Neufeld (n 209) 636, 642–643.

ii. New Initiatives

The question worth discussing is whether this system is adequate for situations of lack or limitation of access of investments and investors. In fact, in the cases where these kinds of measures were challenged in the WTO, the respondent states changed their practices. For example, in *China – Publication and Audiovisual Products*, there was an appeal, but in the end the country complied with the ruling by amending its measures within the time limits.[754] In *China – Electronic Payments*, China complied with the Panel Report without appeal and changed its domestic measures in the agreed timeframe.[755] These two cases illustrate an effective use of the WTO framework to tackle investment restrictions.

More specific discussions apply the concept of effectiveness, referred to in the Introduction, to certain features of the regimes. Lang ponders whether the effectiveness of some regimes of governance in the WTO, meaning their power and stability, is derived from the open-endedness of concepts, which are to be determined in a context-dependent, case-by-case basis. The durability comes for their "ability to *serve as the means for a variety of different ends*, and to offer techniques which are of use to as wide a range of actors as possible."[756] As analysed by Cottier, effectiveness relates the actual *state of performance* of a legal order in terms of its objectives.[757] Pauwelyn asks if the composition of the adjudicators in both systems affect the effectiveness of an international tribunal, such as the WTO and investment tribunals.[758] In fact, the effectiveness of the WTO Dispute Settlement may be greatly attributed to the capacity of adjudicators to take into consideration the normative expectations and the ethos of the mandate providers (member states) and its representatives in Geneva.[759] To the extent that those expectations fade away, crisis is inevitable.[760] In international investment

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[754] Implementation notified by China on 24 May 2012, see WTO, *China: Publications and Audiovisual Products – Status Report by China - Addendum* (13 April 2012) WT/DS363/17/Add.15.
[755] Implementation notified by China on 23 July 2013, see WTO, *China: Electronic Payment Services – Status Report by China* (14 June 2013) WT/DS413/9.
[756] Andrew Lang, 'Governing "As If": Global Subsidies Regulation and the Benchmark Problem' (2014) 67 Current Legal Problems 135, 165–166 (emphasis added).
[757] Gehne and others (n 44) 43 fn omitted.
[758] Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 AJIL 761.
[759] Joost Pauwelyn, 'The WTO 20 Years On: "Global Governance by Judiciary" or, Rather, Member-Driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' (2016) 27 EJIL 1119. Cf Howse (n 588).
[760] See the current criticisms by the US (n 587).

law, mandate providers expect that investment courts boost the confidence of investors and lead to an increase in the flow of investments.[761]

Nevertheless, one must ask a question. Why – in the case of multi-sourced equivalent obligations – would an investor ask its home state to activate the WTO system instead of resorting to state-state arbitration under an IIA, the latter having broader powers? The reason for triggering the WTO instead of using SSIA may be related to the existence in the WTO of a centralised system of collective pressure. In other regimes, parties have fewer incentives to adjudicate their claims and more incentives to engage in unilateral retaliation.[762] This is because in the WTO members can as a last resort ask for retaliation to be authorised by the DSB,[763] as part of this special collective surveillance mechanism. This actually happened in cases involving the GATS: in *EC-Bananas*, for instance, which also dealt with GATS mode 3 commitments, claimants resorted to retaliation since the EU did not abide by the decision.[764] This also took place in *US-Gambling.*[765]

The outcome of a reform of the DSU, and of the WTO agreements in general, is hard to predict. Meanwhile, it would be interesting to contemplate how the dispute settlement to be provided in the TISA will deal with these cases. As seen in chapter 2, TISA commitments will cover mode 3 supply of services, therefore, investments. Moreover, there is no indication that a service supplier-state mechanism, akin to ISA, is being analysed or would arise. In this vein, the expected system of TISA – if it is ever concluded – would be one of state-state dispute settlement.[766] Hence, the investor's home states would bring claims against host states for the breach of entry rights in services, with the features described above. In case the limitations provided by the DSU regarding remedies are not present, other types of remedies may be available. One could also think of the possibility of immediate withdrawal of measures, performance determinations

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[761] Shany (n 75) 35–36, 53.
[762] Geraldo Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' [2018] JIEL 11–19.
[763] DSU art 22(3).
[764] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Recourse to Art 21.5 Report of the Appellate Body* (26 November 2008) WT/DS27/AB/RW/USA; WT/DS27/AB/RW2/ECU.
[765] WTO, *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 DSU – Decision by the Arbitrator* (7 April 2005) WT/DS285/ARB.
[766] According to the TISA leaked documents, this is Part IV "Institutional Provisions", Section 1 "Resolution of Disputes" of the Core Text < https://wikileaks.org/tisa/document/20160621_TiSA_Core-Text/> accessed 15 August 2018.

or other mechanisms of reparation. On the other hand, there is a chance that a TiSA system of centralised countermeasures would only cover the service sector so there will be no cross-sector retaliation, as available in the WTO.

In treaties where trade and investments are negotiated together, it is perhaps possible to create a system of compliance based on cross-retaliation. In the NAFTA, which was renegotiated into the USMCA, art 2019 already provided for a system of suspension of benefits, in case of non-implementation.[767] In the ASEAN, for example, the investment framework contains an investor-state dispute settlement.[768] On the other hand, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism[769] also provides for a state-state dispute settlement.[770] Any investment controversies may also be solved by resort to the mechanisms of the Protocol.[771] There is the possibility of suspension of concessions in relation to investment obligations according to the 2009 ACIA. There, the system of countermeasures is interestingly applied in the backdrop of general international law.[772]

An interesting solution was also adopted by art 17.20 and 17.22 of the Protocol of the Pacific Alliance. There, in case of non-enforcement of a state-state investment dispute award, the affected party can trigger a centralised system of suspension of benefits. This is a viable mechanism in agreements that include both trade and investment, but this discussion is much broader than the scope of this work.[773] A wider analysis should naturally encompass several other equally important issues.

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[767] For an analysis on how cross-sector retaliation has been applied as a tool to ensure compliance in NAFTA, see Klint W Alexander and Bryan J Soukup, 'Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance under NAFTA' (2010) 28 Berkeley J Intl L 313.

[768] ASEAN Comprehensive Investment Agreement – ACIA (signed 26 February 2009) sec B art 33.

[769] ASEAN Protocol on Enhanced Dispute Settlement Mechanism (adopted 29 January 2004, entered into force 29 November 2004).

[770] For an overview, see Gino J Naldi, 'The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal' (2014) 5 Journal of International Dispute Settlement 105, 129–136.

[771] ACIA (n 768) art 27.

[772] Paparinskis, 'The Schizophrenia of Countermeasures in International Economic Law' (n 578) 273–275.

[773] Lubambo, 'Is State-State Investment Arbitration an Old Option for Latin America?' (n 498) 17.

d. CONCLUSION

This chapter reinforces the conclusion of chapter III: the effectiveness of investor-state arbitration is limited in cases of entry. The situation is more evident when the required remedy is non-pecuniary, such as the withdrawal of a measure or specific performance. One must not forget that the international investment regime is not only about investor-state arbitration but, also, encompasses state-state mechanisms, albeit rarely used.

It could be suggested that broad remedies generally implicit in SSIA appear to adequately address market access concerns of investors. This is especially evident when there is no basis to calculate damages, given that entry has not occurred and future profits are too speculative. In these cases, investors and their home states will be generally more focussed on the withdrawal of measures or on the declaration that a specific internal measure is a violation of treaty provisions. The remedies as consequence of a breach of an international obligation will likely involve juridical restitution, but some residual role for compensation may be envisaged in relation to pre-entry costs and the expansion of investments.

In sum, to the extent that parties decide to limit or exclude investor-state arbitration for entry rights, there is a reduction in the number of non-shared characteristics between the regimes of international trade and international investment law regimes. One could interpret this as a sign of adjudicatory convergence between the regimes, when it comes to entry. To inquiry whether this sign of convergence brings about more effectiveness to the rules, one needs to the look at the way such a system can frame behaviour by attaining the goal of investment liberalisation balanced with the safeguard of regulatory space.

The reality is that the exclusion of one mechanism (ISA) and the lack of adherence to entry commitments may lead to a situation of under-enforcement of those rights. This tilts the balance in favour of host state's regulatory space. While the WTO offers a centralised system of authorised retaliation, the BITs and regional systems will probably rely on the general law of countermeasures in absence of more specific rules. State-state investment arbitration, coupled with a system of regulated countermeasures, appears to be a feasible mechanism to tackle these situations. It would be interesting to observe how the new treaty-making initiatives will develop the issue. The analysis of the case studies may cast light on this

subject. This will allow the questions raised in the concrete examples in the introduction to chapter III to be fully addressed.

PART B – INTERACTION AND CONVERGENCE: INTRODUCTION TO CASE STUDIES

Chapters I and II of Part A described and analysed the substantive content of international treaties regulating the entry and access of foreign investments. They presented the way in which the WTO agreements, IIAs and PTAs systematise the topic. The focus has been on how treaties limit the options that states have to set up the domestic regulation of the entry of investments. This is naturally reflected in states' rights and obligations under international law. Finally, they showed some signs of substantive convergence in the coverage of the issue in the new treaties.

Chapters III and IV of Part A set out a framework to show how states can enforce these rights and obligations. They analysed how treaties confer jurisdiction for the international adjudication by dispute settlement. Besides, they presented the available remedies and the mechanisms to promote the observance of decisions. Finally, they identified signs of convergence in the available mechanisms of adjudication of disputes involving the issue.

The introductory chapter delineated the normative criteria to guide treaty making and adjudication to face the new developments. It defined the notion of convergence and set the conceptual grounds of effectiveness as the attainment of investment liberalisation goals with the safeguard of state's regulatory space. This was necessary to better explore some normative aspects of the international regulation of the entry of investments.

As mentioned in the Roadmap, Part B develops the concepts by presenting and exploring these issues in topical situations. Chapter V reveals a perspective of convergence different from the one covered until now by analysing the MFN clause. Present in most treaties, as briefly mentioned in Part A, it has the potential to incorporate the better treatment from one regime into another. This includes rights related to investment entry and liberalisation, perhaps encompassing their enforcement.

In chapters VI to VIII, case studies illustrate the interpretative and normative challenges that lie ahead. They are organised around three topical issues which exemplify how the entry of investments is covered in international economic law. The first issue is investment screening regulation. The second one is the protective

regulation of certain sectors for domestic investors. The third issue touches on the scope of the host state's regulatory space, illustrated by the analysis of prudential measures.

Given that each of these aspects involves individual decisions and administrative, legal or even constitutional measures, attention is focused on the assessment of the conformity of these measures with international economic rules and on the ways the rules were or could be enforced. It is hoped that this analysis will illustrate the signs of convergence identified in Part A and reiterate the common challenge of striking the balance between investment liberalisation and regulatory space.

CHAPTER V – MFN AND ENTRY OF INVESTMENTS

a. GATS MFN CLAUSE: HIDDEN POTENTIAL?

i. Scope and Interpretation

The MFN standard guarantees the equality of opportunity among states.[1] Its purpose is to "establish and maintain at all times *fundamental equality without discrimination* among all the countries concerned".[2] In fact, MFN clauses have traditionally encompassed certain areas of the relation between states, including rights of establishment for nationals of one country in the territory of a foreign country.[3] Besides, the standard plays an essential role by ordering investment relations based on multilateral considerations, equal treatment and non-discrimination.[4] In this sense, it shares the same liberalising objective of national treatment clause: avoiding undue protectionism and ensuring non-discriminatory entry of investments.[5]

This conception is reinforced by some of the discussions regarding the interpretation of MFN clauses. While the International Law Commission (ILC) Study Group emphasises that strict adherence to the VCLT is to be expected, it highlights the "common objective" among MFN clauses, to be taken into account under an analysis of purpose.[6] The need to reaffirm the allegiance to the rules of treaty interpretation comes from the fact that the MFN standard has been thought as a

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[1] For a classic and historical analysis, see Georg Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 British Ybk Intl L 96, 97–99, 113.

[2] *Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176, 191–92 (emphasis added).

[3] Robert Yewdall Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Longman 1992) 1329.

[4] Thomas Cottier and Lena Schneller, 'The Philosophy of Non-Discrimination in International Trade Regulation' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014) 12–14; Stephan Schill, 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath' (2017) 111 AJIL 914, 933–934.

[5] Jürgen Kurtz, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' (2004) 5 JWIT 861, 886. See also Donald McRae, 'Introduction to the Symposium on Simon Batifort and J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization"' (2018) 112 AJIL Unbound 38, 42.

[6] ILC, 'Final Report of the Study Group on the Most-Favoured-Nation Clause – Annex of the Report of the International Law Commission on the Work of its 67th Session' (4 May-5 June and 6 July-7 August 2015) UN Doc A/70/10, 179.

"meta-clause", to which particular principles of interpretation would be applicable.[7] What may have intrigued some commentators was the hidden, uncovered aspect of the clause, with its power to incorporate a whole set of rights or content from other treaties by means of a shortcut.[8]

The context of application of the MFN clauses in international trade law exemplifies the idea that coherence is an indicator of legitimacy: whenever the MFN exceptions are principled and rational, as in the General System of Preferences, the rule's coherence is preserved.[9] This suggests that convergence towards a model where the rule and its exceptions are coherent and their interpretation is consistent brings about effectiveness to international economic law. This is reinforced when the resulting regulation promotes the attainment of liberalisation goals while ensuring state's regulatory space.

Chapter II described in detail GATS provisions on market access and national treatment and left the MFN obligation to be discussed in this chapter. The language of the MFN clause (art II) is the obvious point of departure. The provision reads:

> Article II
> Most-Favoured-Nation Treatment
> 1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
> 2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions. …

In this regard, the first aspect to be noted is that the clause applies to "any" measure, which reflects a broad coverage.[10] The equality of treatment is to be guaranteed immediately and with no conditions. As in GATS art XVII, it refers to services and service suppliers. However, it applies to all modes in all service

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[7] This idea stems from statements such as: "There are innumerable m.f.n. clauses, but there is only *one* m.f.n. standard". Schwarzenberger (n 1) 120.
[8] As acutely put by Schwarzenberger, "It is clear that m.f.n. clauses serve as an *insurance against incompetent draftsmanship and lack of imagination* on the part of those who are responsible for the conclusion of international treaties [but] *another aspect of the matter is more significant [:] … the adaptation of treaties to changed circumstances*." ibid 99 (emphasis added).
[9] Thomas M Franck, *The Power of Legitimacy among Nations* (OUP 1990) 153, 178, 180.
[10] WTO, *Canada: Certain Measures Affecting the Automotive Industry – Report of the Appellate Body* (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R [79].

sectors, that is, it does not depend on scheduling, different from the national treatment.

When it comes to its interpretation, the MFN clause in the GATS should be functionally compared with the MFN clause in the GATT (art I), and not with other standards.[11] This may suggest that the underlying concept has an important status, compared to the mere textual interpretation.[12] Unlike the GATT, the GATS explicitly incorporates no less favourable treatment in the MFN clause (and in the national treatment clause, as seen in chapter II). The fact that GATT art I had been interpreted to cover de facto discrimination was relevant for the WTO Appellate Body (AB) to conclude that the GATS art II should encompass this possibility.[13] In such a case, there would be no treatment less favourable to like services and service suppliers if it does not modify the conditions of competition in favour of certain foreign services or service suppliers. The context for the interpretation of the GATS MFN clause should include similar clauses in other treaties[14] and the ILC 1978 draft rules.[15]

As will be seen, an analytical comparison of the GATS MFN clause with investment MFN clauses is perhaps even more valuable than a comparison with the GATT MFN clause or between the national treatment clauses of both the trade and investment regimes. Some claim that the clauses have historically served different purposes in trade in goods (GATT) and in bilateral treaties of establishment: while the national treatment clause in GATT art III protected the MFN border tariffs bargain, the national treatment and MFN clauses in investment treaty law were an expression of the classic liberal approach.[16]

The analysis of the GATS MFN clause may lead though to a different perspective. This is because in services the general dichotomy of barriers at the border (tackled by the MFN) and internal barriers (dealt with by the national

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[11] WTO, *EC: Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (09 September 1997) WT/DS/27/AB/R [231].
[12] ILC Study Group 2015 (n 6) 159, para 45.
[13] *EC – Bananas AB Report* (n 11) [232]-[233].
[14] Rüdiger Wolfrum, 'Article II' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 72.
[15] ILC, 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries – Section II.D of the Report of the International Law Commission on the Work of its 30th Session' (8 May-28 July 1978) UN Doc A/33/10, 16-73.
[16] Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff Publishers 2013) 434.

treatment) does not stand. Most of the services regulations, including in relation to entry, are internal, although they may have some sort of territorial extension.[17] Besides, the MFN standard in the GATS has a broader scope than the national treatment. It constitutes a functional obligation in itself, just like the MFN clauses in IIAs.

The MFN obligation concerns all services and service suppliers in mode 3. Moreover, it applies in case of better treatment related to the creation or constitution of a juridical person, which translates into commercial presence. Therefore, one can say that the GATS MFN provision covers the process of *establishment of an investment in services*. It applies to measures affecting prospective investors, as shown in relation to the national treatment related to entry. In this regard, all measures that discriminate investors according to their state of origin would be inconsistent with the MFN clause. The result is that, according to the clause, a WTO member cannot impose measures which differentiate in treatment investors in services of another WTO member based on their foreign origin.

The analysis will naturally involve the likeness and less favourable treatment tests. The GATS MFN clause was extensively discussed in *Argentina – Financial Services*. The Panel's conclusion was that some of the Argentine measures were incompatible with the GATS clauses. In the end, the AB ruled that the services were not like, including in relation to art II.1, and decided to reject Panama's claim in its entirety, for the failure of the Panel to carry out its task.[18] Likeness, in the context of GATS art II, must focus on the evaluation of competitive relationship, in which considerations of both services and service suppliers play an integrated role.[19] The comparison will though be related to the treatment of two *foreign* services and service suppliers. The finding of a breach could be justified by the general exceptions in art XIV and is also subject to other carve-outs.

In any case, the broad coverage and extension makes the GATS MFN clause extremely powerful.[20] On the other hand, it is still underutilised and not

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[17] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 87.
[18] WTO, *Argentina: Measures Relating to Trade in Goods and Services – Report of the Appellate Body* (14 April 2016) WT/DS/453/AB/R [6.49]-[6.71].
[19] WTO, *Argentina – Financial Services* (n 18) [6.24], [6.29].
[20] Yi Wang, 'Most-Favoured-Nation Treatment under the General Agreement on Trade in Services - And Its Application in Financial Services' (1996) 30 JWT 91, 105.

explored in relation to investment measures.[21] In this sense, the GATS MFN clause works as an external "multilateralizer", whereby "the most advantageous conditions contained in a member's BIT are to be extended to the full WTO membership".[22] Any investment liberalisation measures in the service sector taken in favour of a state must be conferred to all the other WTO member states. Therefore, if a state's measure unilaterally confer to another state better treatment in relation to establishment, that state must extend the resulting advantage.

Concerns as to the extension of benefits of liberalisation of investment agreements in services have arisen during the OECD MAI negotiations, due to the GATS MFN obligation.[23] The discussions dealt with the obligation of extension of treatment in the following terms:

> a MAI member might be prepared to subject to MAI disciplines a service sector that it *had not listed in the GATS schedule*; or the member might have been prepared to offer, in a given service sector, *a greater level of national treatment in the MAI negotiations* than it offered in the GATS negotiations. It was considered that each country would have to take a *policy decision on the acceptability of undertaking a higher level of obligations* under the MAI which *would then be extended, on an MFN basis to all GATS members*.[24]

It is highlighted that the most immediate exception to the GATS MFN is GATS art V, which deals with cases of economic integration.[25] If its conditions are fulfilled, members of the area of integration are exempted from the obligation of the GATS MFN. The discussions in the MAI included ways to make the MAI compatible with GATS art V to avoid free riding, but the characteristics of the treaty led to doubts about its application.[26] In fact, this provision has not been put to test in a dispute settlement case. The Panel in *Canada-Autos* decided that the provision

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[21] Rudolf Adlung, 'International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS' (2016) 17 JWIT 47, 79.

[22] Rudolf Adlung, 'Multilateral Investment Disciplines: Don't Forget the GATS' (Vale Columbia Center on Sustainable International Investment 2014) 117 2 <http://ccsi.columbia.edu/files/2013/10/No-117-Adlung-FINAL.pdf> accessed 15 August 2018. See also McRae (n 5) 42.

[23] Mark Koulen, 'Chapter 9 - Foreign Investment in the WTO' in EC Nieuwenhuys and Marcel Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International 2001) 188.

[24] Katia Yannaca-Small and Marie-France Houde, 'Relationships between International Investment Agreements - OECD Working Papers on International Investment, 2004/01' 12 (emphasis added).

[25] One can also mention the Least Developing Countries (LDC) Services Waiver, which allows non-LDC countries to give preferential market access to LDC countries in deviation of the GATS MFN provision. See WTO, 'Preferential Treatment to Services and Service Suppliers of Least-Developed Countries' WT/L/847, Decision of the Ministerial Conference (17 December 2011).

[26] Yannaca-Small and Houde (n 24) 12.

was not applicable to that situation.[27] The AB in *Peru-Agricultural Products* recognised that, when it comes to services, art V is the only route to assess the conformity of PTAs with GATS art II.[28] In relation to BITs, the WTO Secretariat has stated that:

> Clearly, *BITs are not economic integration agreements permitted under Article V of the GATS*, given their focus on investments (in service sectors and otherwise) and the a priori exclusion of certain modes of supply. In most cases, existing MFN exemptions have not been reciprocated by the other party to the BIT. The latter is therefore bound to extend to all WTO Members *any preferential treatment that may result from the BIT.*[29]

A compelling argument has been made that if the BIT is analysed *in conjunction* with a PTA between the same parties, it could be exempted by GATS art V.[30] This would be even more straightforward if BITs are incorporated as investment chapters in larger agreements liberalising trade in services, as shown in chapter II. The reason is that the conditions for art V would arguably be fulfilled, especially the substantial sector coverage in modes of supply.[31] In this case, the IIA or agreement with an investment chapter would arguable meet the conditions of elimination of substantially all discrimination[32] if pre-establishment rights are granted, even in the face of some exclusions or exemptions.[33]

In any case, another carve-out is GATS art II.2, which deals with MFN exemptions. In this regard, the provision's approach is one of pure negative list in comparison to the approach under the national treatment, which highlights the difficulty in classifying the GATS model as a whole.[34] The lists are subject to

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[27] WTO, *Canada Autos*: *Certain Measures Affecting the Automotive Industry – Report of the Panel*, WT/DS139/R, WT/DS142/R, (11 February 2000) [10.269]–[10.272]. In *Canada-Autos*, the Panel found likeness based on the criteria set by *EC-Bananas* (n 11) and, consequently, an MFN violation; the AB reversed the decision, since the Panel had not analysed if the measure affected services and had not properly assessed the effects of the measure on the wholesalers as services suppliers.

[28] WTO, *Peru: Additional Duty on Imports of Certain Agricultural Products – Report of the Appellate Body*, WT/DS457/AB/R (31 July 2015) [5.113] fn 276, fn 300.

[29] WTO, 'Mode 3 – Commercial Presence: Background Note by the Secretariat' S/C/W/314 (7 April 2010) [63] (emphasis added, fn omitted).

[30] Federico Ortino and Audley Sheppard, 'International Agreements Covering Foreign Investment in Services: Patterns and Linkages' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 212.

[31] Required by GATS art V(1)(a) and fn 1.

[32] Required by GATS art V(1)(b).

[33] Ortino and Sheppard (n 30) 213–214.

[34] Tomer Broude and Shai Moses, 'A Look at the Trade in Services Agreement (TiSA) Negotiations' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016) 392.

periodical reviews and are closed for further additions, unless a waiver under art IX:3 of the Agreement establishing the WTO is granted by consensus or ¾ majority.[35]

The concern as to the extension of investment treaty advantages by means of GATS art II had been present since the discussion of the Uruguay Round and this GATS flexibility led to the inclusion by states of several exemptions.[36] A GATS negotiating document highlighted that the exemption has to be "expressed *in terms of the actual measure that a Member takes* and not merely by reference to the law, agreement or arrangement pursuant to which the measure is taken."[37] However, there are doubts on the scope of the exemptions since members have opted for vague language to accommodate new policy issues and there has been no authoritative interpretation on the scope of flexibilities.[38]

In practice, several members placed exemptions to investment-related matters.[39] The exemptions do not constitute a major problem, since their coverage is narrow and concentrated in terms of sector.[40] Originally, exemptions were present in the lists of Brunei, Canada, Chile, Costa Rica, Guatemala, Jordan, Kuwait, Malaysia, Poland, Singapore, Sweden, Thailand, Trinidad and Tobago, Turkey, US and Uruguay. For example, Singapore exempts Investment Guarantee Agreements; Turkey may extend national treatment to investments of nationals of certain countries; and Thailand could grant national treatment to American businesses and services in several sectors.[41] In the same line, the US has an exemption for BIT entry and stay provisions of natural persons; Uruguay has an exemption on provisions related to transfer and investment of capital; Chile has an exemption concerning dispute settlement procedures in existing and future BITs; Canada and Poland exempt compulsory arbitration of disputes related to service

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[35] See the Marrakesh Agreement art IX:3(a) and GATS Annex on Art II Exemptions [Scope (2)]. In practice, the ¾ majority rule has not been used yet in this case. See also WTO, 'Decision-Making Procedures under Articles IX and XII of the WTO Agreement' WT/L/93 (24 November 1995).
[36] Walida Ben Hamida, 'MFN and Procedural Rights: Solutions from WTO Experience?' in Todd Weiler, *Investment Treaty Arbitration and International Law*, vol 1 (JurisNet 2008) 243.
[37] WTO, 'Issues Relating to the Scope of the GATS' Doc MTN.GNS/W/177/Rev 1 (4 November 1993) para 20 (emphasis added).
[38] Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' (2009) 12 JIEL 357, 377–378.
[39] Adlung (n 21) 69.
[40] Pierre Sauvé, *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003) 323.
[41] WTO 'Mode 3' (n 29) fn 53.

suppliers.[42] Furthermore, Brunei and Malaysia submitted exemptions that provide margin to define foreign equity ceilings.[43]

The provision of reservations in GATS art II.2 is only possible upon the accession of a new member state. Of the states that acceded a bit later only Vietnam, Jordan, Tajikistan, Laos and Russia exempted measures extending preferential treatment pursuant to BITs.[44] From 2015 onwards, all the states that acceded to the WTO included exemptions related to investment treaties – Seychelles, Kazakhstan, Liberia, and Afghanistan. They had sufficient time to think over the subject, and had suffered more pressure to liberalise their services.[45] The language of art II:2 ["maintains"] means that only measures in existence before the entry into force of the GATS, or before the accession of the state, could be included in the exceptions list.[46] If BITs in general are considered a single "measure", the inscription may provide a permanent departure from GATS obligations.[47] As to the cross-sector exemptions, the WTO Secretariat emphasised that several exemptions directly focussed on mode 3 type of provision, such as foreign equity limits and ownership of real estate and land.[48]

In fact, at that occasion, the WTO Secretariat underestimated the potential consequences of the MFN in relation to establishment. It stated the BITs do not have an equivalent of GATS art XVI "market access" and most of them do not cover pre-establishment obligations.[49] The OECD Secretariat also pointed out the limited impact of the issue of overlap, given that only the US and some regional agreements provided for pre-establishment.[50] Nevertheless, Part A showed that current trend is the opposite, which will require analytical tools of interpretation to reassess the impact.[51] The status of open-ended exemptions for future BITs is

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[42] Hamida (n 36) 243–244.
[43] Rudolf Adlung and Martín Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?' (2008) 11 JIEL 365, 395.
[44] See GATS List of Article II Exemptions, available at <www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm> accessed 15 August 2018.
[45] Adlung (n 21) 70, 77.
[46] Wolfrum (n 14) 89.
[47] Adlung and Molinuevo (n 43) 395.
[48] WTO 'Mode 3' (n 29) para 62 (emphasis added, fn omitted).
[49] WTO 'Mode 3' (n 29) para 64 and fn 57.
[50] Yannaca-Small and Houde (n 24) 10.
[51] The OECD has begun work on this issue, as reported in the Annex in Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements' (Organisation for Economic Cooperation and Development 2018) OECD Working Papers on International Investment 2018/01 73–74.

unclear, especially if they are liberalisation treaties.[52] Most probably, states will have to recur to the GATS art V exemption, with all its requirements. As already mentioned, this would be easier if BITs are incorporated as investment chapters in larger agreements.

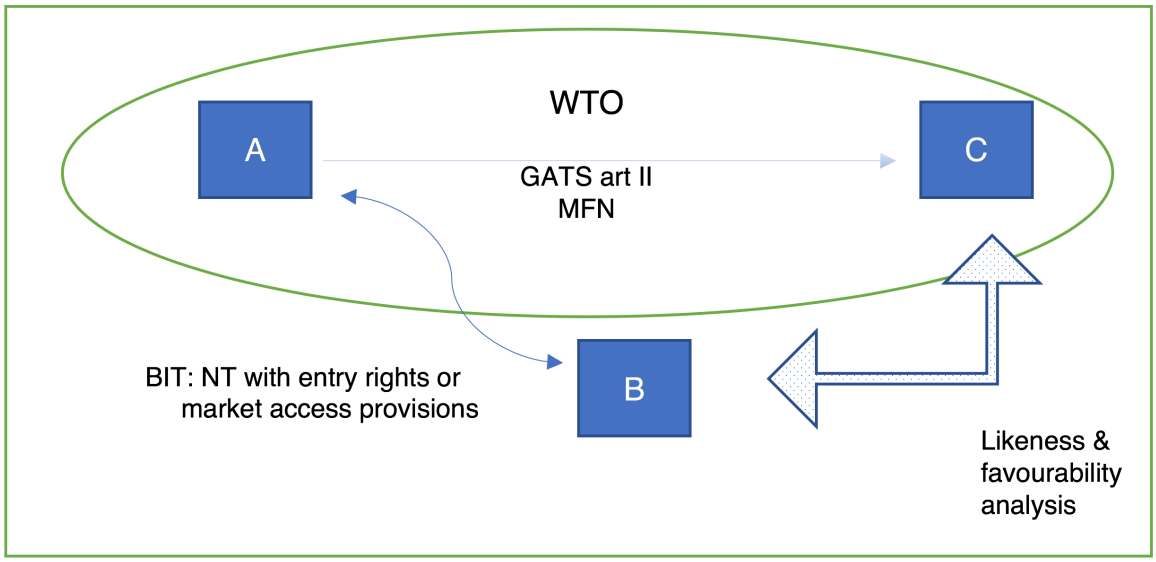
ii. Using the WTO to Incorporate IIAs Entry Rights

Having set the context, the next step is to analyse how the GATS MFN clause operates in practice as regards IIAs that confer entry rights. Also, one should evaluate whether the WTO mechanisms can effectively enforce the MFN obligation and, in consequence, ensure the extension of such rights. Whereas the ILC Study Group recognised that beneficial provisions under BITs can potentially be covered by GATS art II, it expressed concern for the lack of practice and jurisprudence on this issue.[53] As seen in Part A, IIAs confer entry rights by giving national treatment and/or MFN to establishment, acquisition or expansion of investments, and sometimes by imposing market access obligations. Thus, if a state's measure confer this right to another state by virtue of an IIA, the same treatment has to be immediately and unconditionally extended to services and service suppliers of all the other WTO members.

To illustrate, think of a BIT between State A, a WTO Member, and State B.[54] The BIT confers establishment rights under national treatment. State A's regulations allow for the provision of urban transportation services by domestic-owned companies, with basic requirements. The sector is not scheduled in the GATS commitments of State A; therefore, investors from WTO members do not have a priori the right to perform those services or to invest in companies in order to do it. The following chart summarises the situation:

[52] Adlung and Carzaniga (n 38) 378 fn 43.
[53] ILC Study Group 2015 (n 6) 160, para 51.
[54] For a less intricate example, see Ortino and Sheppard (n 30) 205–206.

Chart I – WTO MFN Clause



Imagine that a company from State B[55] wants to provide transportation services in the territory of State A. State A, based on the BIT with State B, chooses then to recognise the extension of national treatment or does not impose restrictions to the provision of those services. Then, a company from State C, which is also a WTO member, wants to provide those same services. State A is under an obligation to immediately confer the same treatment to the investments and investors from State C. Therefore, by virtue of the GATS MFN clause, State A has to "liberalise" investments in this specific service sector to all WTO members under the same conditions granted to investments and investors from State B.

The analysis would necessarily involve the definition of whether the services or service suppliers in mode 3 from states B and C are like, with all the qualifications described in Part A. This would also involve the discussion of whether a cross-mode comparison is possible or required. In any case, in the context of access, while the extension of the MFN to service suppliers aims at ensuring undistorted competition, this does not mean that actual service suppliers and potential ones should get equal treatment.[56] It has been argued that the object and purpose of GATS MFN clause suggest it applies to the treatment towards potential service suppliers "only if and when concrete steps are taken to enter the market."[57]

[55] State B could also be a WTO Member, but for this purpose, let us assume it is not.
[56] Wolfrum (n 14) 85.
[57] ibid.

If this is true, an investor arguably has to attempt entry so that a WTO member can claim that "treatment" has been less favourable.

In any case, State C has to rely on a "measure" taken by State A. This measure can be a general decree extending national treatment to investors from State B or specifically authorising the provision of services. Arguably, it could be a decision that grants admission to the supplier of State B. Or less convincingly, the norm that incorporates the BIT into the legal system of State A. Finally, it has even been sustained that the "mere signature or ratification" of treaty would be a measure: as some investors would enjoy higher market access, this would be considered less favourable treatment.[58]

A particular interpretative challenge for the WTO panel is how to carry out the comparison when a service supplier (investor) from State B has not been established either. In this case, the claim could only be based on the *abstract* treatment given by the BIT. This may have less appeal, given that there is only an applicable standard of treatment, that is, national treatment provided for establishment, and no actual treatment. In general, in MFN clauses, the term "treatment" should be given a wide interpretation: it does not matter if it is granted by domestic law or international agreements nor whether the third state, or its nationals, have availed themselves of the better treatment.[59] In this line, the mere conferral of better rights by a BIT may be considered more favourable "treatment". It is the analysis of "likeness" that is difficult to establish in absence of a comparable supplier from State B that benefitted from those rights and with a potential supplier from State C that has not attempted entry.

All in all, the idea is the more IIAs incorporate entry rights, the wider the potential scope of the GATS MFN clause will be. This is another sign of the substantive convergence in the regulation of access, when it comes to investments in services. The treatment granted to WTO members by a certain state concerning investments will be equivalent to the better treatment conferred by the provisions of national treatment, market access and others in its BITs, especially rights of establishment in services. There are thus more common standards and obligations, which is an increase in the shared characteristics between the

[58] Ortino and Sheppard (n 30) 206–207.
[59] Schill (n 4) 923–924.

regimes. The content of the GATS MFN standard is progressively informed by the content of the rights and obligations of the investment regime.

In fact, the enlargement of the WTO membership means the broadening of the MFN obligation. One cannot exclude this effect, unless the treaties signed with new members are justified under GATS arts II.2 or V, as seen above. Also, it would be difficult to justify MFN breaches under the exception of GATS art XIV, especially in the light of the requirement that the measure does not amount to "unjustifiable discrimination between countries where like conditions prevail."

Coming back to Chart I, State C can ask for the extension of treatment in the form an entry right in services granted by WTO member A to investors of State B. In case of non-extension, the breach of the MFN provision allows the activation of the WTO mechanism, by means of a request of a panel against State A. The decision by a WTO panel would require that State A bring the measures into conformity, complying with the obligation to accord no less favourable treatment to State C supplier and other WTO members. This could require the amendment of legislation, if necessary, or the non-imposition of barriers when access is requested, as seen in chapter III. Therefore, one can say that the enforcement of the GATS MFN obligation has the effect of "incorporating" investment entry rights and obligations contained in other IIAs. This is to extent that those rights and obligations constitute better treatment to prospective investors.

Another possibility is that the IIA contains more favourable market access provisions, such in EU-Canada CETA art 8.4,[60] described in Part A. This certainly amounts to better treatment that falls under the scope of the GATS MFN clause. In this regard, the extent to which the treatment given by PTAs will fit under GATS art V depends on the evaluation of its requirements. In any case, the broad wording of the GATS MFN clause undoubtedly applies to treatment granted by measures which ensure substantive access commitments, such as market access.

Outside the GATS framework, similar examples can also arise in the context of MFN obligations *contained* in PTAs. For example, the CETA text reads:

> Article 8.7 - Most-favoured-nation treatment
> 1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment *no less favourable than the treatment it accords in like situations,* to investors of a third country and to their

[60] Comprehensive Trade and Economic Agreement between Canada and the European Union (signed 30 October 2016).

> investments with respect to the *establishment, acquisition, expansion*, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.
> …
> 4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, *absent measures adopted or maintained by a Party pursuant to those obligations.*[61]

Some have pointed out that the extension of MFN treatment to the pre-establishment phase should be generally accompanied with exceptions and carve-outs.[62] It has also been noted that the MFN clause in CETA does not include a retroactivity limitation, the reasons of which are not clear.[63] This means that the MFN in CETA also potentially covers measures adopted pursuant to obligations in all BITs signed by any of parties before the agreement. While the ILC Study Group acknowledged that in regional trade agreements the interpretation of the MFN clause would be no different than in the WTO or in BITs, it regretted the lack of academic analysis or judicial commentary.[64]

CETA art 8.7(1) is indeed quite similar to the clauses already seen. The text also includes a definition of treatment in art 8.7(4). This goes in line with the concern to avoid any ambiguities and to create a more integrated and consistent coverage of trade and investments.[65] It also states that the mere obligation in other treaties does not amount to treatment if implementing measures are not adopted. As a departure from earlier practice,[66] this substantially narrows down the meaning of "treatment" and excludes some of the examples above that would be possible under the GATS MFN clause. While the EU-Singapore Agreement[67] does not provide for MFN treatment in relation to investments, it clarifies that "treatment"

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[61] (emphasis added).
[62] Antonios Tzanakopoulos, 'National Treatment and MFN in the (Invisible) EU Model BIT' (2014) 15 JWIT 484, 497.
[63] ibid 501.
[64] ILC Study Group 2015 (n 6) 160, para 54.
[65] Adlung (n 21) 84.
[66] Schill (n 4) 929. For a less persuasive reading, see Simon Batifort and J Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111 AJIL 873, 905–907.
[67] EU-Singapore Free Trade Agreement (authentic text as of 18 April 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 15 August 2018.

includes a failure to act.[68] In turn, the MFN clause in the EU-Vietnam Agreement[69] focuses specifically on establishment and provides for a clause similar to the definition of treatment in CETA.[70] Besides, both the CETA and the EU-Vietnam MFN clauses do not incorporate better treatment in the form of an investor-state mechanism, as will be discussed in the next section.

iii. Application to Dispute Settlement

A related, but more general question is whether the GATS MFN would consider as treatment procedural provisions that give access to specific dispute settlement provisions. This section deals with this issue to the extent that it helps to illuminate the meaning of the GATS MFN clause. It is indeed unresolved whether advantages provided in other IIAs, including provisions of investor-state dispute resolution, are covered by the clause.[71] In this line, according to Sauvé, it is not entirely clear whether it is possible for states to amend or clarify their article II MFN exemptions, given that few countries took the precaution to list ISDS as an exemption.[72] It is true that exemptions related to arbitration, such as those included by Canada, Chile and Poland, arguably mean that the consent expressed in a BIT, will not be extended to other countries. What to conclude then in the absence of such an exemption?

This topic has been discussed since the Uruguay Round[73], in the following terms:

> (c) Measures relating to the settlement of dispute pursuant to bilateral investment protection agreements:
> 12. Such measures usually provide for procedures (e.g. binding arbitration) through which a private investor who is the national, or an enterprise, of one party to an investment agreement could settle any dispute that may arise with the government of the host country, which is the other party to the agreement. … The issue then is *whether such measures which provide for special, and presumably*

[68] See art 9.1(5) fn 6, sec A (Investment Protection) of ch 9 [Investment].
[69] EU-Vietnam Free Trade Agreement (concluded January 2016, in the process of ratification) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1875> accessed 15 August 2018.
[70] See arts 4(1) and 4(6) under sec 1 [Liberalisation of Investments] of ch 2 [Investment].
[71] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 312.
[72] Sauvé (n 40) 354.
[73] Ansgar M Wimmer, 'The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment' (1995) 19 World Competition 109.

> *more efficient dispute settlement procedures, could result in more favourable treatment to some Members of the GATS and not others.*[74]

The extract questions whether the availability of dispute settlement mechanisms would be considered more favourable treatment under the GATS MFN. The debate under the MAI in the OECD covered the issue as well. The question was whether consent to investor-state arbitration under the MAI would have to be transferred by the GATS MFN obligation. The delegations were split at the time: while some mentioned that the clause was restricted to substantive obligations, the WTO Secretariat emphasised that it extended to procedural and substantive obligations as well.[75]

Neither has academic doctrine come up with a solution to the issue. Some have argued that the fact that only three states incorporated exceptions – and the others remained silent – would mean that WTO member states believed from the beginning that the subject matter of GATS art II does not cover those issues.[76] Others defend a broad interpretation of the GATS MFN clause encompassing both substantive law and procedural law, so that BIT rights can be "imported" to the WTO agreement; in any case, the compliance procedure should follow WTO mechanisms.[77]

It is important to highlight that "procedural guarantees as elements of substantive treatment and procedural guarantees as elements of international dispute settlement are functionally different."[78] In other words, the application of administrative requirements and licensing procedures that are a part of a standard of treatment are not a contentious issue, different from the application of dispute settlement procedures. While in relation to the former, the WTO DSB has already given an affirmative answer[79] and the point seems far from controversial, the valid

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[74] WTO 'Scope of the GATS' (n 37) para 2(c) (emphasis added). See also Group of Negotiations on Services 'Multilateral Trade Negotiations the Uruguay Round' MTN.GNS/W/114 (12 June 1991) 10-13; Sub-Committee on Services 'Preparatory Committee for the WTO' PC/SCS/M2 (2 August 1994) para 6 and PC/SCS/M4 (23 November 1994) para 9; WTO '1st Meeting of the Council for Trade in Services' S/C/W/1 (15 February 1995) para 5.

[75] Hamida (n 36) 245.

[76] Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 184.

[77] Jorge A Huerta-Goldman, 'Domestic, Regional and Multilateral Investment Liberalization', *Regulation of Foreign Investment*, vol 21 (World Scientific 2012) 85.

[78] Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Review 14, 45.

[79] *EC Bananas - AB Report* (n 11) [205]–[207]. In relation to the GATT MFN, see *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992) GATT BISD 39S/128 [6.8]. In relation to the difference of procedural requirements as a violation

inquiry is whether the GATS art II would require the extension of investment arbitration.[80]

If a state's measure provides consent for an investor to have access to investment arbitration, this seems to amount to treatment under the GATS. This treatment will be less favourable if it modifies the conditions of competition to the detriment of an investor in another member state. Access to international arbitration lowers the risk for the establishment of investment. That is the position that should prevail in the dispute settlement mechanism of the WTO. However, the consequence of such a finding decision would not be to create consent automatically: the WTO member could arguably choose to decline to give consent, suffer retaliation or offer compensations.[81] Alternatively, it could withdraw the consent given to the favoured investor to level off the playing field. While some states may be silently reluctant to bring claims in relation to the issue, this does not mean that a reading of the treaty excludes the possibility.[82]

As highlighted in chapters III and IV, recent treaty practice moves towards the exclusion of entry rights from the investor-state system. The state-state enforcement mechanism is thus the only remaining option for adjudication, but only rarely has this alternative been used to tackle these issues. In turn, the WTO system has more experience in dealing with access issues, as will become apparent in chapters VI and VIII. It has been much more widely used than equivalent mechanisms to enforce entry provisions in PTAs.[83] Thus, when it comes to entry rights, there is less practical use to incorporate consent from the BITs, if the consent cannot be used to trigger an arbitration regarding entry.

The development of this discussion helps to emphasise what matters most here: that all substantive obligations of BITs affecting services, including procedural advantages, are transferred through the GATS MFN standard. From a treaty-making perspective, it might be prudent that drafters of exemptions and non-conforming lists explicitly engage with investment treaty matters. This amounts to

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of the national treatment, see *United States – Section 337 of The Tariff Act of 1930* (7 November 1989) GATT BISD L/6439 - 36S/345 [5.10].

[80] Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 78) 46.

[81] Hamida (n 36) 245.

[82] Adlung (n 21) 79.

[83] Geraldo Vidigal, 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' [2018] JIEL 18.

a recognition that the GATS MFN rule is capable in principle of covering those issues.

b. IIAs MFN CLAUSES: DEBATE RECAST?

i. Scope and Interpretation

Equality of opportunities, including in relation to rights of establishment, has always been a concern at the core of contemporary international investment law: investors rely on the host state's promise of granting no less favourable treatment than investors of their kind.[84] The MFN, as an emanation of the treatment no less favourable, is an important standalone aspect of the bargain in an investment treaty.[85] One could argue that it is less relevant than the national treatment: the invocation of the MFN in the treatment of investments would only be preferable to national treatment in the unlikely situation where a third country investment is treated better than a national one.[86] This conclusion assumes that, different from the GATS, the scope of both standards is the same.[87] In fact, nothing in the MFN [or the national treatment] clauses prevents the host country from introducing measures favouring foreign investors over nationals.[88]

In the context of entry, however, the MFN standard acquires special importance. The MFN clause performs a function that goes beyond the mere protection of investors: it ensures that investors are not given a competitive advantage, which is consistent with IIAs objective as it is in the WTO.[89] The argument that the network of BITs leads towards convergence and function as multilateral system has been successfully put forward.[90] In this light, one could read

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[84] Weiler (n 16) 443, 457.
[85] ibid 457.
[86] ibid 444.
[87] Compare, in this regard, the first BITs signed by China, which included only an MFN clause and no national treatment, eg China-Sweden BIT (signed 29 March 1982) art 2(2) and China-Norway BIT (signed 21 November 1984) art 4.
[88] Martín Molinuevo, *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (Kluwer Law International 2012) 117.
[89] McRae (n 5) 42. For a less persuasive contrary argument, see Facundo Pérez-Aznar, 'The Fictions and Realities of MFN Clauses in International Investment Agreements' (2018) 112 AJIL Unbound 55.
[90] Schill (n 76).

that the extension of investment liberalisation is one the effects of the MFN standard.

The MFN will guarantee in particular the equality in treatment *between* foreign investors. This is the case of legal requirements specifically related to foreign investments (included in the national treatment exceptions or non-conforming measures). The MFN clause will be applicable to the situation where there are discriminatory measures against certain nationalities for political reasons. The MFN clause would be also relevant in situations where there are no comparable national investors.

It is natural then to proceed to the evaluation of the textual expression of the MFN obligation in IIAs. Some of these aspects were analysed in Part A. The MFN clause in the US model BIT grants investors and covered investments treatment no less favourable than accorded, "in like circumstances", to investors and investments "with respect to the *establishment, acquisition, expansion,* management, conduct, operation, and sale or other disposition of investments."[91]

The ILC Study Group explicitly acknowledged that MFN clauses in investment treaties may and do cover the pre-investment period.[92] The discussion of the MFN clause applied to admission is relevant in the light of the approach of the GATS and of BITs such as those based on the US model.[93] In fact, one can notice that the clauses are quite similar, especially the expressions "to accord" and "treatment no less favourable". In turn, a weaker liberalisation is achieved when BITs grant only MFN and not national treatment in relation to establishment, even considering the fact that these treaties generally do not contain exceptions.[94]

Other examples of treaty practice are relevant. Japanese BITs, despite including a classic admission control clause, used to contain a specific clause granting MFN for the admission of investments in the following terms:

> Japan-Russia BIT, art 2(2):
> Investors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favorable than that

[91] art 4 (emphasis added).
[92] ILC Study Group 2015 (n 6) 161-162, para 62 and fn 62.
[93] Giorgio Sacerdoti, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties' (2000) 1 JWIT 105, 109–110.
[94] Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010) 415.

> accorded to investors of any third country *in respect of the matters relating to the admission of investment*.[95]

After 2001, Japanese practice has been in most cases to grant MFN in relation to all investment activities, encompassing establishment, acquisition and expansion. On the other hand, the UK BIT practice traditionally do not extend treatment as regards the entry of investments nor cover investors willing to invest.[96] This would a priori mean that their content is not of interest to this research. The UK model BIT (replicated in several treaties) brings both national treatment and MFN in a single clause, respectively applied to "investments" [art 3(1)] and "investors" [art 3(2)], as follows:

> Article 3
> National Treatment and Most-favoured-nation Provisions
> (1) Neither Contracting Party shall *in its territory* subject investments or returns of nationals or companies of the other Contracting Party to *treatment less favourable* than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
> (2) Neither Contracting Party shall *in its territory* subject *nationals or companies* of the other Contracting Party, as regards their *management, maintenance, use, enjoyment or disposal of their investments*, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
> (3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) of this *Article shall apply to the provisions of Articles 1 to 11 of this Agreement*.[97]

Nevertheless, a remaining question is if UK investors can rely on third parties' BITs which granted national treatment to prospective investors. For example, the UK-Mozambique BIT contains the clause above.[98] Conversely, Mozambique has a BIT with the US with a national treatment clause which covers the entry phase.[99] The same coverage is present in the agreement between Mozambique and Japan.[100]

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[95] Japan-Russia BIT (signed 13 November 1998) (emphasis added).
[96] See eg UK-Singapore BIT (signed 22 July 1975).
[97] UK Model BIT art 3 (emphasis added).
[98] See UK-Mozambique BIT (signed 18 March 2004) art 3(2).
[99] According to the US-Mozambique BIT (signed 1 December 1998) Letter of Submittal, p viii: "Paragraph 1 generally ensures the better of national or MFN treatment in both *the entry* and post-entry *phases of investment*. It thus prohibits, outside of exceptions listed in the Annex, *"screening" on the basis of nationality during the investment process,* as well as nationality-based post-establishment measures." (emphasis added).
[100] Mozambique-Japan BIT (signed 1 June 2013) art 1(e), which includes establishment, acquisition and expansion as investment activities, and art 3, the MFN clause.

Suppose that an UK investor, let us say in the tourism sector, is discriminated in the screening of its investments by the Government of Mozambique.[101] The argument would be more plausible if like investors from Japan and the US have actually been granted approval to their investments. Was the MFN treatment breached and could the UK investor bring an investor-state claim? A possible answer for the substantive issue is that the scope of the UK MFN clause is not wide enough to cover establishment. The *subject matter* of the clause only encompasses other aspects. This is evident by the absence of the reference to establishment, acquisition or expansion in art 3(2). In the UK BITs, no less favourable treatment is due only to investments already made or to investors that made an investment. Also, the qualifier "in its territory" may also limit the scope of measures subject to the standard.[102] The answer for the procedural aspect would be that there is no jurisdiction for claims when there is no investment.[103]

On the other hand, if those qualifiers were not present in the UK clause, the conclusion in relation to the substantive aspect would be different. The reason is because the term "treatment" is very broad. If the MFN treatment is granted by the investment treaty with respect to "all matters" or "all rights", even a sovereign investor may be able to affirm admission rights through the operation of the clause.[104] An easier situation is when the MFN clause explicitly covers the notion of entry[105] or when the definition of investors includes those that "attempt to make" an investment.[106] In relation to the procedural aspect, the impediment would remain and the only option of redress would be state-state dispute settlement.[107]

Another aspect is related to the exclusions and non-conforming measures. Imagine that a Japanese investor wants to enter in Mozambique in a sector, even though the sector is reserved to nationals, by means of its inclusion as a non-

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[101] See, for example, 'Law on Investment' Law No 3/93 (24 June 1993) (Mozambique) art 21.
[102] Facundo Pérez-Aznar, 'The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements' (2017) 20 JIEL 777, 799. See also *Vladimir Berschader and Moise Berschader v The Russian Federation,* SCC Case No 080/2004, Award (21 April 2006) [185].
[103] See UK model BIT art 8(1) [and alternative].
[104] Claudia Annacker, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 Chinese Journal of International Law 531, 548.
[105] See Japan-Russia BIT, clause above (n 95).
[106] See NAFTA ch I art 1139.
[107] See UK-Mozambique BIT art 9.

conforming measure in the Mozambique-Japan BIT.[108] The MFN provision (art 3) accords investors "treatment no less favourable than the treatment it accords in like circumstances to investors of a non- Contracting Party and to their investments with respect to investment activities." The provision on non-conforming measures provides that those treatment standards will not apply to the measures set out in the annex of the treaty.[109] The claim could thus be that the American investor has received better treatment: it can get access to this specific sector since Mozambique did not include *any* exceptions in its BIT with the US.[110] The question is whether the inclusion in the non-conforming list is capable of excluding the sector from the *subject matter* of the MFN clause. The solution boils down to the way in which the non-conforming measure is drafted and to the level of detail in the inscription. In any case, the absence of coherence can be skilfully explored.

All in all, the context requires the comparison between the scope of the several clauses which confer entry rights in BITs and in the GATS. The broad scope of the MFN clause illustrates how incoherence and inconsistency of commitments can be held against the parties and undermine the effectiveness of the rules between the original parties and its exceptions. This equally affects effectiveness by unsettling the balance between the investment liberalisation goal and the safeguard of the host state's regulatory space.

ii. Using Investment Law to Incorporate GATS Entry Rights

The possibility to import WTO obligations into BITs, allowing stronger remedies to the investor for violations of WTO rules, has been discussed and the initial attempts resorted to the umbrella clause or the minimum standard treatment.[111] As most of the later arbitral decisions on umbrella clauses focus on individualised relationships to particular investors,[112] the importation argument would be hard to sustain when it comes to international treaties with inter-state

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[108] See Japan-Mozambique BIT (n 100) art 7. See also Annex I p 58-69, available at <www.mofa.go.jp/mofaj/files/000005929.pdf> accessed 15 August 2018.
[109] Japan-Mozambique BIT (n 100) art 7(1)a.
[110] See US-Mozambique BIT (n 99) art II[2]. Also, according to the BIT Letter of Submittal, p xv: "Mozambique has taken no exceptions to is national treatment obligation or to its MFN obligation."
[111] Huerta-Goldman (n 77) 85.
[112] Jude Antony, 'Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus' (2013) 29 Arbitration International 607, 617–618, 638.

obligations, such as the WTO agreements. Furthermore, the attempts to incorporate WTO law into BITs through the gateway of the fair and equitable treatment under "international law" have not been successful.[113] The option was not entirely compatible with the FTC interpretation of NAFTA art 1105[114] and would constitute an undue stretching of the standard.

Nevertheless, it has been also suggested that WTO law could be incorporated into BITs through the backdoor of the MFN,[115] but arbitral decisions have yet to come to evaluate this possibility. There has been at least one hypothetical illustration in the context of GATS obligations.[116] In this regard, let us refer back to the GATS negotiating document:

> A relevant question to examine in that respect is the extent to which procedures provided for under bilateral agreements would allow an investor of a country which has an investment agreement with the host country to *enforce a GATS right in a more efficient manner* than would be possible under GATS procedures and thereby accord him more favourable treatment than other GATS Members.[117]

The highlighted excerpt mulls the possibility of enforcing GATS rights through an investment treaty. In more precise terms, this would represent the application of the MFN obligation in the IIA, which extends the better treatment represented by those GATS rights. Therefore, this possibility was already envisaged during the discussions in the Uruguay Round. In fact, when it comes to entry commitments, the MFN clause could be used as a shortcut, as shown in the chart below:

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[113] Gaetan Verhoosel, 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 JIEL 493, 500–503.

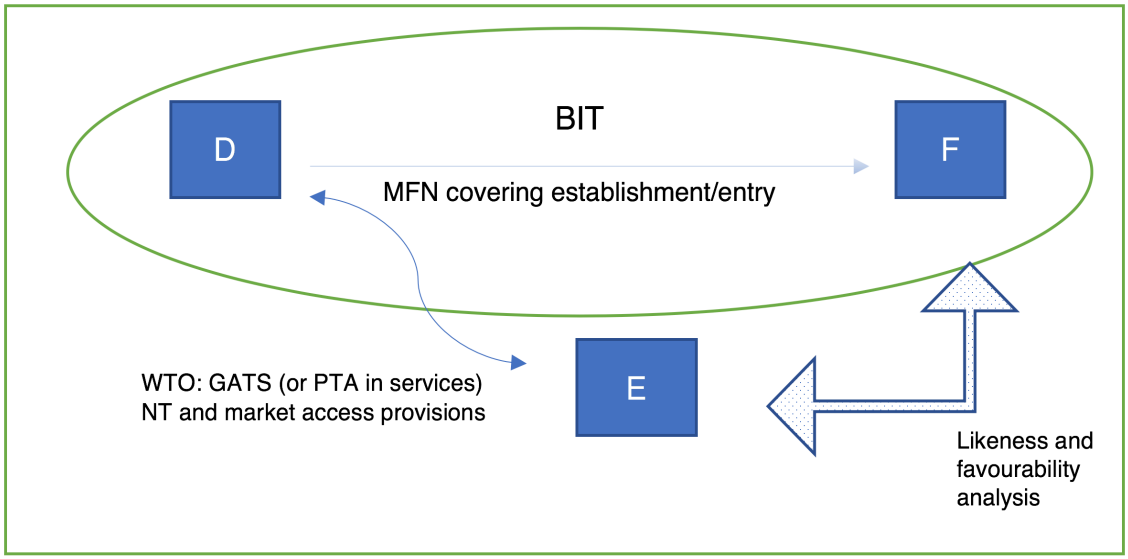
[114] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) at <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 15 August 2018.

[115] Verhoosel (n 113) 499 fn 28. See also *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award on Merits (10 April 2001) 117.

[116] Arguing that the non-compliance with core obligations of the GATS Telecommunications Annex could amount to a breach of certain BIT standards, see ibid 497 (emphasis added, fn omitted) .

[117] WTO 'Scope of the GATS' (n 37) 4, para 13 (emphasis added).

Chart II – IIAs MFN Clause



Suppose that a company from State E, a WTO or PTA member, provides educational services in the territory of State D. State D, based on commitments included in its GATS schedules (or in other PTA covering services), recognises the extension of national treatment to WTO Members or to the parties to the PTA, such as State E. Also, State D does not impose burdensome restrictions to the provision of those services. Now a company from State F,[118] with whom State D has a BIT with an MFN clause regarding entry, wants to provide those same services, claiming BIT rights. State D is under an obligation to confer the same treatment to the service or service supplier from State F, under the same terms offered to State E in the GATS schedules. Therefore, State D has to liberalise the specified service sectors to investors from State F or to withdraw the better treatment granted to investors to State E in order to end the wrongful conduct.[119]

The analysis would necessarily involve the definition of whether both services and service suppliers from states E and F are like. Some emphasise that MFN claims are generally based in de jure discrimination, thus the identification of a comparator is less decisive.[120] This means that the measure is directly benefitting an investor of a certain nationality and not that the benefit arises from the overall effect of the measure (de facto discrimination). Also, State F has to rely on

[118] For this purpose, State F is not a WTO member. There are at least 20 states that have BITs but are not WTO members.
[119] On the issue of cessation, see Pérez-Aznar (n 89) 803.
[120] Tzanakopoulos (n 62) 488–489.

"treatment" of State D towards State E's investor. This would call for the exercise described in chapter I. Treatment can amount to a decree authorising providers from State E or from all WTO or PTA members. Alternatively, it could be a decision that grants admission to State E's supplier. Less persuasively, it could be the norm that incorporates the GATS or the PTA into the legal system of State D.

As seen in chapter I, section b, a tribunal has limited the scope of the MFN clause in an IIA stating that treatment in like circumstances is not the *applicable* legal standards of protection but refers to *actual* treatment.[121] This echoes state parties' submissions in some NAFTA cases.[122] The statement has been followed by commentators reinforcing the argument that this specific treaty term could not import standards of treatment.[123] However, this conclusion has been challenged. Schill convincingly shows that general international law supports the application of MFN clauses to substantive standards of treatment.[124] Multilateral and dispute settlement state practice from the traditional home and host states support this understanding, as posited by Paparinskis.[125] Old treaties which simply confer most favoured "treatment" should be interpreted as ensuring equality among foreign investors, irrespective of whether different treatment has been granted by domestic law or by substantive treaty standards.[126]

When it comes to establishment, the possibility to use the MFN provision to rely on the standard of treatment given by another treaty is key to ensure equality in liberalisation. Unless a comparable investor has been treated better (in the example, the investor from state E), prospective investors will exclusively base their claims on the standard of national treatment conferred by another more favourable agreement (in the example, the GATS or a PTA). The analysis should also take into account whether the BIT exempts regional trade areas from the scope of its MFN clause. There may be some divergence between the scope of host state commitments under the GATS or PTAs and the breadth of negative lists

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[121] *İçkale İnşaat Limited Şirket v Turkmenistan*, ICSID Case No ARB/10/24, Award (8 March 2016) [329]-[332].
[122] See eg *Mesa Power Group LLC v Canada*, UNCITRAL, PCA Case No 2012-17, Canada's Rejoinder on the Merits (2 July 2014) para 42; *Mesa Power Submission of Mexico pursuant to NAFTA, article 1128* (25 July 2014) para 13.
[123] Batifort and Heath (n 66) 909–910; Pérez-Aznar (n 102) 798–800.
[124] Schill (n 4) 921–926.
[125] Martins Paparinskis, 'MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the "Conventional Wisdom"' (2018) 112 AJIL Unbound 49, 51–52.
[126] Schill (n 4) 933.

in their liberalisation BITs. Although possible, this is an unlikely scenario, because, in general terms, GATS commitments have been much less ambitious than the scope of commitments implicit in liberalisation BITs.[127]

A connected issue is whether the general exceptions of GATS art XIV are also incorporated into the BIT. This would be perhaps an expansive reading, but touch at the very core of the question on the balance between liberalisation goals and the host state's regulatory space. If one reads the general exceptions as defences, then they would not be incorporated: the BIT defences are the ones that would prevail. If they are seen as a qualification of the right of establishment, they would arguably have to be incorporated. This is not an easy question and arbitral decisions have not yet provided clarity.

Therefore, at least in theory, it seems to be possible to use investment treaties to "incorporate" GATS rights in relation to establishment. The issue has not been raised in investment arbitral decisions exactly because GATS obligations in relation to established investments are lighter than what is generally found in BITs. On the other hand, the inclusion of the notion of entry changes the incentives. Market access and national treatment obligation upon entry are generally stronger in the GATS than in most BITs. Nevertheless, considering the analysis made in chapters III and IV, one could notice that entry rights are progressively being excluded from investor-state dispute settlement. There are also several barriers as to the possible remedies. Thus, it would be unlikely that this path is effective, as it would be devoid of practical utility.

iii. Application to Dispute Settlement

The interpretation of MFN clauses with the consequence of establishing jurisdiction or overcoming admissibility burdens to investor-state tribunals for specific situations has taken divergent paths in arbitral decisions. Decisions have gone both ways, putting forward arguments or interpreting the clause in favour[128]

[127] Adlung and Molinuevo (n 43) 371–374.

[128] With arguments in favour of a broader application, one may cite the following decisions: *Emilio Agustín Maffezini v The Kingdom of Spain,* ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) [54]; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) [104] in relation to FET; *Siemens AG v Argentina,* ICSID Case No ARB/02/8, Decision on Jurisdiction (2 August 2004) [85], [102]; *Gas Natural SA v Argentina*, ICSID Case No ARB/03/10, Decision on Jurisdiction (17 June

or against[129] a broader reading, but each had its nuances and peculiarities. In sum, the MFN clause has been applied to dispense with the requirement of previous litigation in the domestic courts, to expand the material scope of the jurisdiction or to create consent when there was none. It has been the object of several academic discussions.[130] The ILC Study Group has also examined the matter and published its conclusions in its Report.[131] The consensus seems to be that it all boils down to the interpretation of the terms used in the wording of the MFN clause (eg treatment, favourable…).

The most extreme consequence of a wider reading would be to consider that the MFN clause in an IIA, in which there is no consent whatsoever for any

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2005) [49]; *Suez, Sociedad General de Aguas de Barcelona and InterAguas SA v Argentina,* ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006) [64]-[66]; *Telefónica SA v Argentina*, ICSID Case No ARB/03/20, Decision on Jurisdiction (25 May 2006) [100]; *National Grid plc v Argentina*, UNCITRAL, Decision on Jurisdiction (20 June 2006) [89]-[94]; *AWG Group Ltd v Argentina*, UNCITRAL, Decision on Jurisdiction (3 August 2006) [59]; *RosInvestCo Uk Ltd v Russian Federation,* SCC Case No V079/2005, Award on Jurisdiction (1 October 2007) [133]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan,* ICSID Case No ARB/05/16, Award, (29 July 2008) [575] in relation to FET; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan,* ICSID Case No ARB/03/29, Award (27 August 2009) [153]; *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Award (21 June 2011) [99]; *Abaclat and Others v Argentine Republic,* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) [590]-[591]; *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) [66]-[67]; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic*, ICSID Case No ARB/09/01, Decision on Jurisdiction (21 December 2012) [186]; *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013) [62]-[64]; *Venezuela US, SRL (Barbados) v Bolivarian Republic of Venezuela,* PCA Case No 2013-34, Award on Jurisdiction (26 July 2016) [102].

[129] With arguments against a broader application, one may cite the following decisions: *Yaung Chi Oo Trading Pte Ltd v Myanmar*, ASEAN Case No ARB/01/1, Award (31 March 2003) [83]; *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13 Decision on Jurisdiction (9 November 2004) [119]; *Plama Consortium Limited v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) [198]; *Telenor Mobile A.S. v Hungary*, ICSID Case No ARB/04/15, Award (13 September 2006) [95]*; Berschader v Russian Federation* (n 102) [212]; *Renta4 v Russian Federation*, SCC No 24/2007 Award on Preliminary Objections (20 March 2009) [119], set aside by the *Svea Court of Appeal* Judgement T9128-14 (18 January 2016); *Wintershall Aktiengesellschaft v Argentina*, ICSID Case No ARB/04/14, Award (8 December 2008) [160]; *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No ARB/07/6 Decision on Jurisdiction and Competence (19 June 2009) [220]; *Austrian Airlines v The Slovak Republic*, UNCITRAL Final Award (9 October 2009) [129]; *ICS Inspection and Control Services Limited (UK) v Republic of Argentina*, UNCITRAL, PCA Case No 2010-9 Award on Jurisdiction (10 February 2012) [313], [326]; *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1 Award (22 August 2012) [281]; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1 Award (2 July 2013) [7.9.1]; *ST-AD GmbH v Republic of Bulgaria*, UNCITRAL PCA Case No 2011-06, Award on Jurisdiction (18 July 2013) [402]; *Ansung Housing Co, Ltd v People's Republic of China* ICSID Case No ARB/14/25, Award (9 March 2017) [136]-[141]. In a different context, see *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8 Award (12 May 2005) [377].

[130] Eg Kurtz (n 5); Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 78).

[131] ILC Study Group 2015 (n 6); cf ILC 1978 (n 15).

particular forum of investor-state arbitration, is able to provide jurisdiction, by "importing" the consent expressed in another IIA. The decision *Venezuela (Barbados) v Venezuela* has reignited the debate by accepting this possibility; the award forcefully concluded that: "[both States] *have agreed expressis verbis that the MFN treatment clause shall apply to Article 8*, i.e., to dispute settlement provisions and conditions for resorting to international arbitration thereunder."[132] On the other hand, the dissenting opinion has claimed that "MFN clauses do not possess the power *to express consent*, even though they would be able to impose *the obligation to consent* to international arbitration if their content allows so."[133]

One could argue that the clause grants nothing but a right of a treaty party to expect that the other party (the host state) will express consent whenever asked. Therefore, if consent is not given, there is a breach of the clause, thus, a breach of treaty, and this will be an international wrongful act with the usual consequences. However, under another line of thought, consent could perfectly be given by three legal instruments (state's consent in third party BIT, MFN clause, and investor's consent). As highlighted by Paparinskis:

> The argument that consent given in one BIT transforms itself into a promise of consent by passing through an MFN clause misstates the content neutral nature of the MFN clause. It attracts *nothing more and nothing less than the more favorable treatment in other treaties*, without modifying its substance.[134]

Investment arbitral decisions have been perhaps too concerned with the opposition of substantial versus procedural rights (the right to initiate an arbitration). It would be advisable to reframe the question back to the ordinary meaning of "treatment" and "objective favourability", commonly used terms in the clauses. Both the ILC Study Group Report and some decisions put emphasis on "party autonomy": there is no a priori exclusion of the possibility that the parties agrees in a language that expressly allows for the importation of consent.[135] The UK Model BIT took that path.[136] While arguments put forward in the WTO context should not be used in interpreting clauses in investment treaties,[137] the possibility of extension should not be excluded. The question seems to be whether the

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[132] *Venezuela US, SRL (Barbados) v Venezuela* (n 128) (emphasis added, fns omitted).
[133] ibid, dis op of Arbitrator Marcelo Kohen (emphasis in the original).
[134] Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 78) 40.
[135] ILC Study Group 2015 (n 6) para 162.
[136] See art 3.3 (n 97).
[137] ILC Study Group 2015 (n 6) para 48; Hamida (n 36) 246.

possibility of invocation of responsibility by adjudication in a specific mechanism can be considered treatment and whether the very existence of a tribunal is more favourable treatment.

In this matter, the analysis of "favourability" brings the problem of comparability for procedural issues and their incommensurability.[138] Non-comparable matters cannot be evaluated under the scope of the MFN. In any case, there seems to be a clear advantage in competition for an investor in services which have access to ISDS compared to one which has not; the former would bear fewer transaction costs and could offer more competitive prices.[139] The recurrent issue, however, is what the interest in incorporating investor-state arbitration would be in the context of entry rights. However, while it is true that the incorporation may not address the particular challenges of access, for the reasons seen in chapters III and IV, the relevance of the debate lies on the confirmation of the broad scope of the clauses.

c. *EJUSDEM GENERIS*: LIBERALISATION VS PROTECTION

One could raise some points against the application of the MFN provision in terms of the subject matter of the MFN clause, the focus of the interpretive rule of *ejusdem generis*.[140] It could be initially argued that trade and investment are not a facet of the same economic phenomenon. This would be hard to defend in a context of GVCs and the servicification of the world economy, as suggested in the introductory chapter. Another argument would maintain that treaties of protection of investments and treaties which result in the liberalisation of trade are essentially different. Attention is turned to this line of reasoning.

One must first bear in mind that the *ejusdem generis* rule requires that the benefits be of the same category as expressed in the subject matter of the clause and not exactly that the treaty including the clause and the treaty which provided

[138] Martins Paparinskis, 'Investors' Remedies under EU Law and International Investment Law' (2016) 17 JWIT 919, 934–935.
[139] Schill (n 76) 181.
[140] See ILC Study Group 2015 (n 6) paras 15, 35, 72, 76, 79, 85-87, 147, 158, 191, 214. See also ILC 1978 (n 15) which provides in its art 9(1) "Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause."

better treatment be of the same category.[141] In *EDF v Argentina*, the tribunal rejected the reliance on the *ejusdem generis* rule to try to avoid the incorporation of umbrella clauses.[142] The losing argument was that umbrella clause obligations, as related to the domestic law, were of a different kind compared to proper public international law obligations.[143] MFN provisions in IIAs can be invoked in relation to provisions contained in treaties of a different nature, which is evidenced by exceptions related to tax treaties in regional economic agreement in IIAs.[144]

It is no surprise though that MFN clauses may operate differently given different regime objectives.[145] The focus on the textual expression of the respective clauses may require some analysis of the character of the treaties (IIAs or the GATS) in which they are inserted and of the treaties from which the rights are incorporated. This is particularly evident when the clause refers to all matters or measures covered by the agreement.

There are several reasons to believe that rights of better treatment under the form of entry commitments will be of the same category. As an analogy, it might be helpful to rely on the discussion of engagement with 'sameness' of subject matter of the treaty.[146] What is important here is to check how the term "subject matter" has been interpreted. Cases involving intra-EU BITs dealt with the issue. To conclude that the treaties had not the same subject matter, the *Eastern Sugar v Czech Republic* tribunal considered the fact that EU law provided for the "right to invest" and the "free movement of capital" in contrast to the BIT in question, which provided for investment protection after establishment.[147] The Tribunal in *EURAM*

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[141] See ILC 1978 (n 15) 30, which states in the commentaries to art 9.1 in para 12: "It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of a most-favoured nation clause." (emphasis in the original, fn omitted). See also Daniel Vignes, 'La Clause de La Nation La plus Favorisée et La Pratique Contemporaine : Problèmes Posés Par La Communauté Économique Européenne (Volume 130)' [1970] Collected Courses of the Hague Academy of International Law 227.

[142] *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012) [929], [934].

[143] ibid [925]. The tribunal also recognised that the matter involved a substantive treaty provision and incorporating the provision was the natural effect of the MFN [932]-[933].

[144] Pérez-Aznar (n 102) 801.

[145] Michael Waibel, 'Putting the MFN Genie Back in the Bottle' (2018) 112 AJIL Unbound 60, 63.

[146] According to the VCLT, treaties relating to the same subject matter then give rise to different consequences: priority of the provision of one of the treaties (art 30.2); compatibility of interpretation (art 30.3) or termination of the previous treaty (art 59). See Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[147] *Eastern Sugar BV (Netherlands) v The Czech Republic,* SCC Case No 088/2004, Partial Award (27 March 2007) [161]-[164].

v Slovakia did not accept the focus on goals or overall purposes of the treaty; it stated that the subject matter "is inherent in the treaty itself and refers to the *issues with which its provisions deal*, i.e., its topic or its substance."[148] However, the key justificatory argument conflated in the end with a systemic teleological approach. The Tribunal relied on the fact that the BIT fostered investment flows through protection while EU law provided for the creation of the EU internal market and on the fact that foreign direct investment was only later incorporated to EU's competence.[149]

To some extent, one could say that the logic of treaties of investment liberalisation is different from treaties of investment protection. The economic argument in investment protection is related to risk: an investor would only invest if it is given certain sufficient assurances which lower its risk.[150] In fact, capital-importing states generally need to persuade investors to increase the size and duration of its investments, in other words, "to invest for the longest time possible and for the lowest possible return."[151] In turn, investment liberalisation measures affect investment that will be made. These measures will be beneficial to the investor of the home state, which is already willing to invest and to take the risk. It does not invest yet because it is not allowed to do so or it finds the conditions too strict.

Nevertheless, whereas the conceptual tension between treaties which grant investment protection and treaties which result in investment liberalisation, such as the GATS, is evident, this distinction does not make sense in practice. The artificial separation between the normative goal of protection of foreign investor and liberalisation of trade restrictions resulted from contingent factors and is now indefensible.[152] The strict divide between investment protection treaties and liberalisation treaties seems to have lost its explanatory appeal. In several circumstances, these are two facets of the same topic and substance: some

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[148] *European American Investment Bank AG (EURAM) v Slovak Republic,* UNCITRAL PCA 2010-17, Award on Jurisdiction (22 October 2012) [170]-[172] (emphasis added).
[149] ibid [178], [183]-[184].
[150] It is important to stress that "someone will always be prepared to speculate, but *only if there is a spectacular rate of return*—after which both the investment and the profits vanish." Jan Paulsson, 'The Power of States to Make Meaningful Promises to Foreigners' (2010) 1 Journal of International Dispute Settlement 341, 347 (emphasis added).
[151] ibid.
[152] Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016) 279.

regulatory barriers restricting establishment may at times be tackled by both protection mechanisms or liberalisation provisions contained in a BIT.

Another angle to go about sameness of subject matter is a rule-by-rule basis, that is, "two rules have the same subject matter if they apply to the same facts".[153] In this regard, *Eureko v Slovak Republic* acknowledged that while treaties need not be fully "co-extensive", there must be "more than a minor overlap or incidental overlap."[154] In this sense, chapters I and II extensively explored the shared characteristics between the treaties in both regimes and concluded that they regulate the same issues. It is hard to disagree with the idea that treaties that regulate trade in services, including the juridical notion of commercial presence, and treaties that regulate investments and grant establishment overlap substantially. Thus, particularly in the services area, the provisions and rights associated with them can be considered as part of the same "genus".

In sum, an objection to the effects described in the previous sections based on the *ejusdem generis* rule would arguably not succeed as a general argument. It would only play out if certain expressions limit the scope of the MFN clause. It is the case when there is a qualifier in the scope of the covered investment activities, as highlighted in relation to the UK BITs. The rule is not an obstacle to considering that entry rights and obligations in BITs and in the GATS are in theory reciprocally incorporated. In principle, a GATS liberalisation commitment must be extended to non-WTO members which have BITs with these clauses. Likewise, a BIT liberalisation commitment should be extended to WTO members.

It was pointed out in Part A that the level of obligation of some BITs have exceeded what was covered by the GATS; therefore, the GATS MFN clause applies to those situations.[155] It has been shown that there is a wide gap for several least developing countries when it comes to the national treatment commitments in BITs and the GATS commitments, as the Mozambique example denotes.[156] US BIT partners, for instance, included commitments on an average of 83% of their

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[153] Respondent's position in *EURAM* v Slovak Republic (n 148) [159] rejected by the Tribunal, which further stated that "a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different" [168-169].

[154] *Eureko BV (Achmea BV) v Slovak Republic,* UNCITRAL PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) [242].

[155] Wimmer (n 73) 116.

[156] Adlung and Molinuevo (n 43) 373.

services sectors, while on the GATS the average was 40%.[157] The MFN clause in GATS offers a much greater sectoral scope compared to investment agreements, since it excludes fewer sectors.[158] It has thus the power to level off the gap, to the detriment of the regulatory space.

While not a conflict per se, the situation may signal at the same time sloppy drafting, unskilful negotiation or power imbalance in treaty making. The fact that the impact of these clauses was not envisaged before may undermine the effectiveness of the rules as it disturbs the balance between the attainment of the goal of investments liberalisation and the safeguard of regulatory space. Given the high degree of interaction and linkages between the obligations, even in absence of convergence in treaty making, there is a broad range of common standards and obligations.

Most interestingly, the discussion of the scope of the GATS MFN clause did not arise in the WTO but in an investment dispute. The broad language of the MFN in GATS was tested in *Menzies v Senegal*, where the claimant attempted to raise the GATS MFN obligation as the basis for consent to investor-state arbitration.[159] In this regard, the jurisdictional decision of the investment tribunal had to rule on whether there was consent to investor-state arbitration based on the fact that the host state is a WTO member, and thus, a signatory of the GATS.

The host state can always state in its defence that it has not given consent. Then, after the denial, a case could be brought to the WTO with the claim that the host state has not conferred this advantage on an MFN basis. A different argument is that the GATS MFN clause operates automatically, extending consent to other members, because this is per se considered less favourable treatment and equality of conditions operates immediately.

The *Menzies v Senegal* tribunal decided that the GATS MFN clause could not provide the basis for consent, therefore, no jurisdiction was found in this regard. The main reasons for the court decision were, firstly, that consent should be clear, unambiguous and express.[160] Nevertheless, this reasoning may lack support. The

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[157] Adlung (n 21) 76.
[158] Molinuevo (n 88) 134.
[159] *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal* ICSID Case No ARB/15/21, Award (5 August 2016). See also UNCTAD, 'World Investment Report' (United Nations 2016) UNCTAD/WIR/2016 106, 121.
[160] *Menzies v Senegal* (n 159) [130].

ILC Study Group registers the opposition to the interpretation that there is a higher burden for a party to invoke the MFN clause to a question of jurisdiction.[161] Dispute settlement provisions should be interpreted as any other treaty clause.[162] Besides, there has been support in academia and in the ICJ for the view that international law does not require consent to be interpreted strictly.[163]

The second ground for the refusal of jurisdiction was that GATS obligation provided for an obligation to grant consent in the future: an obligation cannot be mixed up with its execution.[164] This reasoning resembles the argument brought by Marcelo Kohen's dissent in the *Venezuela (Barbados) v Venezuela* case and may have some support.[165] The argument that the situation in relation to the claimant is one of the extension of the offer and not of a right to be given the offer was not accepted by the tribunal.[166]

As the third ground of refusal, the tribunal analysed the debates at the moment of the negotiation of the GATS and the current treaty practice to claim that states have never explicitly intended that the GATS would extend the offer to arbitrate.[167] However, the fact that states kept negotiating BITs (which cover other types of investments, such as in the production of goods, intellectual property and financial bonds) cannot be used to conclude that the GATS MFN clause had not included access to international arbitration. Besides, the tribunal incorrectly assumed that the two systems developed in distinct directions and that one did not take into account developments in the other. This is not accurate, given the discussion in the sections. In sum, only the second set of reasons may have some legal grounds.

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[161] ILC Study Group 2015 (n 6) paras 102-103.
[162] *Suez* (n 128) [66]; *Austrian Airlines* (n 129) [95].
[163] *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection Judgment) [1996] ICJ Rep 803, 847 [35] (Separate Opinion by Judge Higgins); Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 78) 40; Christian Tomuschat, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012) 610–611. For a more nuanced view, see Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 350–352.
[164] *Menzies v Senegal* (n 159) [136]-[137].
[165] See (n 133). For a more critical assessment, see Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 78) 40.
[166] *Menzies v Senegal* (n 159) [140].
[167] ibid [149]-[150].

The decision also discussed the direct effect in the international arena of the GATS principles, to the benefit of service providers and investors.[168] The answer may in the end depend on whether international arbitration is rooted in a specific national legal system or not.[169] In any case, what matters most here is what the interpretative analysis of the GATS MFN, carried out by an investment tribunal, revealed in terms of the potential of the clause. This is decisive to the way that liberalisation commitments are undertaken and carve-outs are drafted.

d. CONCLUSION

Based on the foregoing analysis, even if the regulation of the entry of investments in both regimes remains separate and there is no treaty-making convergence at all, there are still several possibilities of interaction. The MFN clauses in both the WTO and the investment law systems seem capable of incorporating reciprocal obligations. The coherence/consistency aspect of the framework of substantive rules, exposed by the MFN clause, will have an impact on their effectiveness.

This contribution has tried to fill the existing gap in the literature dealing with certain effect of the MFN clauses. There are no panel decisions on whether a WTO member can claim benefits granted through a BIT signed by another WTO member, if the treaty sets more favourable treatment to services suppliers. In reality, this reflection anticipates future contentious issues.

In particular, MFN clauses have the power to incorporate more favourable treatment, in the form of entry commitments, from other regimes. This conclusion comes from the broad wording of the GATS MFN clause and from the inclusion of establishment in MFN obligations in BITs. Therefore, liberalisation commitments that constitute better treatment are extended from one regime to the other. This has not been sufficiently explored by states.

The effects of the MFN standard may, to some extent, homogenise or uniformise the rights and obligations throughout the regimes, striking a new balance between liberalisation goals and regulatory space. It also provides a

[168] ibid [112]. See also [120].
[169] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Brill 2010) 67–150.

systemic linkage for this balance, as an indication of progressive convergence. The analysis of the case studies may cast light on how the application of MFN clauses affect the effectiveness of rules and exceptions negotiated by states.

CHAPTER VI – SCREENING OF FOREIGN INVESTMENTS: FROM COMMITMENT TO SOVEREIGNTY?

a. DEFINITION AND COVERAGE

The entry of foreign investments into countries is subject to domestic controls of different nature. This section deals with the screening of foreign investments. Screening will refer to all domestic procedures and mechanisms through which a state analyses, or is notified of, a specific and prospective foreign investment to evaluate whether and under which conditions it will be allowed to take place.

As seen in Part A, most states do not require authorisation for a foreign investment to be made. While the fulfilment of certain criteria and the compliance with procedures may be mandatory for the performance of the activity to which the investment refers,[170] the act of investing, that is, of establishing an investment is not generally subject to screening.[171] In fact, individual screening mechanisms were getting rarer and forthright prohibitions becoming less common. However, as recent developments have shown, there may be renewed concerns as to mergers and acquisition by foreign companies, which may lead to tighter investment screening and closer competition law scrutiny.

If states opt to have oversight mechanisms, they may adopt several forms, as follows. When it comes to foreign direct investment: an *industry specific approach* encompasses approval mechanisms for investments connected to sensitive sectors, especially when certain thresholds are reached; a *targeted transaction approach* involves the analysis by a specific organ of foreign investment transactions which raise concerns related to national security; a

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[170] As highlighted in the *PSEG v Turkey* Award, "it is quite common that countries, host to an investment, will require a *number of other authorizations to permit the investment to operate a number of specific activities*, but in so far as the authorization to invest is concerned only one decision by the pertinent government service suffices." *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Decision on Jurisdiction (04 Jun 2004) [118] (emphasis added).

[171] There may also be additional requirements, such as registration or notification to the Central Bank or other authorities, but they are generally for operational purposes, eg repatriation of profits.

comprehensive approval regime includes, among its variations, mechanisms allowing for intervention based in broader criteria.[172]

The institutional framework that will implement these different approaches can also vary. For instance, a state can set up a commission to evaluate foreign investments. In Europe, member states are able to establish such types of review, provided that the procedure and outcome do not go against European law and the freedoms of movement of capital and establishment.[173] In Germany, some highlighted the risk of a "protectionist spiral" after the implementation of a system of review by "public order" of foreign acquisitions of German companies.[174] In France, an illustration of the *industry-specific model,* the scope of the authorisation procedure depends on whether the investment originates from Member States of the EU or not, this discrimination being arguably acceptable under TFEU art 64[175] and under the WTO.[176]

In the US, the main example of the *targeted transaction approach*, the Committee on Foreign Investments (CFIUS) has the power to vet foreign transactions that could impact on national security.[177] Investments by foreign-controlled government companies and sovereign wealth funds are more carefully screened.[178] This naturally suggests that Chinese and Russian investments have been lately under closer scrutiny. While the process, which may end up with a prohibition decision by the US President, has been described as streamlined and

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[172] For details on this classification and a comparison of state practice, see Mark A Clodfelter and Francesca MS Guerrero, 'National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 175–179, 187–220.

[173] Julien Chaisse, 'The Regulation of Sovereign Wealth Funds in the European Union: Can the Supranational Level Limit the Rise of National Protectionism?' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 485–486, 490–491; Thomas Jost, 'Sovereign Wealth Funds and the German Policy Reaction' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 458–460.

[174] Jost (n 173) 461.

[175] Treaty on the Functioning of the European Union (TFEU) art 64(1) and (2).

[176] Chaisse (n 173) 490.

[177] James K Jackson, 'The Committee on Foreign Investment in the United States (CFIUS)' (2017) Congressional Research Service RL33388 <https://fas.org/sgp/crs/natsec/RL33388.pdf>.

[178] Clay Lowery, 'The U.S. Approach to Sovereign Wealth Funds and the Role of the CFIUS' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 420.

balanced, it is not free from the "dangers of politicization".[179] Even greenfield investments, that is, not related to a merger or acquisition, have been prohibited under that scheme.[180] Economic security, including job and company protection, should not be part of the analysis,[181] but nothing prevents it from being reframed as a national security concern.[182]

Private foreign investments have been subject to reservations, especially in the case of short-term volatile investment, such as hedge funds.[183] States may wish to limit foreign takeovers for concerns such as a relocation of headquarters, which may lead to a decrease or shift abroad of senior management and associated local services.[184] In Canada, an example of the *comprehensive approval regime*, some have expressed concern that issues of economic security and protectionist pressures play an undue role in the investment review, which may result in discrimination against certain types of FDI.[185]

Sometimes the merger control regime constitutes the form of screening of foreign investments.[186] Whilst the safeguard of competition is generally the reason for the imposition of conditions, other factors may be taken into account, provided they are within the powers of the competent authority. For example, in the UK, the merger mechanism allows for a review in the light of the public interest.[187] There is express provision for the intervention of the Secretary of State in situations involving national security, media plurality and stability of the financial system. In case the Secretary of State raises an intervention notice, this may lead to a second-phase investigation from the Competition and Markets Authority (CMA) in relation

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[179] Alan P Larson and others, 'Lesson from CFIUS for National Security Reviews of Foreign Investment' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 423–427.
[180] See the prohibition of the investment of the Russian Roscomos to build GPS monitor stations in the US and the concerns of Russia Rosneft eventually exercising control over refineries in the US. Jackson (n 177) 31, 33.
[181] Lowery (n 178) 420.
[182] For a review of national security policies concerning investments, see Joachim Pohl and Frédéric Wehrlé, 'Investment Policies Related to National Security: A Survey of Country Practices' (2016) OECD Working Papers on International Investment 2016/02.
[183] Eduardo Safarian, 'The Canadian Policy Response to Sovereign Direct Investment' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 432.
[184] ibid 435–437.
[185] ibid 448–450.
[186] Sornarajah (n 71) 114.
[187] Enterprise Act 2002 (UK) secs 58 and 153.

to the interest concerned.[188] In the end, the Secretary of State will make a final decision on whether the public interest is affected and may impose remedies, including the prohibition of the merger.[189] Both national and foreign companies are subject to the same scrutiny. However, in foreign transactions, this decision is equivalent to a denial of a foreign investment, similar to the cases that will be analysed in the following sections.

The UK claims that the process follows clear and transparent procedures, with limited grounds for exceptional intervention, in line with an open approach to foreign investment.[190] Most of the intervention notices up until now have been raised for reasons of national security.[191] Nevertheless, in the end, the final decision, including the prohibition of the investment, will be subject to the political evaluation and discretion of the Secretary of State, though necessarily taking into account the CMA report. Fears about politically motivated investments in UK companies loom large and may provide context for intervention, despite UK's liberal tradition.[192] Also, there have been calls for the expansion of the hypotheses for the public interest grounds test in order to prevent foreign takeovers of UK companies,[193] especially in the light of the exit of the UK from the European Union.

At the EU level, it has been shown, for example, that when it comes to the analysis of acquisitions by Chinese state-owned companies, the EU competition authority has used slightly different standards than it had used in the analysis of intra-EU mergers.[194] Rather than following a rational and legally sound method, the Commission might have been balanced by an unfavourable public perception of foreign direct investments from China.[195]

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[188] ibid secs 59-65
[189] ibid 66
[190] OECD, 'Public Interest Considerations in Merger Control – Note by the United Kingdom' (June 2016) DAF/COMP/WP3/WD(2016)9 paras 25, 33.
[191] As listed in OECD (n 190) 4.
[192] Chaisse (n 173) 489.
[193] Antony Seely, *Mergers & Takeovers: The Public Interest Test* (*Briefing Paper* No 05374 1 September 2016) House of Commons, 42-44. See also Secretary of State for Business, Energy and Industrial Strategy, *National Security and Investment A Consultation on Proposed Legislative Reforms Presented to Parliament* (24 July 2018).
[194] Angela Huyue Zhang, 'The Anti-Competitive Effects of State Ownership' (Social Science Research Network 2017) SSRN Scholarly Paper ID 2927456 <https://papers.ssrn.com/abstract=2927456> accessed 15 August 2018.
[195] Angela Huyue Zhang, 'Foreign Direct Investment from China: Sense and Sensibility' (2014) 34 Northwestern Journal of International Law & Business 395.

Fears have indeed increased owing to the prominence of sovereign wealth funds as relevant players in the international investment arena. Generally focussed on long-term commitments of capital,[196] sovereign investments have concentrated on the services sector.[197] Underlining that certain classes of sovereign investments are not at all distinct from private investments in form or motivation, Alvarez argues that they should not be excluded from the protection given by investment agreements.[198] Requirements of reciprocity, that is, only accepting a sovereign investment if similar access is given to a host state's investment into the home state, may be an excuse to justify protectionism.[199] It is wise to observe that given the risk of "populist backlash", a change of mindset would help to see foreign ownership of assets not as a threat but as an opportunity, by recognising that the comparative advantages of trade are the same for investments.[200]

In any case, this section does not aim to exhaust all the possibilities for states to screen investments. The interest here is how international economic law covers screening activities and the extent to which there are signs of convergence in the way the issue is covered. The section focuses on the extent to which those procedural mechanisms and individual decisions are regulated by the standards and the entry commitments of trade and investment agreements.

The common pattern is that it is the foreign character of the investment that justifies the submission to domestic screening procedures. Moreover, in most of the cases, the origin from certain nationalities is what will provide the basis for a denial decision for an investment. In all those situations, there is an amount of discretion, by means of which all types of interest could play a role. It is reported that in the services sector discriminatory treatment is not always evident in the face of the published measures, but it is hidden in official practice, such as in the ways that the measures have always been enforced or in a general bureaucratic

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[196] Patrick DeSouza and W Michael Reisman, 'Sovereign Wealth Funds and National Security' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 290.
[197] Chaisse (n 173) 463–464.
[198] José Enrique Alvarez, 'Sovereign Concerns and the International Investment Regime' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012) 282.
[199] Safarian (n 183) 477–478.
[200] DeSouza and Reisman (n 196) 293.

tendency not to approve certain activities.[201] The mere existence of screening procedures may give rise to undue delays and differential treatment during regulatory procedures of authorisation.

It is submitted that those general measures and individual decisions may, in some circumstances, constitute prohibited discrimination under international economic law. In fact, a concern with screening procedures and the intention for them to be covered was evident from the discussions surrounding the beginning of the US BIT programme.[202] Depending on how requirements related to notification are drafted, they might result in discrimination.[203] This can take place in the form of either a violation of national treatment or of the MFN standard. Besides, the procedures may breach certain standards of transparency and objectivity present in current trade and investment agreements.

The following situations highlight those issues. They provide the context to analyse whether there are signs of convergence in the regulation of foreign investment screening and whether this promotes effectiveness by the attainment of liberalisation goals with the safeguard of host states' regulatory space.

b. TRANSCANADA KEYSTONE PIPELINE: POLICY PENDULUM

i. Context

A major energy corporation in Canada decided, back in 2008, to move forward with an ambitious cross-border pipeline project into the US. The plan was to build the infrastructure to transport oil from the city of Hardisty, in Alberta, to a junction point in Steele City in Nebraska. This was one of the several other pipelines that ran throughout the country, some of them already operated by the company. It would transport oil from the deposits in Alberta, Canada and crude oil

[201] Gabriel Gari, 'Services Negotiations: Where Have We Been and Where Are We Heading?' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016) 590.

[202] Patricia McKinstry Robin, 'The Bit Won't Bite: The American Bilateral Investment Treaty Program' (1983) 33 American University Law Review 931, 933; Kathleen Kunzer, 'Developing a Model Bilateral Investment Treaty Recent Development' (1983) 15 Law and Policy in International Business 282–283.

[203] Andrew Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar 2016) 6–7.

from Baker in Montana, US to the refineries in the Gulf Coast. The map below shows the proposed project:

Figure I – Keystone XL Pipeline Project

Source: TransCanada – CBC News

The cross-border aspect of the project required an authorisation by the US President, represented by Secretary of State, under American administrative regulations. It can be considered as a type of screening which goes beyond the one established under the CFIUS and is only applied to the cross-border aspect of the project. This was one of the several steps and authorisations essential for the process to go through. Among them, specific environmental permits would be necessary. The federal states through which the pipeline would pass – Montana, South Dakota and Nebraska – also had to give their own permits.

Despite having assessed some of the difficulties ahead with a project of that magnitude, the corporation, TransCanada, as the largest shareholder in TC Pipelines, could not anticipate that this would lead to a seven-year saga, culminating with a decision of denial. The final decision came in the last years of the Obama Administration in 2015, rendered by Mr. John Kerry, the Secretary of State at the time. Key to the justification was the need to maintain coherence in US climate change policy. The administration could not be seen as deviating from its policy of limiting carbon emissions. In fact, the Keystone XL Pipeline Project turned out to be the symbol of the struggle between corporate interest and public policy.

Faced with frustration and with an eye for opportunity, as one would expect from a company with billions already spent in preparations and costs, TransCanada swiftly decided to take legal action. It brought a claim in the US District Court of Southern Texas challenging the administrative decision on several grounds.[204] Among them, it argued that the reasoning of the denial was flawed and that this was not under the remit of the Executive branch. In the end, TransCanada asked for both injunctive and declaratory relief. At the same time, the investor notified its intent to bring an investor-state claim under NAFTA chapter 11, submitted in June 2016. The claims were that arts 1102, 1103 and 1105, analysed in chapter II, had been breached.

The uncertain prospects gave way to renewed expectations. A profound reorientation in the environmental policy of the elected Trump administration had been promised in the campaign. Before the change in power, commentators already expected that the Keystone XL pipeline issue would take a new path. This eventually materialised when a newly sworn-in Donald Trump invited the company to resubmit its application. Mr. Rex Tillerson, then Secretary of State, former CEO of the Texaco corporation, announced that he would stand aside and refrain from analysing the issue to avoid conflict of interests. In any case, in less than two months of resubmission, the authorisation was granted. There were celebrations on the Canadian side: the Prime Minister, the government of Alberta and workers in the energy industry in Canada voiced their excitement.

The approval led to the discontinuation of both the Texas Court claim and the NAFTA claim. TransCanada is naturally required to obtain the respective authorisations in Montana, South Dakota and Nebraska. It evidently expects, and is already facing, opposition from environmental and indigenous groups. In fact, several organisations brought claims against the approval, to be entertained in due time. The key argument is that the environmental conditions have changed and the cross-border authorisation should not have been granted.

Having set the context, the interest here is in the content of the arguments raised by the TransCanada in the NAFTA claim and in the way they provide the linkage with the international regulation of the entry of investments. The next

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[204] *TransCanada Keystone Pipeline Lp and Tc Oil Pipeline Operations Inc v John Kerry and Others* Civil Action No 4:16-cv-00036 (6 January 2016) US District Court Southern District of Texas, Houston Division.

section will attempt to guess what the result of the litigation would be, in the light of the interpretation of the provisions and the past arbitral decisions. The domestic set-up is referred to only to the extent that it reveals the amount of administrative discretion granted to the deciding authorities. This may impact on the assessment of what was the margin of appreciation that would amount to discrimination or arbitrariness in the international law arena. In addition, it is crucial to understand how this claim could change treaty making in relation to the regulation of entry, in substantive and procedural terms.

ii. Arguments and Analogies

The main arguments of the claimants can be summarised as follows. According to the request for arbitration, all the jurisdiction requirements for the submission of a claim to arbitration were met since TransCanada is an enterprise that seeks to make an investment in the terms of NAFTA art 1139.[205] As to the requirements of art 25 of the ICSID Convention, the request also highlights the fact that TransCanada already owned assets that qualified as investments in the US.[206] This is probably done in anticipation of jurisdictional challenges of whether the claim arises directly out of an investment.[207]

This nuance is particularly relevant for two reasons. First, as explained in chapter III, to establish jurisdiction under the ICSID Convention, the claimant needs to show the connection between *any investment* it holds and the claim. Otherwise, the investor would have to go through the ICSID Additional Facility or the UNCITRAL rules. In the request for arbitration, whereas the jurisdiction argument is based on an *existing* investment, the grounds for the substantive claim was the denial of an investment *to be made*.

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[205] *TransCanada Corporation and TransCanada PipeLines Limited v The United States of America*, ICSID Case No ARB/16/21, Request for Arbitration (24 June 2016) [74]-[76].

[206] According to the request for arbitration: "Claimants' interests in the Keystone XL Pipeline project, as well as *direct and indirect ownership of assets including equity and other interests in enterprises, tangible and intangible property, loans, pipelines, contractual rights, equipment, and land easements* in the United States constitute investments under any reasonable definition." ibid [85] (emphasis added).

[207] For a description on how the jurisdictional criteria are established ("double-keyhole" test) see *Beijing Urban Construction Group Co Ltd v Yemen,* ICSID Case no ARB/14/30, Decision on Jurisdiction (31 May 2017) [124]-[138].

Second, as highlighted in chapter IV, in these types of cases, the claimed damages can be either related to the *existing* investments, to the pre-investment costs or to lost profits. Although the relief sought was US$ 15 billion, plus interests, the request does not indicate how the estimations were made.[208] There are though some indications in the request that the large scale nature of the project required extensive preparatory work and the Claimants had "to continue making *capital expenditures,* and investing in *land easements, pipe, materials, equipment*, etc. so that it would be in a position to start construction as soon as possible after the permit was granted … with the *State Department's knowledge*." [209]

One can conclude that the basis for jurisdiction included "investments" in the form of preparatory costs or specific assets related to the sections of the pipeline which did not require authorisation. However, one ponders whether it is fair that the jurisdiction is triggered by an existing investment and the main claim is related to the denial of future investments. It might be said that the preparatory works are already part of the overall investment, the main aspect of which is being screened though. This dichotomy was underlined in chapter IV to the extent that while preparatory works cannot themselves activate jurisdiction,[210] they are indeed taken into account in the calculation of the compensation.

As to the substantive claims, the MFN violation claim was due to the fact that similar pipelines constructed by Mexican companies had been authorised by the US. The national treatment violation flowed from the authorisation of similar pipelines owned and operated by American companies. The argument develops from the assertion that it was the first time that such an application for a permit was denied and that the US had "previously approved pipelines from other investors, including from the US and Mexico, based on factors that, if applied to Keystone's application, would have resulted in approval of the application."[211] Moreover, according to the Claimant, the other applications had been approved in significantly less time and that the delay and the use of "new and arbitrary criteria in deciding

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[208] *TransCanada* - Request for Arbitration (n 205) [91].
[209] *TransCanada* - Request for Arbitration (n 205) [65] (emphasis added).
[210] *Zhinvali Development Limited v Republic of Georgia*, ICSID Case No ARB/00/1, 10 ICSID Reports 3, Separate Opinion of Andrew Jacovides (24 January 2003) 106-113.
[211] *TransCanada* – Request for Arbitration (n 205) [72] (emphasis added, fn omitted).

to deny the application, the *United States discriminated against, and significantly damaged*, Claimants."[212]

It is emphasised that the procedure in question is only required in case of cross-border investments. In the broad sense, as already mentioned, it is a type of screening similar to the ones described in the first section. On the other hand, both foreign and nationally owned investors are formally subject to the same authorisation procedures: only its application to the specific case was being challenged. The assumption would be that had an American corporation applied for the same authorisation, it would have been granted. In the context of NAFTA, this requires an analysis of whether the investors are in like circumstances. This would involve a comparison with similarly placed investors which had their pipeline projects approved.

Two NAFTA cases in which breaches have been found may provide some support for the arguments raised. The first one is *Trucking Services*, relevant for three reasons.[213] To start with, although being raised in a state-state context, the case involved the interpretation of the very same provisions that are in question in the TransCanada case, namely arts 1102 and 1103, in the context of refusal to entry. While American and Canadian entities could invest in trucking services companies in the US, the Mexican fleet owners were discriminated. On the prohibition on direct investments, the Panel determined that the US remained in breach of its obligations contained in arts 1102 and 1103 *"to permit Mexican nationals to invest in enterprises* in the United States that provided transportation of international cargo within the United States."[214]

It is true that Mexico challenged a general ban rather than an individual measure, but both cases dealt with the situations of a refusal to review applications to invest. On the refusal to allow entry, the NAFTA Panel decided that "the *US blanket refusal to review and consider for approval any Mexican-owned carrier* applications for authority to provide cross-border trucking services was and

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[212] ibid.

[213] *Re Cross-Border Trucking Services (Mexico v US)* NAFTA ch 20 Arb Trib Case No USA-MEX-98-2008-01, Panel Decision, Final Report 2 (6 February 2001) (*Trucking Services*) [292] <www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=18355&lang=1> accessed 15 August 2018 (emphasis added).

[214] ibid [297] (emphasis added).

remains a breach of the US obligations"[215] under arts 1202 and 1203, of the NAFTA Services Chapter. Moreover, both cases analyse the assessment of public interest by domestic authorities in the US. In *Trucking Services*, it was road and vehicle safety; in *TransCanada*, the environmental impact and climate change policy coherence. This invites a discussion of justifications and exceptions in relation to entry, which is dealt with in the case studies of the following chapters. Besides, it casts light on the tension of attaining investment liberalisation while ensuring regulatory space.

Another case that provides clues on the possible outcome is the *Clayton and Bilcon v Canada* litigation. As shown in Part A, the case actually evaluated a request for an *expansion* of an investment. In keeping with the tribunal's majority, a Joint Review Panel – JRP – of Nova Scotia, one of Canada's provinces, did not carry out an environmental assessment in conformity with international law. The Tribunal could not find a justification for the differential treatment to the investment under Canadian law and ruled that the "community core values" approach was not only at odds with Canadian law but was also inconsistent with NAFTA investment liberalising objectives.[216] One can read that as a recognition that the case also has a strong investment liberalisation component. This goal played a role to determine a NAFTA breach, based on an unfair assessment in the screening of an investment.

On the other hand, the tribunal considered it unnecessary "to determine whether there was a *distinct denial of national treatment to the Investors* rather than to the Investment."[217] For judicial economy, the merits award avoided the issue of whether there was denial of national treatment towards the investors. It is though a crucial issue that could have been addressed for the sake of coherence in the reasoning.

First of all, if national treatment was due to the investor, the comparison test should be in relation to other investors in like circumstances. As previously shown, decisions interpreting the GATS at least recognised that services and service suppliers are different concepts, although in the likeness assessment, WTO panels

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[215] ibid [295].
[216] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada*, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) (*Clayton and Bilcon v Canada*) [724].
[217] ibid [725] (emphasis added).

and the AB have considered both concepts somewhat connected to each other. This recognition should also take place in the investment regime arena. Second, the FET standard in NAFTA is only due to investments, which means investments already made. It is indeed reasonable to think that the finding of a breach of art 1102 (national treatment) was an influence on the finding of a violation of art 1105 (FET).[218] Third, this difference matters for the purposes of damages: there was no investment related to the claim and the injury was to the investor. An analysis of causality, including the criteria of directness and remoteness, should play a role in this regard.

In any case, the differences between the majority and the dissenting opinion in *Clayton* could arguably be attributed to different perceptions on the severity of the breach of domestic law for it to constitute a breach of international law as well.[219] While the majority may have seen all the circumstances of the case as a repudiation of domestic law standards, in line with *GAMI v Mexico*,[220] the dissenter did not see a deliberate disregard of administrative law in Canada.[221] In this line, the dissenting opinion complained that a "*failure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim* allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law."[222]

The award on damages has had to evaluate lost profits; after all, access claims are basically about unrealised opportunities. More than US$ 100 million were claimed.[223] The investors' memorial attempts to characterise the likely scenario that would have arisen had there been no breaches of international law. It mentioned that if it were not for the breaches, the environmental approval would have been granted and "there can be *no doubt that Bilcon would, in the ordinary course, have obtained the industrial permits* necessary to operate the Quarry."[224] Recalling the principle of full reparation and citing *Crystallex v Venezuela* and *Vivendi v Argentina*, the investors advocated the use of the DCF method to quantify

[218] Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (1st edn, OUP 2017) 26.
[219] ibid.
[220] *Gami Investment Inc v Mexico* UNCITRAL Final Award (15 November 2004) [103].
[221] Hepburn (n 218) 26.
[222] *Clayton and Bilcon v Canada* (n 216) (Dis Op Arbitrator Donald McRae) [48] (emphasis added).
[223] *Clayton and Bilcon v Canada* (n 216) Investor's Damage Memorial (emphasis added).
[224] ibid [215], [227], [229].

lost profits, which are fully ascertainable in their view.[225] If compensation is granted, this would be one of the rarest times where it is solely based on lost profits. This was also the basis of the request in the pending *CANACAR v US* litigation.[226]

Therefore, there are clear parallels between the cases, which, in some way or form, deal with screening of foreign investments. According to Grewal and Adkins, as the strategy in *TransCanada* tried to characterise an "unconstitutional assertion of executive power", it shared the same "the conceptual commitments of the Clayton tribunal in seeking to base a NAFTA violation on a precise interpretation *of a broad domestic legal rule [U.S. Constitution]."*[227] Besides, the *TransCanada* claim would arguably have to deal with the same evidentiary challenges, had it decided to request damages beyond preparatory investments. In a critical approach, they advocate that if the NAFTA tribunal in the Keystone XL litigation had been set, it should never follow the *Clayton Bilcon* decision and that the domestic law (constitutional) argument blurs the "State Department's broad and well-known power to reject permits inconsistent with the 'national interest,'" and "the obvious risk that the pipeline would be rejected on other grounds."[228] The value in such normative critiques is that they touch at the core of the balance between investment liberalisation and host states' regulatory powers. This balance, expressed in the scope of the standards and in the language of the treaty and of its exceptions and justifications, is struck in the process of adjudication.

In *TransCanada*, the argument of the absence of an investment would not prosper, given that prospective investors are explicitly covered by NAFTA arts 1102 and 1103. As extensively analysed in chapter I, the process of establishment of investments is covered by those articles. The FET violation claim (art 1105) centred on the way that the procedure was carried out, that is, the creation of legitimate expectations from the successive requests for amendments of the application. The absence-of-investment argument might be successful perhaps

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[225] ibid [238]-[240]; *Crystallex International Corporation v Bolivarian Republic of Venezuela,* ICSID Case No ARB(AF)/11/2, Award (4 April 2016) [874]; *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic,* ICSID Case No ARB/97/3, Award (20 August 2007) [8.38].

[226] *CANACAR v United States*, Notice of Arbitration, UNCITRAL (NAFTA ch 11) (2 April 2009).

[227] Cory Adkins and David Singh Grewal, 'Democracy and Legitimacy in Investor-State Arbitration' (2016) 126 Yale LJ Forum 57, 74.

[228] ibid 75 (emphasis added, fns omitted).

under this provision. The fact that NAFTA art 1105 only applies to investments not to investors is indeed a textual barrier hard to overcome. In *Clayton and Bilcon v Canada*, there were no specific findings in relation to the discriminatory treatment to the investor. Therefore, the lost profits aspect of the damages can only be related to art 1102, which protects investors. It remains to be seen how the aspect of the claim involving art 1105 is compensated.

It is also true that had the case continued, the US would have raised several arguments related to the exceptions, such as sensitivity to environmental concerns (NAFTA art 1114) or general exceptions, such as the protection of essential security interests (NAFTA art 2101). It is certain that national security would play a role, but in fact climate change policy considerations were more decisive. The exceptions, as an expression of the safeguard of regulatory powers, will be further discussed in chapter VIII. All in all, the main points that would have been addressed in the decision lie on the fairness and adherence to the law of the screening procedure (extended delay, non-transparency) and on the proportionality criteria for the decision (lack of objective assessment amounting to discrimination, incoherence between the objective and the decision).

iii. Recent Screening Cases: Tale of Caution

The conceptual challenges in the *TransCanada* case are similar to other cases that may arise in relation to the screening of foreign investments. Despite its experience in NAFTA claims, including in the *Clayton and Bilcon* case referred above, Canada had not yet been hit by a claim under a BIT until recently. As mentioned in the introduction of chapter III, the available facts are the following.

VimpelCom, a powerful Russian telecommunications provider, decided to invest in 2008 in shares of the Canadian Wind Mobile through its subsidiary Global Telecom Holding – GTH, a company based in Egypt. Wind Mobile would later in 2009 start to provide telecommunications services in the Canadian market, initially in Toronto, Ontario and Calgary, Alberta. Reports claim that after the release of foreign ownership restrictions, Global Telecom tried to consolidate its position with

further investment in the Canadian company.[229] Nevertheless, the application to conclude the acquisition of the control of the Canadian company turned out to be unsuccessful. The operation had to get regulatory approvals and also to face scrutiny under the Investment Canada Act,[230] mentioned before as an example of the comprehensive approval regime.

After a long delay in the investment screening by the Canadian government, the investor decided in June 2013 to withdraw the application for approval and sell any remaining interests in the company. The government allegedly procrastinated the analysis, intentionally stalling the procedures, which led to the exit of the market by the investor. As GTH was Egyptian, the investor brought a claim based on the Canada-Egypt BIT.[231] Canada failed to create conditions for new investors in telecommunications, the argument goes, by breaching its BIT obligations not only through the denial to GTH of FET and full protection and security but also by according preferential treatment to similarly situated national investors and investors from other states.[232]

This claim seemingly focuses on the unreasonable delay to which the investor was subject in the attempt to acquire a larger stake in Wind Mobile. The protracted review process might be attributed to security concerns over the acquisition and doubts about who would be the ultimate owner. Although GTH also raises claims on MFN and national treatment provisions after establishment, it is the pre-establishment aspect that interests most, for obvious reasons. Most importantly, some of these claims relate to the breach of article II.3 of the BIT, an interestingly drafted provision entitled "Establishment, Acquisition and Protection of Investments", which reads:

> Article II
> 3. Each Contracting Party *shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other*

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[229] Douglas Thomson, 'GAR Article: Canada Hit with First BIT Claim' [2017] *Global Arbitration Reporter* <http://globalarbitrationreview.com/article/1036392/canada-hit-with-first-bit-claim> accessed 15 August 2018.
[230] RSC, 1985, c 28 (1st Supp) (Canada).
[231] (signed 13 November 1996).
[232] *Global Telecom Holding SAE v Canada,* ICSID Case No ARB/16/16 (pending). The tribunal was composed, as of February 2017, by Vaughan Lowe, Gary Born and George Affaki (President). See Procedural Order n 1 concerning Procedural Matters (13 June 2017). Adapted from the dispute settlement summaries in <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth_sae.aspx?lang=eng> accessed 15 August 2018.

Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by:
(a) its own investors or prospective investors; or
(b) investors or prospective investors of any third state.[233]

The provision above ensures the establishment of investments either through acquisition or through greenfield investments. On the other hand, decisions not to permit establishment are excluded from the scope of investor-state arbitration.[234] Furthermore, state-state claims based on decisions not to permit an acquisition are somewhat limited.[235] Chapter III has emphasised some of these techniques to narrow down jurisdiction.

In fact, the investor's attempt to acquire business is a common carve-out in Canadian treaties. Besides, historically, Canada has been defensive when it comes to foreign operations in its media-related sectors.[236] The key issue is whether a *decision* has been taken in relation to the application or if the treatment was denied in the conduct of the review process: in the latter case arts II(4)(a) or II(4)(b) would not be a defence.[237] *A contrario sensu*, one may argue, rather compellingly, that if a denial decision is not subject to ISDS, let alone the procedure which would result in the decision. In other words, if a decision to deny establishment could not be challenged, nor could the omission to take a decision be the basis for such a claim.

In case a breach is found, the calculation of the pre-establishment aspect of the case would have to be undertaken similarly to what was argued by the investors in *Clayton and Bilcon v Canada*. This requires the claimant to build a "but-for" scenario of how much the shares would be worth if the Canadian government had allowed to the investment to take place. The development of this discussion helps

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[233] (emphasis added)
[234] Canada-Egypt BIT art II(4)(b) "Decisions by either Contracting Party not to permit establishment of a new business enterprise or *acquisition of an existing business enterprise or a share of such enterprise* by investors or prospective investors shall *not be subject to the provisions of Article XIII of this Agreement*." (emphasis added).
[235] Canada-Egypt BIT art II.4(a) "Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to *whether or not to permit an acquisition* shall not be subject to the provisions of *Articles XIII or XV of this Agreement."* (emphasis added).
[236] Catherine H Gibson, 'GTH v. Canada May Sound Familiar to Media Entities' (*Kluwer Arbitration Blog*, 20 June 2016) <http://kluwerarbitrationblog.com/2016/06/20/gth-v-canada-may-sound-familiar-media-entities/> accessed 15 August 2018.
[237] Luke Peterson, 'Canada Hit by First Legal Blowback under Its BITs with Developing Countries, as Egyptians Telecoms Giant Launches Arbitration' (*Investment Arbitration Reporter*, 7 June 2016) <www.iareporter.com/articles/canada-hit-by-first-legal-blowback-under-its-bits-with-developing-countries-as-egyptians-telecoms-giant-launches-arbitration/> accessed 15 August 2018 (emphasis added).

to define the limits of claims related to entry, the scope of exceptions and the available relief. These cases show that access issues come to adjudication in quite a variety of ways. Screening is an area to which states need to pay careful attention when it comes to commitments and treaty provisions.

c. COMMITMENT OR SOVEREIGNTY: CONVERGENCE?

i. Inter-Regime Shifting: WTO

In order to evaluate convergence in international economic law, a valid enquiry is whether the WTO agreements, especially the GATS, would cover situations involving screening. It has been recognised that investment activities of sovereign wealth funds can be covered by the GATS when they involve taking control of service companies, subject to the exceptions (eg national security and prudential measures).[238] The answer will naturally depend on the sectoral commitments made by the members of the GATS and parties to IIAs, concerning national treatment and market access.

Energy services, for instance, are sometimes not separated from energy products especially when it comes to vertically integrated industries.[239] In this line, transportation through pipelines is considered to be a type of service.[240] While the GATT regulates the use of pipelines in relation to the freedom of transit of energy,[241] the establishment of operations, which requires previous construction of pipelines can be framed as constitution of commercial presence to supply services in mode 3.

In the situation of the TransCanada Keystone XL pipeline, the denial decision is indeed a measure affecting trade in services in mode 3. As seen above, WTO members can make commitments on national treatment or market access in mode 3. The analysis would thus depend on whether the US had listed the sector

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[238] Fabio Bassan, *The Law of Sovereign Wealth Funds* (Edward Elgar 2011) 57–58, 62.
[239] Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP 2015) 35.
[240] It is described in sec G "Pipeline Transport" subsec a "Transportation of fuels" code CPC 7131 in the WTO 'Services Sectoral Classification List' MTN.GNS/W/120 (10 July 1991). See also 'Land Transport Services Part I - Generalities and Road Transport' S/C/W/60 (28 October 1998) paras 3-10; 'Energy Services' S/C/W/52 9 September 1998, para 73, table 10 p 29.
[241] Azaria (n 239) 126–129.

of transportation by pipelines under mode 3, which they have not. On the other hand, the MFN analysis dispenses with that requirement, as shown in chapter V.

Even in investment treaties with establishment rights, parties may (and do) generally set out certain exceptions, as mentioned in chapter I. For example, investments related to the construction of pipelines for the transportation of hydrocarbons have been excluded by Azerbaijan from national treatment (but not from MFN treatment) in the US-Azerbaijan BIT.[242] Besides, pipelines are mega-projects requiring long term investments and are constructed and operated on the basis of a network of agreements.[243] Thus, specific treaties may set reciprocal obligations on the construction and operation of the pipelines, resulting in establishment rights to certain entities in the territory of host states.[244]

In fact, according to the WTO database, more than ten countries have had some sort of commitment in the GATS related to pipeline transportation of fuels.[245] The main questions are the width of each of these commitments and their exceptions. GATS mode 3 commitments may encompass rights to build transportation network facilities such as pipelines: the denial of such rights would arguably constitute market access limitations to the rights of way under art XVI.[246] There may be rights to construct new infrastructure such as pipelines, but this would be limited to entities wishing to transport energy products owned by other entities, as a service supplier with commercial presence.[247] It is possible that GATS and investment law obligations of host states amount to a right to make an investment to build or expand pipeline infrastructure.[248] As the infrastructure is deeply connected to the provision of the service, the construction of the pipeline

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[242] (signed 01 August 1997).
[243] Azaria (n 239) 135.
[244] ibid 116–124, with some examples.
[245] Originally with Australia, New Zealand and Hungary, the list was later expanded with new accessions to include Cambodia, Croatia, Kyrgyz Republic, Lithuania, Republic of Moldova, Montenegro (only additional commitments on transparency and non-discrimination), Nepal, Saudi Arabia, Tajikistan and Macedonia. Ukraine has set up only additional commitments related to transparency in measures related to pipeline transportation and Brazil excludes hydrocarbon products, as available at i-TIP Services WTO/World Bank Database <http://i-tip.wto.org/services/Search.aspx>
[246] Mireille Cossy, 'Energy Services under the General Agreement of Trade in Services' in Julia Selivanova (ed), *Regulation of Energy in International Trade law: WTO, NAFTA, and Energy Charter* (Wolters Kluwer/Kluwer Law International 2011) 165.
[247] ibid 166.
[248] Vitaliy Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (CUP 2017) 176–177, 232 fn 162, 241.

may be considered a business establishment within the territory of a member for the purpose of supplying a service, as seen in chapter II.

In relation to enforcement, arguably, the investor could convince its home state (in this case Canada), or any other, to have recourse to the WTO system and other regional agreement with state-state dispute settlement, similar to NAFTA Chapter 20. There is a potential intersection of investor-state and interstate proceedings if the US was obliged under the WTO to permit the construction of pipelines within its territory.[249]

But, what would be the practical result of the relief in systems, such as the WTO, where there is no possibility of compensation, but only juridical restitution? The issue is whether states could bring measures into conformity in case a breach is found. This would naturally depend on whether the challenge is against the denial decision of an investment, against the general measures where the criteria are set out or against a general administrative practice of discriminatory decisions.[250] In addition, as highlighted in chapter III, whereas it is doubtful that the GATS could always apply to a specific individual decision, it seems clear that laws, decrees or general practice that allow for that sort of discriminatory discretion in screening could be challenged.

Another question is: would any of the exceptions of arts XIV or XIV *bis* apply? It is true that national security has somewhat of a super-value, to which all states generally defer.[251] The problem is when in the process of screening, states attribute to national security decisions that have a different underlying justification. Climate change policy and fear against certain nationalities can all be attributed to national security. This concern is higher in cases where total discretion is the rule in domestic law. While the solution of those issues depends on a careful analysis of the rules of each of the regimes, they certainly highlight the anxieties that states face when dealing with the screening of investments and drafting new treaties.

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[249] Azaria (n 239) 136.

[250] For an analogy in the context of banking services, see Bart De Meester, *Liberalization of Trade in Banking Services: An International and European Perspective* (CUP 2014) 230, 236.

[251] The GATS art XIV *bis* – the security exception – may be tested in the Qatar's request against Arab countries. See WTO, *United Arab Emirates; Bahrain, Kingdom of; Saudi Arabia, Kingdom of – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights,* Request for Consultations (31 July 2017) WT/DS526, WT/DS527, WT/DS528.

ii. Policy Considerations: Carve-Outs and Limitation of Discretion

It is interesting to note that entry and access for investments have been incidentally discussed in several cases.[252] Most of them involved the refusal to issue licenses[253] or impediment to project completion.[254] The fact that there was some protected form of investment could have given basis to the claim, despite the fact that the *main* investment could not take place. At times, it is impossible to fully decouple the entry/access aspect of the claim – that is, the investment that would have been made but-for the breach – from the established investment claim – the amount already invested or spent. This is the reason why most of those claims often come as a breach of the expropriation or FET provisions and not the admission/establishment ones. In some of those cases though the access/entry aspect is more predominant. Tribunals have considered that, in certain BITs, the failed attempt to invest is covered by the FET standard as the term investment, for this limited purpose, is not restricted to investments made.[255]

From a policy perspective, states should be aware that treaty language similar to the one used in NAFTA is capable of including a broad scope of measures and individual decisions. One may defend that a decision on the admission of a specific investment should never be challengeable whatsoever. In fact, for many, the mere possibility of questioning an assessment of national interest or environmental policies in an international arbitration is troublesome.[256] In this light, treaty language could be adapted so that the fact that establishment is covered only means that there is commitment to accept investments to which no authorisation is required.

Canada has explicitly narrowed down treaty coverage of the issue, the Canada-China BIT (art 6.3) being an example. One could also foresee a limitation

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[252] Sornarajah (n 71) 119.

[253] Eg *RSM Production Corporation and others v Grenada,* ICSID Case No ARB/10/6, Award (10 December 2010); *Pac Rim Cayman LLC v Republic of El Salvador,* ICSID Case No ARB/09/12, Award (14 October 2016).

[254] *Grupo Francisco Hernando Contreras v Republic of Equatorial Guinea* (ICSID Case No ARB(AF)/12/2) Award (4 December 2005) [260-261]; *Nordzucker AG v The Republic of Poland,* UNCITRAL Partial Award on Jurisdiction (10 December 2008) [172]-[175], [218], 2nd Partial Award on Merits (28 January 2009) [95], 3rd Partial and Final Award on Damages and Costs (23 November 2009) [65].

[255] *Nordzucker v Poland,* Jurisdiction (n 254) [135-136], [211]-[217].

[256] Adkins and Grewal (n 227).

of the recourse to ISDS when it comes to screening procedures. The increasing adoption of an ISDS carve-out in state treaty practice is an example of the move towards a state-state system to enforce these issues. One may observe that the renegotiation of NAFTA into the USMCA resulted in the exclusion of screening procedures from investor-state arbitration. This would be a move towards taking back sovereignty.

In fact, the interpretation of the scope of the coverage of domestic screening activities by international economic law tends to draw on the discussion of the limits of administrative discretion, in some way or form. This discussion is essential to evaluate the standards of fairness and non-discrimination. In the *PSEG v Turkey* case, referred to in chapter III, domestic law considerations affected the tribunal's decision on the breach of the treaty, mainly the inconsistency of the Executive power in exercising its authority.[257] Most importantly, the authority which had the discretion to authorise the investment – the Turkish Ministry of Energy and Natural Resources (MENR) – required the fulfilment of certain criteria which had no legal basis, for example, by imposing the constitution of a locally established corporation. According to the tribunal, the administration ignored rights given by law in particular in "the case of the foreign branch corporate structure, recognized under the law … when it demanded the establishment of a Turkish corporation.[258]

With a different outcome, in *Glamis Gold v US*, the competent authorities were deemed to have followed all the internal domestic law procedures to reach a decision of the refusal to approve a plan of operations.[259] For this reason, there was no treaty breach, which has been described as a case of domestic legality contributing to FET compliance.[260] The claim was one of expropriation of mining rights, which were considered to be an investment; although the activity had not fully started, the company had commenced exploratory drilling and incurred substantial capital expenditures.[261] To the claim that the pre-existing legal regime and earlier findings in the process led to the expectations that the plan would be

[257] Hepburn (n 218) 22–24.
[258] *PSEG v Turkey* (n 170) Award on Merits (19 Jan 2007) [248].
[259] *Glamis Gold Ltd v USA,* UNCITRAL Award (8 June 2009) [763].
[260] Hepburn (n 218) 17–18.
[261] *Glamis Gold* (n 259) [32]-[35], [98].

approved,[262] the tribunal concluded that the processes and decisions had not been arbitrary or unreasoned.[263]

This raises the question of the convenience to prevent blatant and outrageous treatment or de jure discrimination in the screening of investments. Therefore, one could imagine ways to expand the treaty coverage of screening measures, if states so desire. This would be interesting to face challenges in institutional environments where arbitrariness and corruption is the rule in the authorisation to invest. To some commentators, GATS art VI on domestic regulation is perhaps the "functional equivalent" of the FET clause,[264] though much lighter. In this regard, an alternative is that IIAs adopt a provision similar in content to GATS art VI whereby the process of authorisation to supply services, in this case to invest, should be timely and objectively carried out. This alignment would be a source of convergence between the regimes regulating the issue.

In fact, the FET standard is the most immediate reference when one thinks of "minimal levels of due process in regulatory decision-making, or arbitrary criteria for the award of tenders, concessions, or licences."[265] In a normative perspective, states might consider having a treaty provision rule that grants FET also to investors seeking to make an investment, even if the meaning of the article is restricted to egregious and outrageous violations.[266] Some of the German BITs might suggest this coverage, even though not directly covering establishment, such as the Germany-Poland BIT, as hinted at by *Nordzucker v Poland*.[267] The clause in CETA[268] is limited to investors in relation to their covered investments and not future investments. Similar to the market access clause in the GATS, the FET is an absolute standard, and thus, does not require a finding of discrimination. The expansion of the FET treatment to investors with respect to the investments they are seeking to make would cover those situations.

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[262] ibid [636]-[637].
[263] ibid [781].
[264] Molinuevo (n 88).
[265] Hepburn (n 218) 93.
[266] For a suggestion that there is some practice extending FET at a stage prior to the entry of investments, see Sornarajah (n 71) 120 fn 48.
[267] See *Nordzucker v Poland,* Jurisdiction (n 255) [182]-[185] and German-Poland BIT (signed 10 November 1989) art 1(1)(c) and 2(1).
[268] See CETA art 8.10(1)(2).

To sum up, the use of clear carve-outs or exemptions is an option in the light of the scope of the standards and commitments (as will be seen in the next section) and the general character and conceptual challenges of exceptions and justifications (as shall be highlighted in the final section). On the other hand, the explicit extension of the FET to prospective investors would broaden the scope of treaty standards related to screening measures. In the same line go expanded market access commitments in mode 3 in sectors subject to screening. This topical issue suggests that both substantive and procedural rules can be carefully tailored to allow for the wider or narrower coverage of specific situations of foreign investment screening procedures in both trade and investment contexts. This would promote effectiveness to the extent that it fine-tunes the host state's regulatory space to attain investment liberalisation goals.

CHAPTER VII – PROTECTION OF DOMESTIC INVESTORS: INCENTIVES AND TECHNIQUES

a. LOGIC OF INVESTMENT PROTECTIONISM

Since equality of opportunities underpins international economic law, when it comes to liberalisation treaties, rights of establishment for foreign investments help to achieve this goal. An investment liberalisation treaty commitment may be negotiated as a concession to the other treaty party in exchange for other benefits, as analysed in chapter II. Conversely, a commitment may be the international reflection of liberalising or privatising measures that states are taking domestically. The liberalisation treaty may serve as a signalling device also to the domestic private sector to express the host state's benign view towards private capital in general, in contrast to public capital.[269]

Given the prima facie beneficial effect of most investments, one might ponder why a state would create illegitimate difficulties for a foreign investment to take place. Also, why states would impose or maintain conditions for foreign investments in a context where they compete for the attraction of capital. The discussion is important since the prevention of investment protectionism is an essential component of the goal of investment liberalisation.

What may lie behind these measures are suspicions against private capital in general, against foreign capital as a whole or against specific types of foreign capital, as will be seen. As highlighted in the Introduction, restrictive investment measures take place even in a context of shortage of foreign capital. Some suggest laudable policy reasons why restrictions make sense, among them the risk of stifling a domestic entrepreneurial class and the destruction of infant businesses.[270] Organised groups of domestic investors may press for protection, as they are unable to support competition from foreign firms with better technology or resources.[271] Even in case of greenfield investments, that is, productive

[269] Jeswald W Salacuse, *The Law of Investment Treaties* (2nd ed, OUP 2015) 113.
[270] Sornarajah (n 71) 130.
[271] ibid 115.

investments that increase labour demand, internal lobbies have the same incentives as in trade protectionism, since they are facing a potential competitor.[272]

The academic literature on political economy has highlighted that states may have incentives to raise or maintain barriers to foreign investments and investors in face of political pay-offs.[273] Depending on the domestic circumstances, this choice may constitute a rational behaviour.[274] In this light, the host state could assume liberalisation commitments as a *lock-in* to better deal with internal pressures to favour domestic capital.[275] There may be cases where states opt for the protection of national champions or well-connected domestic investors. Those restrictions may also harm less connected national investors, as will be developed later. However, this would affect, first and foremost, foreign investors, as states are denying equivalent conditions for them to make an investment or preventing them from investing.

In any case, since overtly protectionist measures affect states which adopt them, one can assume that an "open and inclusive democratic debate will distinguish protectionist measures that impose costs on the public at large to the *benefit of entrenched interests* from programs that credibly pursue broadly *beneficial development strategies* or defend widely held *national values*."[276] Therefore, it is telling to analyse situations where this dichotomy between entrenched interests and developmental strategies is present. This shows how states manage to shield the interests of its powerful domestic investors by strategically choosing the language for their treaty commitments and provisions.

In the liberalisation of trade in services, well-organised and politically connected (though less efficient) companies are able to voice their concerns and

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[272] Kurtz (n 152) 88–89.

[273] Gene M Grossman and Elhanan Helpman, 'Foreign Investment with Endogenous Protection' in Robert C Feenstra, Gene M Grossman and Douglas Irwin (eds), *The Political Economy of Trade Policy: Papers in Honor of Jagdish Bhagwati* (MIT Press 1996) 216, 220; Simeon Djankov and others, 'The Regulation of Entry' (2002) 117 The Quarterly Journal of Economics 1.

[274] Insights of political economy are a useful illustration of the incentives behind the discussion. As this contribution takes a juridical viewpoint, it is more concerned about how this will be reflected in treaty language and how the purposes of the regulatory restrictive measures will be evaluated in adjudication.

[275] Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime?' in José Enrique Alvarez and Karl P Sauvant (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP USA 2011) 13.

[276] Bernard Hoekman and Charles Sabel, 'Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy' (2017) EUI Working Paper - Robert Schuman Centre for Advanced Studies 2017/36 17.

demand protection, which is conveyed to government representatives in negotiations.[277] As emphasised by Gari, there is ample room for the articulation of coalitions by protectionist lobbies, which are closer to the sectoral regulators: their technical and more protective positions most likely prevail over the trade negotiators' will to commit.[278] The political economy of international trade provides some insights in this regard. Only when the prospective benefits exceed the costs of the concession – such as the loss of market share for domestic companies and the constraints on regulatory autonomy – will states make liberalisation commitments.[279]

This scenario invites three observations. One is that the internal dynamics of states may generate barriers to the entry of foreign investments, even to the detriment of certain national consumers. As shown, protectionist incentives are no less true for services in mode 3 (therefore, investments). The *CANACAR* v US litigation, which followed the *Trucking Services* state-state case, provides an example of how protectionism is reflected in terms of less foreign investments. According to the claimant, the competitive advantage of Mexican carriers is what explained why the International Brotherhood of the Teamsters – the powerful American labour union – heavily opposed the opening of this large market; for a small investment, Mexican trucks would carry international cargo throughout the US if the state-state award had been complied with.[280]

The second remark is that when domestic firms instigate government-led restraints to investments and services, there is an issue to be tackled by trade, investment and competition policies.[281] International agreements, such as the GATS, provide one of several instruments to deal with these restrictions; other policies may in the end bring about the same outcome. Competition policy can avoid the creation of monopolies and control conducts that prevent entry. Regulatory policy can set limits to market power and encourage the opening of

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[277] Gari (n 201) 592; Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73, 85–86.
[278] Gari (n 201) 594.
[279] Broude and Moses (n 34) 388–389.
[280] *CANACAR v US* (n 226) 16. For an account of the Mexican approach to US non-compliance with the award, see Klint W Alexander and Bryan J Soukup, 'Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance under NAFTA' (2010) 28 Berkeley J Intl L 313.
[281] Kevin C Kennedy, 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2001) 33 George Washington International Law Review 585.

markets. Research and development policy may promote the entry and transfer of foreign technology and so on.

In the area of services, there have been several examples of organised domestic suppliers which were successful in their lobbies to establish regulations that limit foreign supply of services. To illustrate, Wilson describes case studies in Pakistan where, in his view, domestic businesses captured the government and convinced them to erect illegitimate barriers.[282] One of the situations clearly consisted in the protection of two domestic service providers, respectively from Saudi Arabia and Pakistan. A scheme of quota-sharing supported by government policies limited the provision of flight services between both countries for the purposes of the Hajj, the annual pilgrimage to Mecca. Investigation by the Competition Commission in Pakistan led to the recommendation that the government should change its policies, which resulted in the introduction of more companies (and, thus, associated investments) to operate the route.[283]

The third point is that measures preventing the entry of investments may in the end affect other domestic investors. This happens when there are limitations on the number of investors or the definition of exclusive suppliers. Market-access-type provisions, such as GATS art XVI, generally prohibit these quantitative measures, irrespective of a finding of discrimination, as explained in chapter II. Therefore, the enforcement of market access provisions can benefit those domestic investors as well. These provisions tackle not only protectionism against foreigners, but in particular protectionism benefitting incumbents, either national or foreign. Therefore, to the extent that investment chapters progressively incorporate market access provisions, they offer an extra tool to tackle investment restrictions in general.

The case is particularly acute when it comes to state-owned enterprises (SOEs). It is known that they may have different guiding objectives, decision-making procedures and corporate forms.[284] Depending on the level of control of the states and the chosen corporate structure, those entities may at times be

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[282] Joseph Wilson, 'Opening Services Markets in Developing Countries: What Role for Competition Law?' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016).
[283] ibid 494–496.
[284] For an overview, see Ines Willemyns, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 JIEL 657, 659–663.

considered a creature of their own states: state's interests would prevail in the end. In that case, there is a priori no need for SOEs to lobby and as well as no opportunity of capture. In turn, in other cases, states may hold equity and manage their voting rights following a market-oriented approach. Finally, in more complex cases, the network of interests produces a grey area where government and private goals intertwine.

Privileges such as rights of monopoly[285] or of exclusive service supplier[286] indeed affect competitive neutrality on the entry of investments. The case of a legal monopoly is, in essence, an exclusion to invest: SOEs influence to a large extent the entry conditions for competitors.[287] Moreover, subsidies in terms of financial support from the state and regulatory favouritism may distort the equality of competition, as analysed in chapter II.[288] What interests most here is how this is translated into the language of treaty provisions and commitments concerning access and entry of other foreign investors. All those investment restrictive measures will be scrutinised by international economic law, under the framework developed in Part A.

Although the pursuit of public goals may be bestowed on SOEs by the government, therefore, justifying the special treatment,[289] this may be a violation of national treatment and other special provisions of trade and investment treaties. This is the case when states make commitments in respect to certain sectors but do not include clear carve-outs for SOEs. Concerning the substantive coverage of SOEs in trade and investment agreements, some propose they should be subject to sound national treatment obligations in relation to inbound services, coupled with a non-exception policy when it comes to market access; this would ensure access and investment in facilities by competing firms.[290] While this may be a deliberate and perhaps legitimate choice by polities, it is necessary to ensure that the

[285] GATS art XXVIII(h).
[286] WTO, *China: Certain Measures Affecting Electronic Payment Services – Report of the Panel* (31 August 2012) WT/DS413/R [7.587].
[287] Sherry Stephenson and Gary Clyde Hufbauer, 'Services and State- Owned Enterprises' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016) 310.
[288] ibid 309.
[289] Willemyns (n 284) 660.
[290] Stephenson and Hufbauer (n 287) 324.

measures that confer this protection are in conformity with international commitments, as argued at the beginning.

As suggested in the introductory chapter, investment liberalisation is one of the aims that states can elect when entering in international economic law agreements. Once it is clear that a treaty is explicitly intended to bring about investment liberalisation, this should impact on the way investment treaty rules are interpreted to ensure their effectiveness. The analysis should naturally be carried out at the level of object and purpose.[291] An effective adjudication of those rules is one in which adjudicator pay attention to this goal. For example, some provisions, such as national treatment, have to be interpreted not only with the aim of investment protection in mind but also of liberalisation. This may strengthen the view of national treatment as a guarantee of access and competitive opportunities to the most capable or innovative producer or service provider, regardless of its origin.[292] In this context, the rules of such a regime would be considered more effective if they bring about some sort of liberalisation tempered with the protection of regulatory space.

It is important to point out that, as seen in part A, each treaty bargain will establish the level of liberalisation in the context of the need for regulation in the public good. Besides, as shown in the discussion of *ejusdem generis* in chapter V, there is a blurred line between investment protection and liberalisation and they can amount to same phenomenon. Investment liberalisation needs to be analysed under the framework of the bargain struck and not as overarching goal, as will be evident in chapter VIII. An effective international adjudication means a system that safeguards such balance when enforcing the rights and obligations. The next section provides a good illustration of these adjudicatory efforts.

[291] As aptly put by Kurtz, "coherence in legal reasoning, measured partly by adherence to the VCLT, is a critical value towards which adjudicators in both systems should aspire." Kurtz (n 152) 278.
[292] ibid 90.

b. AMERICAN INVESTORS IN CHINA: ELECTRONIC PAYMENT SERVICES

i. Context

There is no doubt that the Chinese accession to the WTO was a landmark towards the assumption of liberalisation commitments for foreign investments into China. The way in which the commitments were crafted at first sight allowed for the establishment of foreign investments to the benefit of Chinese consumers while also safeguarded Chinese interests to protect its domestic investors.[293] The relaxation of FDI restrictions, following the commitments, led to an inflow of investments in some industries.[294] The outcome of the process though was less clear and more litigated than expected.[295]

The case involving China's national champion for international payments, China Union Pay – CUP, a bankcard services corporation, headquartered in Shanghai, well typifies the scenario: it is currently the largest payment scheme in the world in terms of value of transactions.[296] The current position has been achieved to some extent due to the fact that CUP had been protected by domestic measures in the Chinese market, which were later found, by a WTO Panel, to be against international commitments set in the GATS.

Providers of electronic payments such as Mastercard, VISA and American Express were the players behind the US challenge of Chinese measures in the WTO DSB. This is not surprising given the interest of those companies to invest in the lucrative and not completely open market for electronic payments in China. This dynamic market is targeted by both traditional and new *fintech* companies,

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[293] For an overview of the political economy process that led to the liberalisation of investments upon China's accession, see Lee G Branstetter and Robert C Feenstra, 'Trade and Foreign Direct Investment in China: A Political Economy Approach' (2002) 58 Journal of International Economics 335.

[294] For an account of the effect of FDI in domestic firms after the entry of China in the WTO, see Yi Lu, Zhigang Tao and Lianming Zhu, 'Identifying FDI Spillovers' (2017) 107 Journal of International Economics 75, 89–90.

[295] See, for instance, WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel* (12 August 2009) WT/DS363/R.

[296] RBR 'UnionPay takes top spot from Visa in $22 trillion global cards market' Finextra (22 July 2016) <www.finextra.com/pressarticle/65412/unionpay-takes-top-spot-from-visa-in-22-trillion-global-cards-market---rbr> accessed 15 August 2018

either Chinese (Tencent, Alibaba) or foreign (PayPal), which brings challenges to its regulation.[297]

The market for Electronic Payment Services (EPS) is composed by several actors. In rough terms, a payment card transaction involves not only a consumer (card holder) and a merchant, but also several entities. A payment card can be a credit card, a debit card, a prepaid card, an automated teller machine (ATM) card or similar cards.[298] Payment card companies own the brands, operate the infrastructure and network and license them to issuers and acquirers.[299] Issuers are banks that make cards available to card holders, authorise transactions, collect payments and transfer funds.[300] Acquirers, often banks, connect merchants to a card company, maintain merchants' accounts and ensure that payments are credited.[301]

Among the measures of protection, there were mandatory requirements for banks and institutions to issue cards with the CUP brand[302] and also to acquire CUP transactions.[303] There were also requirements that all ATM terminals and point-of-sale terminals accept CUP cards.[304] In addition, foreign companies had their presence severely limited in Hong Kong and Macao since CUP was the only company allowed to handle the clearing of renminbi transactions in bank cards used or issued there.[305]

The reasons behind the protection of the Chinese provider may include the interest to maintain the monopoly in the provision of those services. While acquirers or merchants could accept other cards, CUP strengthened its privileged position since it "*does not have to invest in promoting* its brand to issuing institutions … and *does not have to invest in persuading* banks to acquire transactions for the CUP brand ..."[306] While payment card companies from other members States had to invest time and effort to make their brand known and

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[297] Louise Lucas, 'Race for China's $5.5tn Mobile Payment Market Hots Up' *Financial Times* (1 May 2017) <www.ft.com/content/e3477778-2969-11e7-bc4b-5528796fe35c> accessed 15 August 2018.
[298] *China: Electronic Payments* (n 286) [7.12].
[299] ibid [7.17].
[300] ibid [7.14].
[301] ibid [7.15].
[302] ibid [7.229].
[303] ibid [7.354].
[304] ibid [7.331].
[305] ibid [7.383].
[306] ibid [7.503] (emphasis added).

displayed in the cards, CUP did not face that.[307] Concluding that CUP could clearly support more competition to the benefit of Chinese consumers and merchants, Hoekman and Meagher suggest that the case was triggered as "CUP was starting to eat into the core market of the major card companies – particularly the market leader, Visa".[308]

The obligations upon China's accession to the WTO included mode 3 commitments related to EPS. China had undertaken several commitments for foreign investments in financial services under both the national treatment and the market access entries, since there were no limitations in relation to the subsectors. The commitments meant that "foreign financial institutions *must no longer face any limitations on national treatment*".[309] Subject to the fulfilment of qualification requirements to engage in local currency business, "*China is obligated to give EPS suppliers of other WTO Members access to its market, through commercial presence,* so that they may engage in local currency business in China …"[310] Having set the context, the next section turns to the main legal findings of the Panel and the way it relates to investor access rights.

ii. Arguments and Outcome: Access and Competition

It was not surprising that China's measures were considered to be against some of those commitments. The Panel concluded that the measures breached GATS arts XVI and XVII, since they constituted limitations in relation to the subsectors. Concerning the market access claims, the Panel came to the conclusion that:

> [T]he Hong Kong/Macao requirements are inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) *mode 3 market access commitments*, they maintain a limitation on the number of service suppliers in the form of a *monopoly*; [311]

[307] ibid [7.738].
[308] Bernard Hoekman and Niall Meagher, 'China – Electronic Payment Services: Discrimination, Economic Development and the GATS' (2014) 13 World Trade Review 409, 441.
[309] ibid [7.674] (emphasis added, fns omitted).
[310] ibid [7.575] (emphasis added, fns omitted).
[311] ibid [8.1(e)(v)] (emphasis added).

As the requirements failed to accord to services and service suppliers of other Members treatment no less favourable than China accorded to its own like services and service suppliers, the Panel decided that:

> [T]he issuer requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and *mode 3 national treatment commitments*, …;[312]
> [T]he terminal equipment requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and *mode 3 national treatment commitments* … ;[313]
> [T]he acquirer requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and *mode 3 national treatment commitments* … ;[314]

In short, the result was satisfactory to the extent that the Panel correctly interpreted the rules and led to the determination of removal of barriers to entry affecting investments by foreign card companies.[315] Had China wanted to protect the market for CUP, it should have not included those commitments in its schedules. As aptly put by Hoekman and Meagher, "governments *should not make full commitments on market access and national treatment if they wish to pursue policies that result in a sole supplier* of a certain type of service as was the case with CUP."[316] The inability of Chinese negotiators to include specific reservations in their lists or the inexperience of Chinese regulators to craft compliant solutions may also have contributed to this setback.

While there are not enough normative elements to assess whether a monopoly would be in China's long-term interest, one certainly sees in the Panel decision the warning that there is no way around the clear language of commitments. The case was not appealed perhaps for the fear that member States could take retaliatory measures to prevent CUP's internationalisation and growth.[317] The possibility of states imposing barriers to investments by companies which provide innovative types of electronic payments is not detached from reality. Protectionist trends and retaliatory purposes may intertwine with prudential reasons and consumer protection issues and lead to the imposition of restrictive regulations in this area. This may take the form of restrictions on the acquisition of

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[312] ibid [8.1(f)(i)] (emphasis added).
[313] ibid [8.1(f)(ii)] (emphasis added).
[314] ibid [8.1(f)(iii)] (emphasis added).
[315] Hoekman and Meagher (n 308) 438.
[316] ibid (emphasis added).
[317] ibid 441.

companies by established players of a certain origin, through screening mechanisms, such as those discussed in chapter VI.

In fact, the imposition of such measures is a credible scenario, the level of political and economic friction between US and China providing the perfect illustration.[318] When it comes to the conformity of these measures with the GATS market access and national treatment provisions, the first step is to figure out whether these new digital payment services are already included in the schedules, as a technology neutrality argument would suggest.[319] If they are classified as something else, they would be outside the scope of the commitments. On the other hand, as shown in chapter V, the GATS MFN provision would naturally apply if there is discrimination between foreign investors. In any case, this discussion goes beyond the scope of this inquiry.

Another point to be noted is that, as suggested in chapter II, market access restrictions may also affect potential domestic investors. In the context of the case, quantitative measures that limit the number of investors would also affect CUP potential domestic competitors, if any. In this light, some express concern over the fact that the 'aspect' of the measure that affects the domestic suppliers is regulated by the GATS.[320] There is an implicit risk, the argument runs, that measures that only relate to nationals (investors) of the host country be scrutinised.[321]

One should not deny the possibility that an international treaty deals with non-discriminatory market access restrictions which happen to affect primarily only domestic investors, eg quota for licenses only for domestic companies. While a normative objection could be made against an international treaty regulating access for investors of the host country, there are arguments that justify such a regulation based on the effect on international trade and investments. In fact, international provisions to control monopoly power and ensure competition

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[318] Given China's restrictions for cloud computing services from US firms (Amazon, Microsoft), the US is considering to retaliate, eg, prohibiting Alibaba from offering cloud-computing in the US or blocking the company's expansion in the country, see Bob Davis, 'U.S. Wants to Retaliate Against China's Restrictions on American Tech Firms' *Wall Street Journal* (17 April 2018) <www.wsj.com/articles/u-s-is-examining-ways-to-retaliate-against-chinese-restrictions-on-u-s-tech-companies-1523910784> accessed 15 August 2018.

[319] WTO, *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004) WT/DS285/R [6.285].

[320] Michelle Q Zang, 'The Uncompleted Mission of China – Electronic Payment Services: Policy Equilibrium between Market Access and National Treatment under the GATS' (2015) 12 (1) Manchester Journal of International Economic Law 16, 22.

[321] ibid 23.

progressively go in that direction. The idea behind this might be that the more competitive is the domestic market, the less it is prone to anticompetitive practices by domestic companies.

In *Mexico-Telecoms*, the Panel decided that Mexico had breached its mode 3 commitments by not issuing laws or regulations to guarantee access and use of facilities by foreign established providers from the US.[322] Furthermore, the Panel considered that Mexico failed to maintain suitable measures to prevent anti-competitive practices by its major telecom supplier (Telmex), which excluded foreign supply.[323] It was clearly a case of hybrid public/private restraints: a former state-owned incumbent, which kept barriers supported by the governments to restrict access of foreign competitors.[324]

Most importantly, though, the government measures required that even the smaller domestic competitors to Telmex adopted certain market-sharing conducts and higher prices.[325] Thus, even if there are no government measures limiting foreign investments per se, practices such as the above can indeed hinder market access and affect foreign investors. The idea behind is when domestic providers are also subject to investment restrictions, there is less integration in GVCs and less FDI spillovers. This effect would eventually fulfil the requirement of application of GATS art I:1.[326] In any case, the most common situation are measures of market access restrictions that affects both domestic and foreign groups, so one should expect that international trade in services is affected.

The Panel approach in *China – Electronic Payments* has not been free from criticism, especially on the relation between national treatment and market access. Zang argues that the Panel could have done more than "simply affirming the existence of overlap; it should have continued to demonstrate there is a complete overlap of measures to which both GATS arts XVI and XVII apply."[327] The exact

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[322] WTO, *Mexico: Measures Affecting Telecommunications Services – Report of the Panel* (2 April 2004) WT/DS363/R [7.381].
[323] ibid [7.265]-[7.269].
[324] Eleanor M Fox, 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) 9 JIEL 271, 281–282. Fox clarifies that as Mexico's regulations prohibited foreign suppliers to undercut the fixed high prices for international calls, they could not compete effectively for domestic customers as foreign investors in Mexican firms, since Telmex would engage in cross-subsidisation.
[325] ibid 283–284.
[326] GATS art I:1 provides, "This agreement applies to measures *affecting trade in services*." (emphasis added).
[327] Zang (n 320) 25–26.

scope of the overlap between the provisions include both discriminatory quantitative measures applying to post-establishment and discriminatory quantitative measures *affecting the ability to establish*, as sustained by Mattoo.[328] This reaffirms the conclusion that discriminatory quantitative restrictions affecting the entry of investments and investors are to be evaluated under both articles, as mentioned in chapter II.

Furthermore, if the market access column is "unbound", this is equivalent to inscribing all the six types of prohibited measures of GATS art XVI.[329] That is how the Panel read GATS art XX:2,[330] the consequence of which is that the discriminatory aspect of those measures will not be in breach of the national treatment obligation of GATS art XVII, even when the national treatment column grants full commitment ("none").[331] In the context of the entry of investments, the inscription "unbound" in market access means that there is guarantee of non-discrimination only concerning discriminatory measures affecting the ability to establish that do not fall under GATS art XVI.[332] For example, if a numerical quota for the establishment of foreign investors in, let us say the hotel sector, is discriminatory, it would not be a violation of national treatment if the market access column is "unbound".

What is worth highlighting here are the legal consequences of the inclusion of market access provisions as part of investment chapters in larger economic agreements. This discussion is particularly important in the context of convergence in treaty making, as delineated in chapter II. This means that investment treaties become valuable not only to foreign investors, but also, at least indirectly, to certain domestic investors. The latter would benefit from rules that prohibit the imposition of non-discriminatory measures affecting any investor.

One ponders to what extent panel and AB interpretations of GATS art XVI would be resorted to in the interpretation of these similar investment provisions. Moreover, it is uncertain how the market access provisions will interact with

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[328] Aaditya Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora Box' (1997) 31 JWT 107, 115.
[329] *China – Electronic Payments* (n 286) [7.660].
[330] GATS XX:2 provides: "Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. *In this case the inscription will be considered to provide a condition or qualification to Article XVII as well."* (emphasis added).
[331] *China – Electronic Payments* (n 286) [7.661]-[7.665].
[332] Mattoo (n 328) 115–116 fn 18.

national treatment obligations inscribed in negative lists. However, as market access provisions are being excluded from investor-state arbitration mechanisms, there will be less opportunities for adjudicators to clarify the scope of those commitments.

iii. Inter-Regime Shifting: International Investment Law

Having set the main aspects and repercussions of the GATS case, it is now time to analyse alternative mechanisms through which the dispute could have been brought. The possibility of enforcing an equivalent obligation in another regime of international economic law has been described as inter-regime shifting, whereby parties experiment with cross-enforcement between trade and investment.[333]

The strategy can involve either party-shifting or relief-shifting: the first one refers to the attempt to change the traditional subject of the enforcement whereas the second relates to the experimentation on the type of relief one is willing to obtain.[334] While the very existence of a "traditional" or "preferable" enforcement actor is debatable, this framework is a compelling way to think about the issues. *Trucking Services,* referred to in chapters I, III and IV, can be considered an effort to engage in such strategy.

The question is whether the entry issues discussed in *China – Electronic Payments* could have been a breach of investment treaty obligations and challenged under investment treaty mechanisms. There have been cases of overlap that were actually brought in both trade and investment forums, such as the Mexican corn syrup saga.[335] The most evident examples are the tobacco regulation challenges. They were framed as a TRIPS violation case, brought by several states under the WTO dispute settlement mechanism against Australia[336]

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[333] Sergio Puig, 'International Regime Complexity and Economic Law Enforcement' (2014) 17 JIEL 491, 503.
[334] ibid 503–505.
[335] WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages – Report of the Panel* (7 October 2005) WT/DS308/R and *Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc v United Mexican States* ICSID Case No ARB(AF)/04/5, Award (21 November 2007); *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2 Award (18 September 2009).
[336] WTO, *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Panel* (28 June 2018) WT/DS435/R WT/DS441/R WT/DS458/R WT/DS467/R.

and also as a BIT breach in investor-state arbitrations, brought by Philip Morris against Uruguay[337] and Australia.[338] Both investment claims were unsuccessful (for lack of jurisdiction in the latter, and for lack of merit in the former) and the WTO claims were rejected in their entirety. In any case, while there is no definitive mechanism of coordination inherent in international law, treaty making can certainly address those situations. CETA art 29.3, mentioned in chapter II, is an example of a provision that regulates parallelism.

As to *China – Electronic Payments,* could the same set of facts provide the grounds for a claim brought by the affected investor through investor-state dispute settlement? If yes, which type of relief could be granted? It is noted that several WTO cases on services were brought by member States backed by the interests of large multinationals companies in the financial, distribution and telecommunication sectors owing to a restriction on mode 3, therefore on investments.[339] In this case, the most immediate answer would be negative, since there is no investment treaty between the US and China, let alone one providing for arbitration.

Therefore, it is perhaps useful to think in terms of model investment obligations contained in a hypothetical BIT. The construction of hypotheticals may help to cast further light on the complex dynamics between WTO services regulation and IIAs. Some have analysed whether the factual matrix of certain cases brought to the WTO could provide the grounds for a claim by private parties under a hypothetical model BIT.[340] When it comes to the GATS, for example, in relation to *China – Publication and Audiovisual Products*, Afilalo concluded that the case had a reasonable potential of success in an investor-state arbitration.[341]

Let us then suppose the following scenario. Imagine that US and China had a BIT in force, which allowed for investors or its subsidiaries incorporated elsewhere to bring an investor-state claim against their host state. This hypothetical treaty would require some specific features. First of all, it would require a broad

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[337] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay*, ICSID Case No ARB/10/7, Final Award (8 July 2016).
[338] *Philip Morris Asia Ltd v Australia*, UNCITRAL, PCA Case No 2012-12 Award on Jurisdiction and Admissibility (17 December 2015).
[339] Gari (n 201) 605.
[340] Ari Afilalo, 'Failed Boundaries: The Near-Perfect Correlation Between State-to-State WTO Claims and Private Party Investment Rights' (NYU 2013) 01/13.
[341] ibid 137, 139.

definition of investor, including investors which seek or attempt to make an investment. This would allow prospective investors – for instance VISA, Mastercard and American Express – to put forward claims against China. If the definition of investor contained a clarification similar to the CPTPP,[342] then those companies would have to show that they have taken concrete actions to make an investment, in this case, by applying for a permit to operate, as seen in chapter I.

Second, this hypothetical treaty should cover in its standards of protection – national treatment, MFN or even FET – establishment or admission, in the terms analysed in chapter I. The way in which the national treatment obligation was interpreted in the *China – Electronic Payments* Panel is illustrative of how it could be interpreted under the BIT standards. The definition of like services and services suppliers (or like circumstances), the comparability standard and discrimination come into play, as mentioned in chapters I and II. One can note that the Chinese practice in the past had been to confer establishment coverage only in relation to the MFN treatment.[343] In this case, the investor would need to compare its treatment to other foreign investors, with all the qualifications and observations developed in chapter V. However, from the facts of the case, an MFN claim would not be viable.

Third, if the model BIT contained market access provisions, as some larger trade agreements have incorporated, another possible avenue for a claim would arise. For this hypothetical to make sense, the list of non-conforming measures must not carve-out measures in the sector of electronic payments. Likewise, if the BIT follows a positive list model in relation to establishment or market access, China must have added market access or national treatment commitments similar to those in the GATS lists.

Consider then that the same violations of the GATS have been found in respect to this treaty. For instance, the issuer, terminal equipment and acquirer requirements are found to be against national treatment for the investor and the Hong Kong/Macao requirements are considered a violation of market access as they lead to a monopoly. The next key aspect to be discussed is the relief sought by the investors. In general, two options are available in the light of the principle of

[342] CPTPP art 9.1 fn 12. See also USMCA art 14.1 fn 3.
[343] See eg China-Finland BIT (signed 15 November 2004) art 3.3.

full reparation. The first one takes the form of juridical restitution, that is, the immediate repeal of the restrictive measures, as developed in chapter IV. The second one takes the form of compensation, that is, monetary relief for the breach of the international obligations.

For juridical restitution to be available, the hypothetical BIT must not have provisions limiting investor-state claims to monetary relief or to material restitution. The primary objective would be the repeal of the conflicting regulation, which either favours CUP or prevents investments in certain regions. It appears that Visa, Mastercard and American Express would be mostly interested in getting more access to the lucrative Chinese market rather than having compensation for lost profits. It is evident that the actual entry depends on further actions by the host state. Even in face of the WTO decision, only much later did China authorise the first foreign credit card companies to operate in the country, provided that this is done through a joint venture with a local company.[344]

However, if compensation is sought, one needs to assess the basis for the calculation of the damages. The but-for-the-breach scenario would depend on the international obligation in question. Concerning the national treatment breach, the scenario would be one in which Visa, Mastercard and American Express would not have borne the extra costs to convince issuers to put their brand in the cards, for instance. This amount of compensation could be equivalent perhaps to the investment needed for *"promoting* its brand to issuing institutions" and "*persuading* banks to acquire transactions for the CUP brand", as described by the Panel.[345]

Regarding the market access breach, the scenario would be one in which the investments in Hong Kong and Macao would not have been restricted. Therefore, Visa, Mastercard and American Express, for example, would have been able to handle the clearing of renminbi transactions in bank cards used or issued in those places. The companies would have thus entered the market unfettered and would have had a certain market share and earned profits during the period of the breach. The same rationale has been suggested in the context of a hypothetical BIT litigation involving a trade law infringement of intellectual property rights

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[344] Lingling Wei and Chao Deng, 'American Express Is Ready to Charge Into China' *Wall Street Journal* (26 April 2018) <www.wsj.com/articles/american-express-advances-in-effort-to-access-china-market-1524668149> accessed 15 August 2018.
[345] *China – Electronic Payments* (n 286) [7.503].

affecting the establishment and operation of an enterprise.[346] On the other hand, as shown in chapter IV, this type of assessment of damages is far from settled and the degree of speculation is high.

It has been shown that a sign of convergence has been the exclusion or limitation of recourse to ISDS in cases related to entry. In this light, another basis for the damages – related to both the national treatment and the market access breaches – would be damages that were sustained during the attempt to make the investment. This would be the only grounds for damages if there is a limitation in the hypothetical BIT such as the one in CPTPP art 9.29(4), discussed in chapter IV. To recall, only damages sustained in the attempt to make the investment can be awarded. That could perhaps involve, for example, the cost of lawyers, the cost of the preparation of proposals and the cost of paperwork in the application for the licences.

Another way the same set of facts discussed in *China – Electronic Payments* could be challenged under investment treaty mechanisms is through a claim in a state-state context. As rightly emphasised by Puig "provisions aimed at protecting investments can be enforced at *an inter-state level*, as part of larger liberalization commitments."[347] As shown in chapter III, nothing prevents the BIT or regional trade and investment agreement from having their own state-state form of enforcement, in addition to or in lieu of the investor-state mechanism. In fact, as extensively discussed, most BITs have state-state jurisdiction clauses. The state-state alternative can be particularly convenient to enforce rules on the pre-establishment of investments "since the question of direct damages to an unestablished investor could be otherwise difficult to determine."[348]

All in all, this case study invites a reflection on both substantive and procedural rules. Investment protectionism may take the form of several measures and result in the protection of domestic investors and the creation of monopolies for national champions. Substantively, in this context, the precise interpretation of the treaty standards, including the definition of the exact scope of commitments, is the issue on which adjudication will be focussed. An alignment of entry

[346] Afilalo (n 340) 136–137.
[347] Puig (n 333) 503 (emphasis added, fns omitted).
[348] ibid.

commitments between trade in services and investment treaties is what is expected from the new treaties.

Procedurally, the reduced ability to challenge barriers or delays in entry by investor-state mechanisms in the form of lost profits shows that the balance is tilted in favour of potential host states. In a state-state context, host states found in breach of their entry commitments will only have to bring measures into conformity. As the regulatory space is protected, the question would be how this convergence may still effectively further investment liberalisation goals.

CHAPTER VIII – ENTRY OF INVESTORS: RISK REGULATION AND REGULATORY COOPERATION

a. LEGITIMATE CONCERNS AND REGULATORY SPACE: AN OVERVIEW

The last issue touches on the regulation of the entry of investments justified by legitimate concerns, with an emphasis on the financial services sector. The sector has been the object of a major GATS case decided by the WTO AB, with particularly interesting features. The idea is not to describe in detail the challenges of the regulation of the entry and liberalisation of investments in the financial sector, but to provide some brief background to the discussion of the case and the hypotheticals.

Before addressing the issue, it is interesting to note the jurisprudential exercise required to evaluate regulatory concerns vis-à-vis the liberalisation of investments. As already highlighted, many see the reconciliation between market values and regulatory powers as the common strategic challenge in both the trade and the international investment law regimes.[349] In the WTO regime, the adjudication of claims resorting to the general exceptions – GATT art XX and GATS art XIV, for instance – has involved such an exercise, at times described as proportionality balancing[350] and consensus analysis[351] to assess if a measure is necessary to achieve public policy goals.[352] This exercise tends to be replicated in the analysis of exceptions in the international trade regime. In relation to the freedom of establishment, proportionality analysis has also been at the core of the judicial decisions of the Court of Justice of the EU.[353]

Some governmental measures that aim to prevent the entry of foreign companies are basically exclusionary, such as limitations on foreign ownership of airlines, or are the reflection of successful lobbying that restrict domestic

[349] Sungjoon Cho and Jürgen Kurtz, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29 EJIL 169.
[350] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 152–159.
[351] William J Moon and Alec Stone Sweet, 'Consensus Analysis, State Practice, and Majoritarian Activism in the WTO' (2014) 108 AJIL Unbound 295.
[352] On the balancing exercise, see Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 EJIL 663, 664–667.
[353] Stone Sweet and Mathews (n 350) 140.

competition, as well noted by Sabel and Hoekman.[354] On the other hand, the same authors aptly observe that in states "with *high and similar regulatory standards,* many [measures]*… reflect reasonable differences across countries* in approach to the difficult regulatory problems protecting workers, health, safety and the environment …"[355] In this regard, some highlight the "calls for protectionist policies in support of non-trade values" pushed by an agenda of civil society and consumer organisations "that discourages further liberalization due to the potential impact it may have on the *sovereign right of Members to regulate in the public interest*".[356] This supports the idea that the safeguard of regulatory space is a dimension to evaluate the effectiveness of the convergence of the rules.

The interpretation of the rules by adjudicators would be decisive to the way that liberalisation commitments are undertaken and carve-outs are drafted. Since states may desire to preserve some types of regulation that would not be always easy to justify under the common defences (health, environment …), they would have to include them in the list of non-conforming measures in services and investment treaties. The fact is that the characteristics of new entry barriers sometimes do not fit well into the language of rights and exceptions. Their institution requires a certain level of trust and cooperation, which may even result in higher restrictions.

Concerning sectors in which regulation is based on risk, host states may perceive that prudential risks are manageable and desirable and bring domestic gains; they can thus engage in the "unilateral relaxation of restrictions on foreign ownership of banks, insurers or investment firms for reasons of domestic reform or to bring new capital or skills into a domestic financial economy".[357] It is important to emphasise that in a context where most trade barriers are already reduced by unilateral actions, further moves could be possible generally through regulatory cooperation. This encompasses processes whereby regulators set up a dialogue to exchange experiences and information which may lead to regulatory equivalence or mutual recognition.[358]

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[354] Hoekman and Sabel (n 276) 1.
[355] ibid (emphasis added).
[356] Gari (n 201) 593 (emphasis added, fns omitted).
[357] Stephen Adams, 'Living with "Prudentialism": The Challenges of Building a UK Trade Policy for Financial Services' (2017) 4.
[358] Hoekman and Sabel (n 276) 12.

Initiatives on regulatory cooperation between home and host countries go beyond the standards of discrimination or even market access; they tackle the duplication of non-discriminatory requirements or other regulatory externalities which restrict trade or investments.[359] It has been noted that in the light of "*massive increases in two-way foreign direct investment (FDI) between large industrial countries*, … these regulatory differences are costly for international businesses, … which increasingly have *common preferences for reducing them through trade agreements*."[360]

When it comes to the financial sector, the principle of "home country control", the standard in international financial regulation since late 70s, means that the country which headquarters the financial institutions bears the main supervisory responsibilities over them.[361] The era also marked the beginning of the progressive drive towards international regulatory and supervisory cooperation in finance.[362] In this line, states that push for more observance of tighter norms may use the threat of denial of market access for these financial institutions as a bait for the enforcement of their regulation in the institution's home state; home states face though pressure from their own institutions which risk losing international competitiveness if they themselves adopt the higher standards.[363]

It has been shown that this "lingering threat" particularly from the US and the UK have helped to secure adherence to the rules: the more the domestic interests are in favour of the reform, the more promising are the prospects for adherence to the new standards.[364] Several examples of the regulation of services and services providers show that the requirements for performing services or establishing in the EU (market access) depend on regulatory cooperation.[365] This scenario shows the complex network of rights and obligations intertwined with legal concepts which regulate access of foreign companies to the EU market.[366] Scott

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[359] Gari (n 201) 606–607.
[360] Hoekman and Sabel (n 276) 1 (emphasis added).
[361] Eric Helleiner, 'Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 236.
[362] Federico Lupo-Pasini, 'Financial Disputes in International Courts' (2018) 21 JIEL 7.
[363] Helleiner (n 361) 237.
[364] ibid 238–243.
[365] Scott (n 17) 100–104.
[366] As observed by Scott, "While the line between conduct and presence will not always be easy to draw, where the application of EU law *rests upon a requirement that the person in question is,*

brings a good example of how EU law uses territorial extension to obtain improved access to markets for European companies:

> EU market access for third country firms wishing to provide services to those concluding derivatives contracts is contingent upon that firm's country of origin providing an effective equivalent system for the recognition of foreign firms that wish to provide corresponding services there.[367]

The logic illustrated here is somewhat different to the classic investment protectionism argument: powerful and capable lobbies may press for tighter and restrictive regulations, with which they comply, to be able to access foreign markets and keep their home markets safe from weaker competitors. This is not to say that in investments in financial services there is no room for classic protectionism which distorts competition, as seen in chapter VII. As an illustration, in both India and China, state-owned insurance companies benefit from specific advantages in comparison to private investors or foreign-invested firms.[368]

Furthermore, governments may be worried about the speculative nature of some short-term financial investment. They may be required to adopt certain actions to limit foreign portfolio investments. As regulatory barriers target the acquisition of domestic assets, controls on capital inflows may take the form of blocking investment inflows from investors of a certain nationality.[369] Therefore, the regulation by trade and investment agreements of the ways in which countries limit capital inflows contribute to avoid discriminatory restraints. In the EU, it is noted that the freedom of capital movement has direct effect and may be invoked by parties to enforce treaty commitments.[370] In turn, by giving priority to the protection of investors, trade and investment agreements leading to the liberalisation of the capital account may arguably restrain the ability of states to control capital and achieve financial and monetary stability.[371]

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or wishes to be, resident, established or domiciled in the EU, this will be treated as a territorially-grounded, presence-based, test." ibid 92 (emphasis added).

[367] ibid 108 (fns omitted, emphasis added).

[368] Stephenson and Hufbauer (n 287) 310.

[369] Federico Lupo-Pasini, 'Movement of Capital and Trade in Services: Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account' (2012) 15 JIEL 581, 590–591 fns 29, 31.

[370] Helleiner (n 361) 215.

[371] Annamaria Viterbo, 'Tensions Between International Investment Protection and Financial Stability' in N Jansen Calamita, David Earnest and Markus Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law: Investment Treaty Law Current Issues*, vol 4 (BIICL 2013) 192; Lupo-Pasini (n 369) 616–619.

When it comes to financial regulation, the trade-off between financial stability and the liberalisation of financial services through the removal of capital controls to increase investments has been well documented.[372] Some argue that focussing on prudentialism reveals that the traditional way of bargaining in negotiation for services (and investment liberalisation) does not work in the area and propose that regulatory convergence should be the main strategy.[373] Although this allows for more access in the problematic mode 1 (cross-border supply), issues related to mode 3 (therefore investments) remain challenging. The main features of international trade in financial services impact on the way that commitments are crafted. In mode 3, branches are generally treated differently from full local establishment (as a juridical person): regulators have wider powers in relation to branches, given the prudential risk posed by their parent companies.[374] Those are two forms in which the investment may take place, as seen in chapter II.

As an illustration, G20 leaders have warned non-cooperative jurisdictions that if they fail to meet certain standards, countermeasures could be placed against them including market foreclosure.[375] One may even suggest that financial institutions may press their states to adopt tighter-than-necessary regulation, with market closure, to avoid competition. However, some note that the mechanisms of coercion for closure is becoming less effective with the diffusion of power across the globe.[376] Besides, distrust may make domestic regulators more tempted to rely on local regulation, for example, by requiring the establishment of local subsidiaries or restricting cross-border services.[377]

The question is to what extent these measures affect the entry of investments and investors and do clash with GATS and international investment commitments. Several government measures related to the access of investments, taken under the financial supervisory mandate, can be challenged, such as “the issuance of decrees imposing new regulatory requirements for banks and traders” and “decisions on the granting of new banking or trading licenses”.[378] As emphasised by Waibel and Shaffer, the “lack of alignment, and even potential

[372] Helleiner (n 361) 212.
[373] Adams (n 357).
[374] ibid 2 (emphasis added). See also Meester (n 250) 49–51.
[375] Helleiner (n 361) 247.
[376] ibid 250.
[377] ibid 253–254.
[378] Lupo-Pasini (n 362) 9–11.

conflict, on capital controls has become an important concern."[379] In terms of alignment, both PTAs and BITs may constrain incoming portfolio investment and outgoing capital flows.[380] This occurs when the treaties contain provisions respectively on establishment, covering short-term investments, and freedom of transfers.

As a comparative note, while organised transatlantic lobbies to market access for financial services played an important role in the WTO Uruguay Round, financial associations played a role in the extension of the definition of investments in BITs to encompass portfolio.[381] They also insisted on the maintenance of constraints on governments' ability to impose capital controls coupled with investor-state claim rights.[382] The financial industry power also reflected on the choice to liberalise capital controls in a bilateral or regional setting, especially with smaller economies, rather than in the multilateral arena.[383] This resulted in a set of agreements with no exceptions to address prudential concerns or challenges and with ISDS.[384]

ASEAN's experience with the financial crisis led to the decision to include exceptions to the free transfer provisions in the ACIA 2009.[385] In *Continental Casualty v Argentina*, Argentina had argued that the GATT, GATS and IMF regulations provided support for the restriction of transfers, but in the end the restriction under analysis was not considered to relate to an investment.[386] For some, the general necessity clause under customary international law could arguably have been interpreted to provide for alignment between the investment and the monetary legal orders.[387]

Having briefly set the regulatory trends, attention is now turned to how this is reflected in the context of the case study and the hypotheticals.

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[379] Gregory Shaffer and Michael Waibel, 'The (Mis)Alignment of the Trade and Monetary Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 226.
[380] For a different perspective, see Helleiner (n 361) 212.
[381] ibid 216–219.
[382] Shaffer and Waibel (n 379) 223.
[383] ibid 224.
[384] ibid 225.
[385] ibid 219.
[386] *Continental Casualty Company v The Argentine Republic,* ICSID Case No ARB/03/9, Award (5 September 2008) [238]-[245].
[387] Shaffer and Waibel (n 379) 220.

b. ARGENTINIAN FINANCIAL MEASURES FOR TAX PURPOSES

i. Context

It is undeniable that tax evasion, money laundering and financial systemic risk are among the most pressing issues in international financial relations. State actions to tackle them are generally perceived as legitimate and not protectionist. To face challenges related to those issues, the Argentinian government adopted, from 2011 onwards, several measures affecting companies providing services internationally.

This included measures that imposed special requirements for foreign companies to operate in Argentina, arguably affecting mode 3 GATS commitments taken by that state. The main focus of the measures was a list of jurisdictions considered to be non-cooperative, in other words, jurisdictions that have not signed or initiated the negotiation with Argentina of agreements in the tax area, for fiscal transparency purposes.[388] Argentina's tax authority regularly updates this list of "white" jurisdictions, which means that states, territories or tax regimes included in the list are deemed to be non-problematic; the remaining ones are considered "blacklisted" jurisdictions. Therefore, companies originating from those states face additional restrictions compared to companies from other origins.

As expected, this prompted reactions from affected states. Among them, Panama was the most emphatic to express its concerns. Behind the claim, there was possibly the lobby of several financial companies, including of Argentinian origin, which use Panama to channel their operations. Like all jurisdictions with a low or no tax burden,[389] Panama offers tax advantages for companies from other states, upon their establishment. These companies are considered to be Panamanian, under the GATS definition, as seen in chapter II,[390] even if, ultimately, they are controlled by Argentinians.

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[388] The cooperative countries are listed in <www.afip.gob.ar/jurisdiccionesCooperantes/> accessed 15 August 2018.

[389] For the definition of "tax haven", see OECD, 'Glossary of Tax Terms' <www.oecd.org/ctp/glossaryoftaxterms.htm > accessed 15 August 2018.

[390] See GATS arts XXVIII(m)(i)(ii) and (n)(i)(ii).

Moved by those interests, Panama, acting optimally as an offshore financial centre,[391] requested a panel under the WTO dispute settlement mechanism against Argentina based on alleged GATS violations.[392] Most interestingly, Argentina was quick to include Panama in the list of cooperative jurisdictions. However, this did not prevent Panama from continuing to pursue the claim, either because WTO procedures dispense with interest or because it wanted the decision to have exemplary effect. Basically, the claims focused on national treatment, MFN and market access provisions. The targeted measures were classified and presented by the claimant in eight groups. The focus here is on the measures that affected the provision of services in mode 3, that is, investments. Three are particularly linked to the entry of investments in services.

No matter how noble were the objectives that Argentina wanted to address, the design and implementation had to be carefully scrutinised under the GATS obligations. In a nutshell, the Panel rendered the decision, considered that the services affected by the measures were like and decided that there was no justification for the MFN violation, as will be later detailed. Several observations made by the Panel reinforce the spirit of the GATS to protect access opportunities and the role in the analysis of the GATS of potential service suppliers. For example, the Panel considered that "irrespective of whether service suppliers of the complaining party are engaged in trade or seeking to engage in trade with the Member applying the measure ... WTO obligations *protect equality of competitive opportunities* rather than actual trade volumes."[393]

This is a confirmation of the view that ensuring entry and access is a goal of the GATS and that potential service suppliers have to be taken into account in the analysis. According to the Panel, a contrary reading would be illogical as the "GATS would apply to measures provided that there is actual trade in services but would *not apply to the most trade-restrictive measures*, that is, bans on supplying services, which, *by their very nature, prevent actual flows* of services."[394] The same

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[391] Panagiotis Delimatsis and Bernard Hoekman, 'National Tax Regulation, Voluntary International Standards, and the GATS: Argentina–Financial Services' (2018) 17 World Trade Review 265, 283–284.

[392] WTO, *Argentina: Measures Relating to Trade in Goods and Services – Report of the Panel* (30 September 2015) WT/DS453/R and *Report of the Appellate Body* (14 April 2016) WT/DS453/AB/R.

[393] *Argentina – Financial Services Panel Report* (n 392) [7.89] (emphasis added, fn omitted)

[394] ibid [7.94] (emphasis added).

conclusion can be extended to investments: a ban on foreign investments is the most trade restrictive measure as potential investors are not allowed to invest.

The first set of measures that interest us is related to foreign companies willing to enter the Argentine reinsurance markets.[395] In Argentina, the institution which regulates insurance is the National Insurance Supervisory Authority (SSN). According to the Panel, different from reinsurance operations from cooperative countries, to which no requirements apply, access for investors in mode 3 for companies originating in non-cooperative countries is subject to the fulfilment of the following two requirements:

> (i) that the supplier (or its parent company) is subject to the control and supervision of a body which fulfils functions similar to those of the SSN, and (ii) that the body in question has signed a memorandum of understanding on cooperation and exchange of information with the SSN.[396]

This is a prime example of access for investments conditioned on regulatory cooperation, as developed in the last section. In other words, some sort of regulatory cooperation in the form of inter-agency understanding is a *condition* for the entry of investments. In turn, if there is no cooperation, entry is denied. The Panel concluded that there was less favourable treatment since these two requirements, with which reinsurance companies from cooperative countries need not comply, modified the conditions of competition to the detriment of investors from non-cooperative countries.[397]

The second set of measures of interest here involved a series of requirements for the registration of branches.[398] As highlighted in chapter II, commercial presence under the GATS (investments) may take place also by the creation of a branch or a representative office so that the juridical person is accorded the treatment under the agreement through such presence.[399] When it came to branches of companies from non-cooperative countries, the compliance with those requirements was assessed in a more rigorous manner by the General Justice Inspectorate (IGJ) in Argentina. Even if most companies in the end registered successfully, the Panel concluded that this extra burden modified the

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[395] They correspond to Measure n 5, according to the Panel Report.
[396] *Argentina – Financial Services Panel Report* (n 392) [7.326] (emphasis added).
[397] ibid [7.328] (emphasis added).
[398] They correspond to Measure n 7, according to the Panel Report.
[399] GATS art XXVIII(d)(ii) and XXVIII(g) fn 12.

conditions of competition creating "disincentives to the registration of companies from non-cooperative countries, which *face exposure to closer scrutiny* on the part of the IGJ, and it may mean that a larger number of documents are required."[400]

Additional requirements and the closer scrutiny in terms of one of the procedures for the investment set-up are to be considered less favourable treatment. In this situation, administrative formalities were clearly more burdensome to a certain class of investors. It is worth mentioning that Argentina also imposed restrictions to the establishment of companies in the country, in the form of certain presumptions on the transfer of capital from parent companies from non-cooperative countries to the companies with presence in Argentina.[401]

The third set of measures that will be mentioned refers to the need for foreign exchange authorisation to repatriate direct investments.[402] Although these are measures on the exit of investments rather than on the entry of investments, they have an impact on the establishment of investments. Emphasising that the requirements to be fulfilled after the establishment are relevant for business decisions, the Panel observed:

> The fact that this requirement does not apply at the time of establishing a commercial presence in Argentina but rather at the time of withdrawing the investment from the Argentine market *does not prevent this requirement from being related to the supply of services through commercial presence*, in accordance with the definition of this mode in Article I:2 of the GATS. Indeed, such a measure may have an impact on a service supplier's *decision to invest in the market or, in the terms of the GATS, to establish a commercial presence*. In our view, a measure which, for example, totally prohibits repatriation of invested capital at the time of withdrawal from the market would *most likely influence the supplier's decision as to whether or not to establish a commercial presence in that market*.[403]

This means that measures affecting the incentives to invest, in other words, measures that impact on the decision to establish commercial presence, fit under the concept of "regulation of entry". The concept includes those measures that, despite not applying at the very moment of entry, relate to operational conditions or performance conditions of the investment. On the extreme case, this reading leads to the conclusion that a measure affects the constitution or acquisition of a

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[400] *Argentina – Financial Services Panel Report* (n 392) (emphasis added) [7.349].
[401] ibid [2.17].
[402] They correspond to Measure n 8, according to the Panel report.
[403] *Argentina – Financial Services Panel Report* (n 392) (emphasis added) [7.112].

juridical person even if it applies at the moment of the exit of the investment. In the context of investment treaties, this rationale creates a link to the establishment phase and can provide the basis for a claim when an investor is merely seeking to invest. Coupled with the conclusion that the ban of foreign investment, by its nature, prevent the flow of services, this statement reinforces the aim of the GATS to ensure equality of opportunities.

The Panel underlined that all the business decisions to investment in foreign markets require an evaluation of the host country market "which covers not only *the terms of entry for the investment but also its treatment post-establishment,* including its withdrawal from the country."[404] This goes in line with the suggestion by WTO panels that measures affecting investment plans might be considered trade-restrictive.[405] The Panel also mentioned that any application to the Central Bank of the Argentine Republic (BCRA) to repatriate investment, entails time costs and risk of rejection, which leads to a disincentive for investments by non-cooperative countries.[406] In this light, it seems that being subject to discretion as opposed to a streamlined process in terms of investment approvals is considered less favourable treatment.

ii. Outcome: General Exceptions and Prudential Measures

After assessing the elements of the MFN obligation (likeness, least favourable treatment) and the possible exceptions, the Panel found that the requirements related to the registration of branches and to the foreign exchange authorisation – the second and third set of measures mentioned before – were inconsistent with GATS art II:1.[407] Moreover, the breaches could not be justified under the exception of GATS art XIV(c) [necessary to secure compliance with the laws or regulations] since their application constituted arbitrary and unjustifiable discrimination under the chapeau of GATS art XIV.[408] The requirements related to investments in reinsurance services – the first set of measures – were also deemed

[404] ibid [7.358] (emphasis added, fns omitted).
[405] See *Australia —Tobacco Plain Packaging* (n 336) [7.1231].
[406] *Argentina – Financial Services Panel Report* (n 392) (emphasis added, fns omitted) [7.357].
[407] ibid [8.2(b)].
[408] ibid [8.2(d)].

to violate GATS art II:1 and were not justified by paragraph 2(a) of the Annex on Financial Services (AFS),[409] given that they were not taken for prudential reasons.[410]

Before addressing the AB report, it is worth briefly exploring the features of the general exceptions of the GATS compared to the prudential exceptions of the AFS. Like GATS art XIV, paragraph 2 (a) of the AFS may be used as an exception to all types of measures, including market access restrictions.[411] There is a broader margin of manoeuvre for financial regulators as the language of the Annex does not require that the measures are necessary, nor that they do not amount to arbitrary or unjustifiable discrimination, as mandated by GATS art XIV.[412] Since the only constraint is that GATS obligations are not circumvented or scheduled commitments nullified, the AFS has been interpreted as imposing at least a "reasonableness test", in which the WTO decisions have played a role.[413] The current understanding in the GATS is that states have to show the rationale between the measure and its prudential objective.[414] The Panel has rightly and understandably given deference to the identification of prudential reasons for Argentina's measures.[415] However, while the Panel recognised that reasons for restrictions on the establishment of reinsurers – among them, protect the insured and avoid systemic risk – were prudential in nature, it considered that the restrictions did not have a rational relationship of cause and effect with those reasons.[416]

The key issue was that Argentina considered some states as cooperative, even if they had not concluded an information agreement or effectively exchanged information. This was considered to be arbitrary or unjustifiable discrimination. The same reasoning resulted in the rejection of the GATS art XIV(c) defence, as it did not pass the test of the chapeau.[417] The Panel considered that the investment

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[409] AFS "para 2. Domestic Regulation (a) Notwithstanding any other provisions of the Agreement, a Member shall *not be prevented from taking measures for prudential reasons* ... Where such measures do not conform with the provisions of the Agreement, they shall *not be used as a means of avoiding the Member's commitments or obligations under the Agreement."* (emphasis added).
[410] *Argentina – Financial Services Panel Report* (n 392) [8.2(b) and (e)].
[411] *Argentina – Financial Services AB Report* (n 392) [6.272].
[412] Delimatsis and Hoekman (n 391) 281–282.
[413] Andrew Mitchell, Jennifer K Hawkins and Neha Mishra, 'Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 JIEL 787, 813.
[414] Lupo-Pasini (n 362) 19.
[415] Mitchell, Hawkins and Mishra (n 413) 810.
[416] *Argentina – Financial Services Panel Report* (n 392) [7.904], [7.919].
[417] ibid [7.761], [7.764].

restrictive measures were designed to secure compliance with laws related to money laundering and to the legitimacy of foreign activities of parent companies; it also acknowledged that combating harmful tax practices are a priority objective for the international community.[418] What is more, the Panel recognised the role of relevant international fora and standards.[419] The AB did not address those issues, but one might ponder whether those standards could be granted a more important status in the analysis.[420] The takeaway is whenever states desire to use regulatory cooperation as a criteria for the entry of investments, they must ensure an objective and coherent determination of the outcome of the cooperation (eg actual treaties or effective exchange of information).

While the Panel adequately determined the facts, the AB decided that the Panel had not established likeness in the correct way. This in the end meant that the MFN violations found by the Panel were not upheld. The AB findings on likeness are particularly important, as already developed in chapter II. Reiterating the "integrated element" and "holistic analysis" of likeness, the AB stated that "separate findings with respect to the 'likeness' of services, on the one hand, and the 'likeness' of service suppliers, on the other hand, are not required."[421] In keeping with the AB, the relative weight to be given to each element depends on the aspects of the competitive relationship, according to the circumstances.[422]

It is interesting to mention that in *China – Publication and Audiovisual Products*, the measure at issue prohibited foreign-invested enterprises from engaging in the wholesale distribution of imported reading materials while at the same time allowing Chinese enterprises to engage in that activity.[423] This is an outright discrimination based exclusively on origin. In *Argentina – Financial Services*, the AB recalled that aspect and emphasised that when origin is the exclusive criteria for differentiation, there can be a presumption of likeness, despite recognising that in the GATS context this presumption is more limited.[424] In the case, the discrimination was not based on origin itself but on the regulatory

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[418] ibid [7.648], [7.681], [7.703] and [7.705]. These findings were not reversed by the AB, see *Argentina – Financial Services AB Report* (n 392) [6.241].
[419] *Argentina – Financial Services Panel Report* (n 392) [7.715], [7.759]-[7.760].
[420] Delimatsis and Hoekman (n 391) 280, 287.
[421] *Argentina – Financial Services AB Report* (n 392) [6.29] (fn omitted).
[422] ibid.
[423] WTO, *China – Publications and Audiovisual Products Panel Report* (n 295) [7.975].
[424] *Argentina – Financial Services AB Report* (n 392) [6.38]-[6.39].

framework linked to such origin. According to the AB, the Panel should have analysed the crucial argument that access to tax information affects the competitive relationship and consumer preferences.[425] The narrow view of the AB appears to indicate that only de jure discrimination would benefit from the presumption to substantiate the finding of likeness.[426] In all other cases, a more detailed analysis of likeness is necessary.[427]

The AB approach in *Argentina – Financial Services* has not been immune from criticism. The AB stated that no separate and additional analysis of regulatory purpose of the contested measure (in that case the desire to access tax information) should take place to inform the analysis of treatment no less favourable.[428] The position that the purpose of a measure cannot render it consistent with arts II and XVII of the GATS is not the best approach, in keeping with Mitchell et al.[429]

In any case, this was indeed a resounding victory for Argentina, which left the case with no obligation to change or adapt its measures. The analysis of both the Panel and the AB as well as the parties' submissions provide extensive and rich materials to the discussion. Whereas the decision brings important elements to the analysis of likeness, this may be implicitly read as a deference to Argentina's arguments by the AB. It perhaps entails a recognition of the value of policy choices regarding tax evasion and prudential measures. Although this result was achieved through a convoluted analysis of likeness, instead of through a more mature evaluation of the regulatory purpose in the exceptions,[430] the balance is positive to host states. This case is therefore important in the context of the tension between the GATS regulation of capital transfers and the need to control capital inflows more generally.[431] Besides, it may well serve as a guide to countries on how to draft measures that could result in investment restrictions or bans for prudential measures. These measures may be also subject to investment treaties, as

[425] ibid [6.64].
[426] Delimatsis and Hoekman (n 391) 277.
[427] Compare *Argentina – Financial Services AB Report* (n 392) [6.61] with *Panel Report* [7.185].
[428] *Argentina – Financial Services AB Report* (n 392) [6.106].
[429] Mitchell, Heaton and Henckels (n 203) 119–120.
[430] As hinted at by the AB itself in *Argentina – Financial Services AB Report* (n 392) [6.115]. See also Delimatsis and Hoekman (n 391) 278.
[431] Gabriel Gari, 'GATS Disciplines on Capital Transfers and Short-Term Capital Inflows: Time for Change?' (2014) 17 JIEL 399, 4.

developed in the next section, which evidences the challenge of balancing investment liberalisation goals and regulatory powers in the context of increasing convergence between the regimes.

iii. Inter-Regime Shifting: International Investment Law

A measure that bans investments or capital flows from certain countries in any sector would not only be subject to the GATS but also to other investment agreements that cover entry. Thus, similarly to the previous case study in chapter VII, what matters here for the purpose of the comparative approach is to check whether the situation in *Argentina – Financial Services* would or could be covered by an existing or hypothetical BIT.

First, the evaluation is whether investors could have used the Panama-Argentina BIT to challenge measures affecting Panama-established service providers in Argentina. This would probably cast light on why Panama did choose the WTO over a state-state or investor-state claim under the same BIT. There is in fact a BIT between Panama and Argentina, but it does not cover entry. While those same countries have signed BITs with establishment rights, as shown in chapter I,[432] the material scope of the MFN of the current Panama-Argentina BIT does not include establishment.[433]

In fact, at least in theory, any company of one of the states affected by the measure which had a BIT with Argentina could have considered to bring a claim. Were the treaty in question to cover establishment, a claim based on the breach of entry rights would arguably be possible. This is the case of the US-Argentina BIT, for example, which contains a clause with entry obligations on an MFN and national treatment basis, modelled by the US BITs in the second half of the 80s, described in chapter I. However, in that case, a complex argument would necessarily involve US investors using Panamanian companies to invest in Argentina, claiming an MFN breach, with all the qualifications and low perspectives of success. If the treaty contains a denial of benefits clause, the scenario would be even more complex.

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[432] Eg Panama-Singapore FTA (signed 1 March 2006); Argentina-Chile FTA (signed 02 November 2017).

[433] Argentina-Panama BIT (signed 10 May 1996). Interestingly, this BIT gave rise to subsequent declaratory note on interpretation which states that dispute settlement procedures are not covered by the MFN clause; see *National Grid PLC v Argentina* (n 128) [85].

Think now of a hypothetical BIT. Like in chapter VII, this treaty would require similar specific features: a broad definition of investor, including those which seek to make an investment; coverage of establishment or admission on national treatment and MFN; and no provisions limiting investor-state claims to monetary relief or to material restitution. This would allow, for example, a prospective investor in the reinsurance sector based on non-cooperative countries – and affected by the first set of measures – to bring an investor-state claim against Argentina.

The investor would primary seek for juridical restitution, which would involve the removal of the discriminatory character of the measure, by allowing its free establishment in Argentina. Furthermore, the investor could seek relief in the form of compensation for the lost opportunities during the period in which its presence was not allowed in Argentina, in the terms discussed in chapter IV. One could also imagine an investor which is the parent company of the branch that wants to set up in Buenos Aires. In this case, it would seek either the imposition of the same burdensome requirements to every company or, much better, the removal of those requirements, which cause him extra costs.

Concerning exceptions, as highlighted in the previous section, an understanding of their character and scope is key to evaluate how aligned the regimes are when it comes to the regulatory space regarding the entry of investments. Given the avalanche of ISDS claims against Argentina in the aftermath of its financial crisis in the early 2000s,[434] the now diligent Argentinian negotiators would do their best to set out very clear carve-outs and justifications for anything financial. Although quite rare,[435] decisions which interpreted prudential exceptions in investor-state disputes have recognised that even if the BIT in question does not contain explicit provisions, this is within the regulatory powers of states.[436]

These kinds of measures are seeking quintessentially legitimate values (financial stability and tax evasion). In fact, many BITs have excluded financial

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[434] William W Burke-White, 'Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, The' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199.

[435] *Saluka Investments BV v Czech Republic,* UNCITRAL, Partial Award (17 March 2006) [270]; *Fireman's Fund Insurance Company v The United Mexican States*, ICSID Case No ARB(AF)/02/01, Award (17 July 2006) [162]-[165]; *Renée Rose Levy de Levi v Peru,* ICSID Case No ARB/10/17, Award (26 February 2014) [338].

[436] Mitchell, Hawkins and Mishra (n 413) 798–800.

regulation from the scope of ISDS. Others have established that a bilateral committee composed by regulators would undertake a pre-evaluation of the claim before it can be brought.[437] In this sense, while state-state litigation is useful when the main interest is the removal of specific regulatory or administrative barriers to trade and investment reflected on commitments, general financial regulatory measures are better tackled in a soft law or regulatory cooperation setting.[438]

As previously observed, most of the differences in regulations reflect different risk evaluation by states. In this case, it is the regulatory cooperation that will try to harmonise perceptions. Sabel and Hoekman warns against the possibility that: "a regulated entity dissatisfied with a measure adopted by the partner jurisdiction might *challenge its validity on procedural grounds before a dispute settlement body* … , arguing that the 'regulatory exchanges' failed to meet the constructive standard.[439] Furthermore, states might be unwilling to cooperate, if the outcome of the cooperation would mean raising barriers to all firms. Some states would lose a competitive advantage which attracts investments. The exclusion of regulatory cooperation from dispute settlement may be positive and allow for trust, instead of cooperation chill.

On the other hand, looking closely at the measures related to reinsurance in *Argentina – Financial Services*, one can notice that access to the Argentinian market was in fact *conditioned* to regulatory cooperation. The challenge derives from the fact that cooperation did not take place. The Panel's analysis shows that one cannot condition market access to the requirements of regulatory cooperation, if not done consistently, as this would be against the commitments. The AB analysis is more ambiguous, since likeness between non-cooperative and cooperative countries was not established. If it had been established, one could imagine that the AB would have taken a favourable view of the exceptions.

The key point here is to recognise that *Argentina – Financial Services*, different from *China – Electronic Payments*, was clearly not a case of domestic protectionism: while detrimental to *offshore* centres, the measures arguable tackled tax evasion from Argentinian citizens.[440] In this light, concerns related to

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[437] See eg the Additional Protocol to the Framework Agreement of the Pacific Alliance (signed 10 February 2014) arts 10.2(3)(a), 11.11 and 11.21.
[438] Lupo-Pasini (n 362) 24–27.
[439] Hoekman and Sabel (n 276) 14 (emphasis added).
[440] Delimatsis and Hoekman (n 391) 283.

general and prudential exceptions get prominence. Therefore, this set of case studies casts light on that conceptual challenges of exceptions and justifications, when applied to the context of access and entry. While the use of clear carve-outs or exemptions could be an alternative to tackle concerns of undesirable entry of investments, it is the definition of justifications that matters most.

The explicit reference to GATS art XIV, or even its incorporation in the treaty text of IIAs, highlighted in chapter II, brings the issue of whether the interpretation of the GATS provisions by WTO panels and the AB is also incorporated. Some have argued that the protection of state's regulatory sovereignty will not be substantially enhanced with the integration of investment law into the WTO law framework: this may be even inefficient, given the progress achieved in new IIAs and level of flexibility of re-negotiation.[441]

One could use the same line of argument: the incorporation of WTO justifications into the investment regime would disrupt the natural evolution of investment law towards a balanced approach. The particularity here is that when it comes to entry (access or establishment of investments) there is an important overlap of international rules. This aspect of convergence in treaty making, especially in the new initiatives, allows for the provision of common exceptions and justifications. It is arguably capable of dealing better with the interpretative challenges of differentiating measures focussed on prudentialism and regulatory cooperation versus measures that are truly protectionist. In this light, this might promote investment liberalisation while ensuring host states' regulatory powers.

[441] Armand de Mestral and Lukas Vanhonnaeker, 'How Best to Protect the Right to Regulate: The WTO or ISA?' [2017] Centre for International Governance Innovation 10–11 <www.cigionline.org/publications/how-best-protect-right-regulate-wto-or-isa> accessed 15 August 2018.

CONCLUSION

a. GENERAL CONCLUSIONS AND CONTRIBUTION

This thesis expanded the debate of convergence and divergence in international economic law and moved it beyond in several ways. As set out in the Introduction, convergence refers to a reduction of non-shared legal and systemic characteristics and an increase in shared characteristics between the international trade and investment regimes. This would be desirable to the extent that it promotes effectiveness in the sense of a secure and predictable way to attain the goal of investment liberalisation and to safeguard regulatory space.

To begin with, the regulation of international trade in services and the regulation of international investments concerning the entry of foreign investments and investors were explored in a deeper and more analytical manner. While other scholarly works have duly identified the inter-relations between the regimes, they failed to analyse all the technical complexities that arise from it. Most of the analyses rely on unsuitable analogies with the regulation of trade in goods and on the decisions adjudicated through the GATT. The thesis went further into the evaluation of specific GATS rules, the interpretation of equivalent standards in both regimes and the way they interact. This is shown, for example in chapter II, when the main GATS concepts are presented, and also in chapter V, which dealt with MFN clauses. In this regard, the thesis established a structured framework of analysis for those issues not only on substantive terms but also on institutional and adjudicatory terms, against the backdrop of public international law.

Besides, it filled an important gap in explaining the extent to which international investment law also regulates the liberalisation of investments and access for investors, as presented in chapter I. General studies are restricted to the description and identification of the so-called pre and post-establishment models, without delving into the nuances and grey areas among them and into the legal consequences of the different levels of entry rights. Few articles deal with this point on their own: mostly, the discussion is secondary to other contexts, such as the discussion of pre-investment expenses and lost profits in damage calculations, as seen in chapter IV on remedies.

Furthermore, the thesis discussed several cases and hypotheticals involving trade in services and investment rules. The circumstances behind those cases bring new light to the topic. Chapter VI, for instance, touched on the screening of foreign investments and asked to what extent those procedures and the decisions that they generate are subject to international investment and trade rules. Chapter VII dealt with some legal consequences of investment protectionism to explain the incentives to bar the entry of foreign investments. It was demonstrated that when states carried out these policies to protect national champions and owners of domestic capital, their actions will be scrutinised under several rules. Chapter VIII dealt with the restrictive effects – concerning the entry of investments – of policies that primarily aim at the public good by tackling financial and other key concerns, common justifications to which states progressively resort.

The conclusion is that there are signs that the international rules regulating the entry of investments in services are converging in various levels. Several factors support this. First of all, there is a progressive incorporation in treaties of establishment rights for investors, that is, commitments by states to allow foreign investments openly or under certain conditions. As chapters I and II showed, while access is historically and generally associated with international trade law rules, it is now even more linked to investment treaties or chapters in larger agreements.

Second, the narrowing-down of investor-state dispute settlement clauses that deal with entry and of the scope of the available remedies was demonstrated in chapters III and IV. As the distinctive feature of the international investment law regime is this type of mechanism, the exclusion or limitation of this possibility and the reduction of the scope of the remedies make the regime systemically closer to international trade law regarding dispute settlement.

Third, chapter V explored the extent of the liberalising power arising from the broad interaction of the MFN clauses in the GATS and in international investment law with entry rights provisions. The clauses have the power to incorporate better treatment from other regimes in the form of entry commitments for investments. This conclusion comes from the broad wording of the GATS MFN clause and from the inclusion of establishment in MFN obligations in BITs. Therefore, liberalisation commitments may be extended from one regime to the other, which highlights the shared and common rights and obligations.

In addition, the thesis highlights the incorporation of concepts and techniques originated from the international trade law world into the investment chapters of larger economic agreements. As seen, in several bilateral and bi-regional treaty initiatives, the entry of investments is also regulated by commitments on market access, which is an absolute standard imported from the GATS. What is more, a system of exceptions similar to those in the GATS, is also being incorporated. This is part of the trend to introduce more flexibilities for the host state's investment regulation. The direct or implicit reference to GATS art XIV in investment treaties and in investment chapters of several treaties was widely illustrated in chapter II.

It is recognised that some legal and systemic divergences persist and will not disappear. Different languages used in the provisions of both regimes provide the grounds for divergent interpretation of similar concepts. This also reflects the idea that the protection of property (ie already established investments) remains a major and pervasive concern and rationalise certain differences. Besides, it is evident that distinct adjudicatory institutions reflect different options by states to solve economic conflicts. This is why it is not clear that there are identifiable signs of convergence in the interpretation of the rules in both regimes.

This work aimed to challenge commonly held notions that international investment law is only about the protection of investments, that it is a synonym of investor-state arbitration and that it can only provide for retrospective monetary remedies. It discussed to what extent investment liberalisation is also a goal of international investment and the trade law regimes in contexts where what matters is access into a sovereign state. The progressive incorporation of investment rules as chapters in larger agreements with entry rights requires a reinterpretation of the aims of the regimes. This is an important turning point for foreign investment regulation in general and for the specific topic of this work, as it evidences the search for the balance between the goal of investment liberalisation and states' regulatory space.

The case studies showed that international economic law covers, in several ways, a wide range of situations connected to entry. They suggest that states can carefully tailor both substantive and procedural treaty rules to allow for the coverage or not of specific situations such as screening procedures, domestic

monopolies and regulatory cooperation requirements in both trade and investment contexts. This involves defining the scope of the standards and commitments and the incorporation of general exceptions and justifications or clear carve-outs and exemptions in the search for the effective balance.

The case studies also shone a spotlight on situations that are clearly an aspect of the interaction between the regimes, such as the MFN case in chapter V. As suggested in chapter VI, while measures prohibiting specific investments through screening primarily affect prospective investors themselves, they are at times a response to political frictions and populist calls. This trigger claims against states by prospective investors with a potential interstate element. Prospective investments of Mastercard and Visa into China were apparently behind the successful WTO claim that the US brought for the breach of China's GATS commitments in electronic payments, as presented in chapter VII. Argentinian prudential restrictions of access to tackle money laundering and tax evasion affected mainly companies that invested and provided services through Panama, which brought an unsuccessful WTO claim, as analysed in chapter VIII.

At this point, it is worth mentioning that there are other WTO cases which deal, in one way or another, with the entry of investments.[442] Likewise, pending investor-state arbitration have a core aspect of access of investments into a jurisdiction.[443] They illustrate how restrictions to the entry of investments can take place in a different array of circumstances and with varied objectives and justifications. These conclusions serve to highlight the applicable conceptual framework and guide the interpretative exercise of the WTO GATS rules and equivalent investment rules.

Finally, these signs of legal convergence are perhaps a natural evolution of the rules to the ongoing complexities of the world economy. As trade and investment are sometimes a facet of the same phenomenon and represent complementary market access strategies in the context of GVCs, some sort of

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[442] These are: 1) WTO, *European Union: Certain Measures Relating to the Energy Sector – Report of the Panel* (10 August 2018) WT/DS476/R (as the Panel Report was released close to the completion of this thesis, there was not enough time to incorporate an analysis of the decision concerning investments); 2) WTO, *Ukraine: Measures Relating To Trade In Goods And Services - Request For Consultations by The Russian Federation* (1 June 2017) WT/DS525/1; 3) WTO, *United Arab Emirates; Bahrain, Kingdom of; Saudi Arabia, Kingdom of* (n 251).

[443] *Clayton and Bilcon v Canada* (n 216) Investor's Damage Memorial; *Global Telecom v Canada* (n 232).

alignment of the international regulation of entry is indeed relevant. To the extent that those affected by these international rules (investors, states, citizens) are able to understand and apply them better in terms of security, predictability and consistency, one could suggest that this is a first step in the move towards convergence. Furthermore, this is particularly tangible to the extent that the goal of investment liberalisation is progressively reconciled with the regulatory space ensured by treaty justifications in the new treaty-making initiatives.

b. SUBSTANTIVE CONVERGENCE AND POLICY OPTIONS

As delineated throughout the chapters, there is an inherent tension between the goal to liberalise barriers to investments and to preserve states' regulatory discretion with regard to entry. States may be reluctant to set liberalisation commitments for investments, since they fear the loss of flexibility in regulation due to the high protection standards in the post-establishment phase. It was shown that some modes of provision of services, such as investments and presence of persons, allow for more control from the host states after the entities are established. The effect appears to be reinforced as there is more room for the liberalisation of entry of investments when new treaties progressively preserve states' regulatory space concerning established investments. As seen, this is done by the inclusion of exceptions and carve outs with more regulatory flexibility. This fact could lead to more rights and obligations concerning the entry and access.

The definition of clear exceptions in terms of coverage is superior to an erosion of BIT principles, but this may be costly, since the host state will not reap the benefits of the entry of investments, as regulatory discretion can still be used by imposing conditions to entry.[444] In this sense, more flexibility in the regulation of established investments could lead to a greater acceptance of foreign investments if the flexibilities are used to regulate established investments and not to justify restrictions to the entry of new investments. A more open entry policy would be the natural outcome.

As outlined in chapter VII, if the internal pressure to raise barriers to entry (and safeguard domestic market opportunities) is strong, the reasons behind the

[444] Vandevelde (n 94) 406.

lack of commitments perhaps lie on investment protectionism. This happens when governments consider to be in their political interest to maintain restrictions to foreign investments. Investment protectionism is a rational behaviour in the current scenario and its prevention is a crucial component of the goal of investment liberalisation. In this case, the introduction of more flexibilities would not independently lead to more liberalisation commitments. Alternatively, when entry prohibitions and conditions are set for the public good and are not expected to be relaxed, no further liberalisation commitments should arise, despite the existence of flexibilities.

In the light of the rise in nationalism and the possible effects against the admission of foreign investments, an alignment of commitments between trade in services and investments is what could be expected from the new treaties. It is natural to accept that the conceptual alignment of standards, principles, rules and exceptions would allow multinationals to plan ahead their provision of services and their investments on a global scale. This is true even if the result is more regulatory powers for host states and less liberalisation. In this context, a precise interpretation of the standards and of the scope of commitments is also certainly crucial. The coherence/consistency aspect of the framework of substantive rules will have an impact on their effectiveness and will further help the regimes to attain their goals.

The signs of substantive treaty-making convergence, which refers to trade and investment rules regulating entry being negotiated in the context of larger economic agreements, would at least make existing commitments more consistent and the general rules and exceptions clearer. This is evident in the incorporation of the absolute standard of market access and its linkages with concepts such as “establishment” and “commercial presence”. It is also evident in the adoption of WTO-type exceptions, a feature in several investment treaties and chapters. With clearer guidance from the law, state governments will be able to better shape their behaviour towards investors in accordance with the rules. This is because they need to comply with fewer blocks of international regulations. Besides, when the scheduled commitments are unified together with common exceptions and carve-outs, there is less space for conflicting obligations and unpredictable outcomes. In practice, treaty-making convergence as to the entry of investments would arguably

allow countries to better craft their entry commitments and allow for clearer and more consistent non-conforming measures. This would also emphasise the common challenge to ensure the goal of investment liberalisation and to safeguard regulatory space.

When it comes to the interpretation of current standards, common tests for the national treatment and MFN provisions and for the shared general exceptions would, in an ideal world, promote more effectiveness for both states and affected rights holders. As explained, the division between the goals of investment protection and investment liberalisation is artificial. This conclusion throws new light on the aims of investment and trade agreements and could guide the interpretation of their provisions and commitments. While this would facilitate a mature reconciliation between liberalisation and regulation translated into the different elements of the tests, distinct languages on treaty provisions would always require a nuanced analysis by adjudicators. This is why one could not conclude that there are clear signs of interpretative convergence in trade and investment rules. The observation in this regard would be that the rules under analysis can be said to be more effective if obligations are consistent and their interpretation is predictable and in accordance with the explicit goals of the regimes.

This is not a statement that multilateral treaties and uniform regulations are better. The search for consistency does not amount to harmonisation, uniformity or centralisation, but involves different rule-making initiatives of multilateral, regional or bilateral regulations that allow different regulatory goals to harmoniously compete.[445] Besides, the signs of convergence that were identified do not lead to a conclusion that the dense and complex network of overlapping rights and obligations will cease to exist. If the objective of the treaty parties is primarily to guarantee more liberalisation, a range of techniques of negotiation and regulation could be of help. Parties may even choose to have less treaty-making convergence with the aim to generate more liberalisation commitments in investments in services, as the ASEAN case illustrates. It has been shown that higher levels of liberalisation in services and investment may come about with fragmented

[445] Katja Gehne and others, 'Introduction - Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundation' in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: from Fragmentation to Coherence* (CUP 2011) 6.

regulation and decentralised decision-making.[446] This does not invalidate two assertions when it comes to establishment rights: investment chapters are generally incorporating establishment rights which were absent in the model BITs and this has been followed by an exclusion of those rights from ISDS.

As shown, even if both regulations remain separate, that is, in different treaties or regimes, there are still several possibilities of interaction, which is also a source of convergence. The interplay between regulations of the same matter produces interesting outcomes, as shown in chapter V. The MFN clauses in both systems are capable of incorporating reciprocal obligations. The application of the MFN to establishment clearly broadens the scope of commitments and produces legal alignment among the different regimes. To the extent that it represents a reduction of unshared characteristics and an increase on shared characteristics, this can be a prime example of convergence. In any case, the recognition of the common strategic challenge of ensuring a balance between the goal of investment liberalisation and the host state's regulatory space is the true source of convergence. Regardless of whether the challenge is translated into treaty-making convergence, into active alignment of the rules or into spontaneous interpretive convergence of legally equivalent concepts and standards across regimes, one can say that this is a move towards effectiveness.

c. ADJUDICATORY CONVERGENCE: WAY FORWARD?

Concerning adjudication and enforcement, states desiring to exclude issues related to entry from treaties have used several techniques, such as narrowing down the legal definitions, setting up jurisdictional exceptions or using procedural exceptions and carve-outs. States have limited the jurisdiction for investor-state tribunals in relation to entry, which re-conceptualises the role of the home states in investments disputes. Chapter III has shown that treaty parties are reducing their options and moving towards a state-state system for the enforcement of entry rights and obligations. This can be carried out either in the WTO or through state-state investment arbitration in a bilateral or regional setting. In this light, there are two apparently contradictory consequences in terms of effectiveness.

[446] ibid 8.

First, in general, more control of the litigation re-gained by states may lead to more secure and predictable decisional outcomes. The critiques against ISDS and the attempts to limit it on jurisdictional grounds show an effort to rebalance international investment law. This may help to control over-enforcement, that is, the use of the rules in a way that was not clearly envisaged by the treaty parties. One can also attest that the line between adjudication of the obligations on liberalisation and protection of investments is definitely blurred. To characterise market access, national treatment and MFN as liberalisation provisions and thus not subject to ISA is an example of that desire to control over-enforcement. In this context, one might say that adjudication would be more legitimate and effective, as it will be aligned with the goals intended by the parties and will safeguard the state's regulatory space.

On the other hand, if states clearly express that investment liberalisation is an aim of an agreement to which they are a party, adjudicators should take that into account. Effective adjudication in that context would mean a process the outcome of which leads to the enforcement of liberalisation commitments. Part A showed that while there are more commitments, there are even less instruments to enforce those entry obligations. Specifically, chapters III and IV explained that the lack of jurisdictional basis for investor-state arbitration in most of the cases related to entry means the absence of effective remedies. In this light, the exclusion of any possibility of adjudication may be less effective as investor-state system could provide an extra avenue to shape state's behaviour in accordance with the treaty norms on liberalisation. Therefore, its exclusion would mean less available alternatives for the invocation of state responsibility concerning breaches of entry obligations.

In this light, also when it comes to adjudication, the source of convergence lies in the recognition of the common strategic challenge. Striking a balance between the goal of investment liberalisation and the safeguard of state's regulatory space is exactly what moves treaty parties to limit or to expand the jurisdictional possibilities and the scope of the remedies regarding the entry of investments. The question is on where the balance is placed, in other words, on the optimum level of procedural adjudication for entry rights. In this light, there are policy options to be explored. States can design their systems of adjudication to

provide for an interaction of both investor-state and state-state mechanisms to ensure adequate enforcement of obligations and commitments.

The inability or procedural difficulty to redress the prohibition or delay in entry through investor-state mechanisms in the form of lost profits shows that the adjudicative balance is tilted in favour of potential host states. They would only need to bring the restrictive measures into conformity or perhaps to compensate pre-investment costs. When available remedies focus only on compensation for damages to established investors, liberalisation provisions, which require the removal of barriers, will have to be enforced in the state-state system, or even not enforced at all. Thus, an alternative for certain states might be to re-conceptualise investor-state dispute settlement clauses to cover establishment rights (by means of excluding jurisdictional requirements) and to provide for further remedies.

It is true that the state-state type of enforcement can be particularly convenient to enforce rules on the pre-establishment of investments. This is a scenario closer to what is available in the WTO, as evidenced by the case studies. The WTO dispute settlement mechanism has been quite effective to tackle investment restrictions and to differentiate them from legitimate regulation. However, in the state-state context of the WTO, remedies are merely prospective. In other contexts, the result of the adjudication, as explained in chapter IV, would be a declaration of the breach and the available remedies will depend on the treaty limitations. It seems that it is completely feasible that the parties agree to a strengthened state-state system, where several other forms of relief are available and a centralised system of retaliation supports enforcement.

In turn, states could still opt to provide some room for the recovery of individual damages for frustrated attempts to make an investment. The situation would apply when there is clear-cut discrimination in the entry of investment in breach of national treatment or MFN treatment. The case is even stronger when it comes to arbitrary measures, adopted by host states without sound basis on the domestic law, in the context of entry. This could be, for example, corrupt investment screening or illegal pressures by domestic firms. An explicit application of the FET standard to the stage of the entry of investors and investments, highlighted in chapter VI, would be in line with this strategy. The possibility of recovery would

make host states liable to pay compensation for lost profits if their actions are manifestly arbitrary, for example.

Furthermore, one should not forget the role of investor-state litigation in the declaration of treaty breaches. States might consider, for instance, maintaining investor-state arbitration, but narrowing it down to non-pecuniary remedies, by taking out the limitation for those types of remedies, as developed in chapter IV. Another option is to ensure that investor-state tribunals are empowered to determine that domestic measures are not in conformity with the treaty and to request the necessary acts for ensure conformity, as the WTO DSB is entitled to do.

As highlighted before, there is an issue in which both substantive and adjudicatory concerns intertwine. A possible outcome of the lack of enforcement of establishment rights by ISDS is more substantive commitments. States would be less reluctant to commit to the entry of investments in certain sectors, given that those prospective investors would not have the power to bring a claim for alleged breaches of entry commitments. In this light, restraining investor-state to very specific situations would arguably be an incentive towards a more open policy. It is to be tested the extent to which overprotection granted to investments and investors in IIAs lead to an under-assumption of commitments by host states to admit investments, or to less admission in practical terms for fear of litigation.

In terms of effectiveness, one might suggest that some sort of balanced interaction in the adjudication mechanisms of new treaty-making initiatives could enhance the legitimacy of both the trade and investment regimes. *De lege ferenda*, an avenue to explore is the merging of the treaty chapters that deal with investor-state and state-state economic disputes in the new economic agreements. Why not empower the investment courts, the creation of which is proposed,[447] also to deal with the general state-state disputes arising out of the investment and trade chapters? In the context of large economic agreements containing trade and investment rules, this could be achieved by referring all types of disputes to the same set of procedural and institutional rules.[448]

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[447] See European Commission, 'Fact Sheet A Future Multilateral Investment Court' (Brussels, 13 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm> accessed 15 August 2018.

[448] This would be roughly equivalent to a referral to UNCITRAL Arbitration Rules, for instance, which do not differentiate between the two situations. See UNGA Res 65/22 UNCITRAL Arbitration

The advantage is that both types of arbitral tribunals would have the same legal source of legitimacy. Under this approach to adjudication, a coherent, consistent or even hierarchical system of precedents could perhaps be established. The home states of investors would be less reluctant to accept to take part in claims, as highlighted in chapter III. Host states could also trigger disputes to put forward their interpretation of treaties. This could bring more effectiveness to the adjudication of trade and investment disputes in which obligations overlap.

One may always argue that these policy options do not touch upon the problem of inconsistency and incoherence between different decisions arising from different tribunals under treaties that regulate the same issues. Such institutional solutions may at least alleviate the lack of security and predictability for the relations between the treaty parties involved. These proposals deserve much a larger perspective than the topical issue of entry of investments could offer. The underpinning assumption is that public international law dispute settlement provides a sensible framework for addressing these matters, something shared by treaty makers for a long time, but possibly not for the near future.

Finally, a brief note on the future viability of the adjudicatory role on both sides of the comparison is unavoidable. On one hand, investor-state arbitration, not only through ICSID arbitration but also through other mechanisms, is subject to intense criticism from political and social actors, as emphasised in chapter III. On the other, the dispute settlement system in the WTO is under rigorous scrutiny by members, especially the US, regarding eg Appellate Body reappointments. Besides, the EU proposal on a multilateral court is far for unanimous. It is evident that these are political issues not entirely within the purview of the legal argument put forward. This thesis has though elucidated and broadened the repertoire of legal solutions at the disposal of policy makers to regulate and tackle international economic conflicts.

Rules (revised in 2010) UN Doc A/RES/65/22, Recital 4. The Iran-US Claims Tribunal is an example of a successful inter-state institution acting on the basis of UNCITRAL.

APPENDIX – LIST OF CASES AND INSTRUMENTS

Cases

- PCIJ and ICJ

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections Judgment) [2007] ICJ Rep 582

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation, Judgment) [2012] ICJ Rep 324

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3

Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) [1928] PCIJ Rep Series A No 17

Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4

Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgement) [2009] ICJ Rep 213

Elettronica Sicula SPA. (ELSI) (United States of America v Republic of Italy) (Judgment) [1989] ICJ Rep 15

Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7

Jurisdiction Immunities of the State (Italy v Germany) (Judgement) [2012] ICJ Rep 99

LaGrand Case (Germany v United States) (Judgement) [2001] ICJ Rep 466

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Nottebohm Case (Liechtenstein v Guatemala) (dis op of Judge Read) [1955] ICJ Rep 4

Nuclear Tests (Australia v France) (Joint dis op of Judges Oneyama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock) [1974] ICJ Rep 321

Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection Judgment) [1996] ICJ Rep 803 (Separate Opinion by Judge Higgins)

Right of Passage over Indian Territory (Portugal v India), (Judgement on Merits) [1960] ICJ Rep 6

Rights of the National of the United States of American in Morocco (France v United States of America) (Judgment) [1952] ICJ Rep 176

- WTO DSB

WTO, Argentina: Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel (19 May 2003) WT/DS241/R

WTO, Argentina: Measures Relating to Trade in Goods and Services – Report of the Panel (30 September 2015) WT/DS453/R

WTO, Argentina: Measures Relating to Trade in Goods and Services – Report of the Appellate Body (14 April 2016) WT/DS453/AB/R

WTO, Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Panel (28 June 2018) WT/DS435/R WT/DS441/R WT/DS458/R WT/DS467/R

WTO, Australia: Subsidies Provided to Producers and Exporters of Automotive Leather – Report of the Art 21.5 Panel (20 January 2000) WT/DS126/RW

WTO, Canada: Certain Measures Affecting the Automotive Industry – Report of the Panel (11 February 2000) WT/DS139/R, WT/DS142/R [10.248]

WTO, Canada: Certain Measures Affecting the Automotive Industry – Report of the Appellate Body (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R

WTO, Canada: Continued Suspension of Obligations in the EC: Hormones Dispute – Report of the Appellate Body (16 October 2008) WT/DS321/AB/R

WTO, China: Certain Measures Affecting Electronic Payment Services – Report of the Panel (31 August 2012) WT/DS413/R

WTO, China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body (19 January 2010) WT/DS363/AB/R

WTO, China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel (12 August 2009) WT/DS363/R

WTO, European Communities: Customs Classification of Certain Computer Equipment – Report of the Appellate Body (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R

WTO, European Communities: Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body (12 September 2005) WT/DS269/AB/R WT/DS286/AB/R

WTO, European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel (22 May 1997) WT/DS27/R/USA

WTO, European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body (9 September 1997) WT/DS27/AB/R

WTO, European Communities: Regime for the Importation, Sale and Distribution of Bananas – Recourse to Art 21.5 Report of the Appellate Body (26 November 2008) WT/DS27/AB/RW/USA; WT/DS27/AB/RW2/ECU

WTO, European Communities: Trade Description of Sardines – Report of the Appellate Body (26 September 2002) WT/DS231/AB/R

WTO, European Union: Certain Measures Relating to the Energy Sector – Report of the Panel (10 August 2018) WT/DS476/R

WTO, Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body (4 October 1996) WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R

WTO, Mexico-Tax Measures on Soft Drinks and Other Beverages – Report of the Panel (7 October 2005) WT/DS308/R

WTO, Mexico-Tax Measures on Soft Drinks and Other Beverages – Report of the Appellate Body (6 March 2006) WT/DS308/AB/R

WTO, Mexico: Measures Affecting Telecommunications Services – Report of the Panel (2 April 2004) WT/DS363/R

WTO, Peru: Additional Duty on Imports of Certain Agricultural Products – Report of the Appellate Body (31 March 2015) WT/DS457/AB/R

WTO, Ukraine: Measures Relating To Trade In Goods And Services - Request For Consultations by The Russian Federation (1 June 2017) WT/DS525/1

WTO, United Arab Emirates; Bahrain, Kingdom of; Saudi Arabia, Kingdom of – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations (31 July 2017) WT/DS526, WT/DS527, WT/DS528

WTO, US: Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan – Report of the Appellate Body (15 December 2003) WT/DS244/AB/R

WTO, US: Continued Dumping and Subsidy Offset Act of 2000 – Report of the Panel (16 September 2002) WT/DS217/R

WTO, US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel (10 November 2004) WT/DS285/R

WTO, US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body (7 April 2005) WT/DS285/AB/R

WTO, US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services –Recourse to Arbitration by the United States under Article 22.6 DSU – Decision by the Arbitrator (7 April 2005) WT/DS285/ARB

WTO, US: Tax Treatment for “Foreign Sales Corporations” – Report of the Appellate Body (24 February 2000) WT/DS108/AB/R

- Regional Agreements

Cross-Border Trucking Services (Mexico v US) NAFTA ch 20 arb trib Case No USA-MEX-98-2008-01, Panel Decision, Final Report 2 (6 February 2001) (Trucking Services) Re

MERCOSUR, Application of Antidumping Measures Against the Exportation of Poultry from Brazil – Decision of the ad hoc Arbitral Tribunal of MERCOSUR Decision n 4 (21 May 2001)

- Court of Justice of the European Union

Achmea v Slovakia (6 March 2018) EU:C:2018:158 (C-284/16)

- European Court of Human Rights

Centro Europa 7 Srl and Di Stefano v Italy (2012) ECHR 974 App no 38433/09 (ECtHR, Grand Chamber Judgement, 7 June 2012)

Gaweda v Poland (2002) ECHR 2002-II App no 26229/95 (Judgment 14 March 2002)

Ozturk v Turkey (1999) ECHR 1999-VI App no 22479/93 (ECtHR, Grand Chamber Judgement 28 September 1999)

- Inter-State Arbitration

Italian Republic v Republic of Cuba, ad hoc State-State Arbitration Award (1 Jan 2008)

Peru v Chile ad hoc arbitration related to ICSID Case No ARB/03/4

Republic of Ecuador v United States of America, PCA Case No 2012-5

- Investment Disputes

- International Centre for the Settlement of Investment Disputes

Abaclat and Others v Argentine Republic, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011)

Aguas de Tunari SA v Republic of Bolivia, ICSID Case No ARB/02/3, Decision on Jurisdiction (21 October 2005)

Ambiente Ufficio SpA and Others v Argentine Republic, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013)

Amco Asia Corporation and Others v The Republic of Indonesia, First Arbitration (1984); Annulment (1986); Resubmitted case (1990), ICSID Reports (Cambridge, Grotius, 1993), vol 1

Ansung Housing Co, Ltd v People's Republic of China ICSID Case No ARB/14/25, Award (9 March 2017)

Antoine Goetz et consorts v République du Burundi, ICSID Case No ARB/95/3 Award (10 February 1999)

Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3, Award (27 June 1990)

Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela ICSID Case No ARB/00/5, Award (23 September 2003) and Award on Merits (19 Jan 2007)

AWG Group Ltd v Argentina, UNCITRAL, Decision on Jurisdiction (3 August 2006)

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29 Decision on Jurisdiction (14 November 2005)

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Award (27 August 2009)

Beijing Urban Construction Group Co Ltd v Yemen, ICSID Case no ARB/14/30, Decision on Jurisdiction (31 May 2017)

Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No ARB/10/15 Award (28 July 2015)

Champion Trading Company & Ameritrade International, Inc v Arab Republic of Egypt, ICSID Case No ARB/02/9 Award (27 October 2006)

Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction – Churchill Mining Plc (24 February 2014) [288] (pend applic for annulment, 31 March 2017)

CMS Gas Transmission Company v Argentina, ICSID Case No ARB/01/8 Decision of the Tribunal on Objections to Jurisdiction (17 July 2003)

CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No ARB/01/8 Award (12 May 2005)

Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Award (20 August 2007)

Continental Casualty Company v The Argentine Republic, ICSID Case No ARB/03/9 Decision on Jurisdiction (22 February 2006)

Continental Casualty Company v The Argentine Republic, ICSID Case No ARB/03/9, Award (5 September 2008)

Daimler Financial Services AG v Argentina, ICSID Case No ARB/05/1 Award (22 August 2012)

EDF International SA, SAUR International S.A. and León Participaciones Argentinas SA v Argentine Republic, ICSID Case No ARB/03/23, Award (11 June 2012)

Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000)

Empresas Lucchetti, SA and Lucchetti Peru, SA v The Republic of Peru, ICSID Case No ARB/03/4

Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3. Decision of Jurisdiction (14 January 2004)

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25, Annulment Decision (23 December 2010)

Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No ARB/11/12, Award (10 December 2014)

Garanti Koza LLP v Turkmenistan, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013)

Gas Natural SA v Argentina, ICSID Case No ARB/03/10, Decision on Jurisdiction (17 June 2005)

Generation Ukraine, Inc. v Ukraine ICSID Case No ARB/00/9 Award (16 September 2003)

Giovanni Alemanni and Others v The Argentine Republic, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014)

Global Telecom Holding SAE v Canada, ICSID Case No ARB/16/16

Grupo Francisco Hernando Contreras v Republic of Equatorial Guinea (ICSID Case No ARB(AF)/12/2) Award (4 December 2005)

Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No ARB/07/24, Award (10 June 2010)

Hochtief AG v The Argentine Republic, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011)

İçkale İnşaat Limited Şirket v Turkmenistan, ICSID Case No ARB/10/24, Award (8 March 2016)

Impregilo SpA v Argentina, ICSID Case No ARB/07/17, Award (21 June 2011)

Inceysa Vallisoletana SL v Republic of El Salvador, ICSID Case No ARB/03/26, Award (25 July 2006)

Ioan Micula, Viorel Micula, SC European Food S.A, SC Starmill SRL and SC Multipack SRL v Romania ICSID Case No ARB/05/20 Award (11 December 2013)

Ioan Micula, Viorel Micula, SC European Food S.A, SC Starmill SRL and SC Multipack SRL v Romania ICSID Case No ARB/05/20 Decision on Jurisdiction and Admissibility (24 September 2008)

Ioannis Kardassopoulos v The Republic of Georgia, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007)

Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan, ICSID Case No ARB/10/1, Award (2 July 2013)

Liberian Eastern Timber Corporation v Republic of Liberia, ICSID Case No ARB/83/2 Award (31 Mar 1986) 2 ICSID Reports 346

Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal ICSID Case No ARB/15/21, Award (5 August 2016)

Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka, ICSID Case No ARB/00/2, Award and dis op (15 Mar 2002)

Mr Franck Charles Arif v Republic of Moldova, ICSID Case No ARB/11/23, Award (8 April 2013)

MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7 Award on Merits (25 May 2004)

MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, and Decision on Annulment (21 March 2007)

National Grid plc v Argentina, UNCITRAL, Decision on Jurisdiction (20 June 2006)

Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, Award (14 October 2016)

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award (11 September 2007)

Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos v Uruguay, ICSID Case no ARB/10/7, Decision on Jurisdiction (2 July 2013)

Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Final Award (8 July 2016)

Phoenix Action, Ltd v The Czech Republic, ICSID Case No ARB/06/5, Award (15 April 2009)

Plama Consortium Limited v Bulgaria, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005)

Plama Consortium Limited v Republic of Bulgaria, ICSID Case No ARB/03/24, Award (27 August 2008)

PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No ARB/02/5, Decision on Jurisdiction (04 Jun 2004)

PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No ARB/02/5, Award on Merits (19 Jan 2007)

Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia ICSID Case No ARB/06/2 Award (16 September 2015)

Renée Rose Levy de Levi v Republic of Peru, ICSID Case No ARB/10/17 Award (26 February 2014)

RSM Production Corporation and others v Grenada, ICSID Case No ARB/10/6, Award (10 December 2010)

Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan, ICSID Case No ARB/05/16, Award, (29 July 2008)

Saipem SpA v The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction (21 March 2007)

Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4 Decision on Jurisdiction (23 July 2001)

Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13 Decision on Jurisdiction (9 November 2004)

Señor Tza Yap Shum v The Republic of Peru, ICSID Case No ARB/07/6 Decision on Jurisdiction and Competence (19 June 2009)

Siemens AG v Argentina, ICSID Case No ARB/02/8, Decision on Jurisdiction (2 August 2004)

Societé Ouest Africaine des Bétons Industriel (SOABI) v Senegal ICSID Case No ARB/82/1, Award (25 February 1988)

Suez, Sociedad General de Aguas de Barcelona and InterAguas SA v Argentina, ICSID Case No ARB/03/17, Decision on Jurisdiction (16 May 2006)

Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/01, Decision on Jurisdiction (21 December 2012)

Telefónica SA v Argentina, ICSID Case No ARB/03/20, Decision on Jurisdiction (25 May 2006)

Telenor Mobile A.S. v Hungary, ICSID Case No ARB/04/15, Award (13 September 2006)

Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela, ICSID Case No ARB/11/26, Award (29 January 2016)

The Rompetrol Group NV v Romania, ICSID Case No ARB/06/3, Award (6 May 2013)

Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004)

TransCanada Corporation & TransCanada PipeLines Limited v United States of America, ICSID Case No ARB/16/21, Request for Arbitration (24 June 2016)

Wintershall Aktiengesellschaft v Argentina, ICSID Case No ARB/04/14, Award (8 December 2008)

World Duty Free Company Limited v the Republic of Kenya, ICSID Case No ARB/00/7, Award (4 October 2006)

Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar, ASEAN ID Case No ARB/01/1 Award (31 March 2003)

Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA 227, Final Award (18 July 2014)

Zhinvali Development Ltd v Republic of Georgia, ICSID Case No ARB/00/1, Award (24 January 2003) 10 ICSID Reports 3

- Additional Facility of the ICSID

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico, ICSID Case No ARB(AF)/04/05, Award (21 November 2007)

Cargill, Incorporated v United Mexican States, ICSID Case No ARB(AF)/05/2 Award (18 September 2009)

Corn Products, International, Inc v Mexico, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008)

Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award (4 April 2016)

Fireman's Fund Insurance Company v The United Mexican States, ICSID Case No ARB(AF)/02/01, Award (17 July 2006)

Gold Reserve Inc v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/09/1, Award (22 September 2014)

Metalclad Corporation v The United Mexican States, ICSID Case No ARB(AF)/97/1, Award (30 August 2000)

Mobil Investments Canada Inc and Murphy Oil Corporation v Canada, ICSID Case No ARB(AF)/07/4 dis op Arbitrator Philippe Sands(17 May 2012)

- UNCITRAL

Austrian Airlines v The Slovak Republic, UNCITRAL Final Award (9 October 2009)

Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana, UNCITRAL ad hoc tribunal, Award on Jurisdiction and Liability (27 October1989) 95 ILR 184; Award on Damages and Costs (30 June 1990) 95 ILR 211

CANACAR v United States, Notice of Arbitration, UNCITRAL (NAFTA ch 11) (2 April 2009) (CANACAR v US)

Canadian Cattlemen For Fair Trade et al v US, UNCITRAL Arbitral Award on Jurisdiction (28 January 2008)

Gami Investment Inc v Mexico UNCITRAL Final Award (15 November 2004)

Glamis Gold Ltd v USA, UNCITRAL Award (8 June 2009)

Khan Resources Inc., Khan Resources B.V. CAUC Holding Company Ltd. v The Government of Mongolia UNCITRAL Award (2 March 2015)

Merrill and Ring Forestry LP v Canada, UNCITRAL, ICSID Case No UNCT/07/1, Award (31 March 2010)

Methanex Corporation v US, UNCITRAL Case, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005)

NAFTA and a Request for Consolidation by the USA of the Claims in Canfor Corporation v USA and Tembec et al v USA and Terminal Forest Products Ltd v USA, Order of the Consolidation Tribunal (7 September 2005) Re

Nordzucker AG v The Republic of Poland, UNCITRAL Partial Award on Jurisdiction (10 December 2008) 2nd Partial Award on Merits (28 January 2009), 3rd Partial and Final Award on Damages and Costs (23 November 2009)

Pope & Talbot Inc v The Government of Canada, UNCITRAL, Award on Merits (10 April 2001).

Saluka Investment BV v Czech Republic UNCITRAL Partial Award (17 March 2006)

SD Myers, Inc v Government of Canada, UNCITRAL, First Partial Award on Merit and Separate Opinion (13 November 2000)

SD Myers, Inc v Government of Canada, UNCITRAL, Second Partial Award on Merit (21 October 2002)

United Parcel Service of America Inc v Government of Canada, UNCITRAL, Award on Jurisdiction (22 November 2002)

United Parcel Service of America, Inc. v Canada, UNCITRAL, ICSID Case No UNCT/02/1, Award on the Merits (24 May 2007)

- PCA

Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador, UNCITRAL, PCA Case No 2009-23, 3rd Interim Award on Jurisdiction and Admissibility (27 February 2012)

Eureko BV (Achmea BV) v Slovak Republic, UNCITRAL PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010)

European American Investment Bank AG (EURAM) v Slovak Republic, UNCITRAL PCA Case No 2010-17 Award on Jurisdiction (22 October 2012)

ICS Inspection and Control Services Limited (UK) v Republic of Argentina, UNCITRAL, PCA Case No 2010-9 Award on Jurisdiction (10 February 2012)

Mesa Power Group LLC v Canada, UNCITRAL, PCA Case No 2012-17

Philip Morris Asia Ltd v Australia, UNCITRAL PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015)

ST-AD GmbH v Republic of Bulgaria, UNCITRAL PCA Case No 2011-06, Award on Jurisdiction (18 July 2013)

Venezuela US, SRL (Barbados) v Bolivarian Republic of Venezuela, PCA Case No 2013-34, Award on Jurisdiction (26 July 2016)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada, UNCITRAL, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015)

- SCC

Eastern Sugar BV (Netherlands) v The Czech Republic, SCC Case No 088/2004, Partial Award (27 March 2007)

Renta 4 SVSA and others v The Russian Federation, SCC No 24/2007, Award (20 July 2012) set aside by Svea Court of Appeal Judgement T9128-14 (18 January 2016)]

RosInvestCo Uk Ltd v Russian Federation, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007)

Vladimir Berschader and Moise Berschader v The Russian Federation SCC Case No 080/2004, Award (21 April 2006)

William Nagel v The Czech Republic, SCC Case No 049/2002, Award (9 September 2003).

- Other

Occidental Exploration and Production Company v Ecuador, LCIA Case No UN 3467, Final Award (1 July 2004)

Yaung Chi Oo Trading Pte Ltd v Myanmar, ASEAN Case No ARB/01/1, Award (31 March 2003)

- UNCC

UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" claims (30 September 1999) S/AC.26/1999/14

UNCC, Saudi Arabian Texaco (SAT) Second Instalments of "E1" claims (24 June 1999) S/AC.26/1999/10

UNCC, Kwait Petroleum Corporation Fourth Instalment of "E1" claims (29 September 2000) S/AC.26/2000/16

Instruments

- Treaties

Additional Protocol to the Framework Agreement of the Pacific Alliance (signed 10 February 2014)

Agreement on Subsidies and Countervailing Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1869 UNTS 14 (ASCM)

Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1C 1869 UNTS 299 (TRIPS)

Agreement on Trade-Related Investment Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1868 UNTS 186 (TRIMS)

Argentina-Chile FTA (signed 02 November 2017)

Argentina-Panama BIT (signed 10 May 1996)

Argentina-Qatar BIT (signed 06 November 2016)

ASEAN Comprehensive Investment Agreement – ACIA (signed 26 February 2009)

ASEAN Framework Agreement on Services – AFAS (signed 15 December 1995)

ASEAN Protocol on Enhanced Dispute Settlement Mechanism (adopted 29 January 2004, entered into force 29 November 2004)

Australia-China FTA (signed 17 June 2015)

Australia-Peru FTA (signed 12 February 2018)

Australia-Vietnam BIT (signed 5 March 1991)

Bolivia-Netherlands BIT (signed 10 March 1992, terminated 1 November 2009).

Brazil-Colombia BIT (signed 9 October 2015)

Brazil-Ethiopia BIT (signed 11 April 2018)

Brazil-Mexico BIT (signed 26 May 2015)

Brazil-Suriname BIT (signed 02 May 2018)

Canada-China BIT (signed 9 September 2012)

Canada-Egypt BIT (signed 13 November 1996)

Canada-Hong China SAR BIT (signed 10 February 2016)

Canada-Korea Free Trade Agreement (signed 22 September 2014)

Canada-Mongolia BIT (signed 08 September 2016)

Canada-Russia BIT (signed 20 November 1989)

Charter of the United Nations (entered into force 24 October 1945) 892 UNTS 119 (UN Charter)

Chile FTAs with Colombia(signed 27 November 2006)

Chile Peru FTA (signed 22 August 2006)

Chile-Argentina FTA (signed 2 November 2017)

Chile-Hong Kong China SAR BIT (signed 18 November 2016)

China-Finland BIT (signed 15 November 2004)

China-Hong Kong CEPA Investment Agreement (signed 28 June 2017)

China-Japan BIT (signed 27 August 1988)

China-Japan-Korea Investment Treaty (signed 13 May 2012)

China-Korea BIT (signed 7 September 2007)

China-Korea FTA (signed 1 June 2015)

China-New Zealand FTA (signed 7 April 2008)

China-Norway BIT (signed 21 November 1984)

China-Sweden BIT (signed 29 March 1982)

China-Tanzania BIT (signed 24 March 2013)

China-Uzbekistan BIT (signed 19 April 2011)

Colombia-United Arab Emirates BIT (signed 13 November 2017)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018) (CPTPP)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159

Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 2 1869 UNTS 401 (DSU)

Economic Partnership Agreement between the CARIFORUM States and the European Community (signed 15 October 2008)

EFTA-Chile FTA (signed 26 June 2003)

Establishment and Consular Convention of 1868 between Italy and Switzerland (signed 22 July 1868, entered into effect 1 May 1869)

EU-Armenia Comprehensive and Enhanced Partnership Agreement (signed 24 November 2017)

European Convention on Establishment of Companies (concluded 20 January 1966, not entered into force) ETS No 57

General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1B 1869 UNTS 183 (GATS)

German-Poland BIT (signed 10 November 1989)

Israel-Japan BIT (signed 1 February 2017)

Japan-Kenya BIT (signed 28 August 2016)

Japan-Philippines Economic Partnership (signed 09 September 2016)

Japan-Russia BIT (signed 13 November 1998)

Japan-Singapore Economic Partnership Agreement (signed 13 January 2002)

Korea-Central America FTA (signed 21 February 2018)

Korea-US FTA (signed 30 June 2007)

Malaysia-Australia Free Trade Agreement – MAFTA (signed 22 May 2012)

Mozambique-Japan BIT (signed 1 June 2013)

Nicaragua-Taiwan FTA (signed 23 June 2006)

North American Free Trade Agreement (adopted 17 December 1992) 32 ILM 289, 605 (1993) (NAFTA)

OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions (signed 17 December 1997, entered into force 15 February 1999) 2802 UNTS 6

PACER Plus [Australia, New Zealand and the Pacific Islands] (signed 14 June 2017)

Pacific Alliance Investment Treaty (signed 10 February 2014)

Panama-Singapore FTA (signed 01 March 2006)

Panama-Singapore FTA (signed 1 March 2006)

Rwanda-Turkey BIT (signed 3 November 2016)

Rwanda-United Arab Emirates BIT (signed 01 November 2017)

Switzerland-Japan FTA (signed 19 February 2009)

Switzerland-Peru (signed 22 November 1991)

TPP (legally verified text released 26 January 2016, not ratified)

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957) 284 UNTS 93

Treaty of Friendship, Commerce and Navigation between the USA and the Italian Republic (signed 2 February 1948, entered into force 26 July 1949) 79 UNTS 171

Treaty on the Functioning of the European Union (TFEU)

UK-Burundi BIT (signed 13 September 1990)

UK-Mozambique BIT (signed 18 March 2004)

UK-Singapore BIT (signed 22 July 1975).

UK-United Arab Emirates BIT (signed 8 December 1992)

United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41

US-Azerbaijan BIT (signed 01 August 1997)

US-Cameroun BIT (signed 26 February 1986)

US-Canada Free Trade Agreement (signed 2 January 1988)

US-Democratic Republic of the Congo BIT (signed 3 August 1984)

US-Georgia BIT (signed 7 March 1994)

US-Mozambique BIT (signed 1 December 1998)

US-Senegal BIT (signed 6 December 1983)

US-Sri Lanka BIT (signed 20 September 1991)

US-Turkey BIT (signed 3 December 1985)

Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

- Recently Concluded Agreements

Comprehensive Economic Trade Partnership between Canada and the European Union (signed 30 October 2016) (CETA)

EU-Vietnam Free Trade Agreement (concluded January 2016, in the process of ratification)

EU-Singapore Free Trade Agreement (authentic text as of 18 April 2018)

EU-Mexico Agreement (concluded 21 April 2018)

EU-Japan Agreement (signed 17 July 2018)

United States-Mexico-Canada Agreement (signed 30 November 2018) (USMCA)

- Model and Draft Treaties

Indian Model BIT

Jamaican Model BIT

Netherlands Draft Model BIT (2018)

Southern Africa Development Community (SADC) Model BIT

UK Model BIT

US Model BIT 2004

US Model BIT 2012

- Domestic Legislation

Enterprise Act 2002 (UK)

Investment Canada Act, RSC, 1985, c 28 (1st Supp) (Canada)

Law on Investment, Law No 3/93 (24 June 1993) (Mozambique)

- United Nations General Assembly

UNGA Res 65/22 UNCITRAL Arbitration Rules (revised in 2010) UN Doc A/RES/65/22

UNGA Res 67/1 (30 November 2012) UN Doc A/RES/67/1

- United Nations International Law Commission

ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' Conclusions of the Word of Study Group – App (2 May 2006) UN Doc A/CN.4/L.682/Add.1

ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (ARSIWA)

ILC, 'Draft Articles on Diplomatic Protection', Commentary on Article I, para 4, p 25-26; 'Report of the International Law Commission on the Work of its 58th Session' (2006) UN Doc A 61/10 (ILCDP 2006)

ILC, 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries – Section II.D of the Report of the International Law Commission on the Work of its 30th Session' (8 May-28 July 1978) UN Doc A/33/10

ILC, 'Final Report of the Study Group on the Most-Favoured-Nation Clause – Annex of the Report of the International Law Commission on the Work of its 67th Session' (4 May-5 June and 6 July-7 August 2015) UN Doc A/70/10

- Other

NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001)

BIBLIOGRAPHY

Aaken AV, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 JIEL 507

—— 'Delegating Interpretative Authority in Investment Treaties: The Case of Joint Administrative Commissions' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015)

Adams S, 'Living with "Prudentialism": The Challenges of Building a UK Trade Policy for Financial Services' (2017)

Adkins C and Grewal DS, 'Democracy and Legitimacy in Investor-State Arbitration' (2016) 126 Yale LJ Forum 57

Adlung R, 'Multilateral Investment Disciplines: Don't Forget the GATS' (Vale Columbia Center on Sustainable International Investment 2014) 117 <http://ccsi.columbia.edu/files/2013/10/No-117-Adlung-FINAL.pdf> accessed 15 August 2018

—— 'International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS' (2016) 17 JWIT 47

—— and Carzaniga A, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' (2009) 12 JIEL 357

—— and Mamdouh H, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' (2014) 48 JWT 191

—— and Molinuevo M, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke?' (2008) 11 JIEL 365

Afilalo A, 'Failed Boundaries: The Near-Perfect Correlation Between State-to-State WTO Claims and Private Party Investment Rights' (NYU 2013) 01/13

Agon SS, 'Is It All About Compliance? Towards a Multidimensional Goal-Based Approach for Analyzing the Effectiveness of the WTO DSS' (2014) 108 Proceedings of the Annual Meeting (ASIL) 118

Alexander KW and Soukup BJ, 'Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance under NAFTA' (2010) 28 Berkeley J Intl L 313

Allott A, 'The Effectiveness of the Law' (1980) 15 Valparaiso University Law Review 229

Alschner W, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014)

—— Pauwelyn J and Puig S, 'The Data-Driven Future of International Economic Law' (2017) 20 JIEL 217

—— Seiermann J and Skougarevskiy D, 'Text-as-Data Analysis of Preferential Trade Agreements: Mapping the PTA Landscape' (UNCTAD 2017) UNCTAD Research Paper n 5 UNCTAD/SER.RP/2017/5

Alvarez JE, 'Sovereign Concerns and the International Investment Regime' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

—— and Vandevelde KJ, 'The BIT Program: A Fifteen-Year Appraisal' (1992) 86 Proceedings of the Annual Meeting (ASIL) 532

Annacker C, 'Protection and Admission of Sovereign Investment under Investment Treaties' (2011) 10 Chinese Journal of International Law 531

Antony J, 'Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus' (2013) 29 Arbitration International 607

Arikaki EA, 'Appendix 1: Treaties of Friendship, Commerce and Navigation and Their Treatment of Service Industries' (1985) 7 Michigan Yearbook of International Legal Studies 343

Azaria D, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP 2015)

Azevedo R, 'Speech at the International Monetary Conference in Washington DC' (4 June 2018) <www.wto.org/english/news_e/spra_e/spra223_e.htm> accessed 15 August 2018

Baldwin RE, *The Great Convergence: Information Technology and the New Globalization* (Belknap Press of Harvard UP 2016)

Bassan F, *The Law of Sovereign Wealth Funds* (Edward Elgar 2011)

Batifort S and Heath JB, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111 AJIL 873

BBC World Service podcast, 'Make America Great Again (12 December 2017)' <www.bbc.co.uk/programmes/p05qwcr2> accessed 15 August 2018

Berman F, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in BIICL (ed), *Investment Treaty Taw: Current Issues. 2, Nationality and Investment Treaty Claims ; Fair and Equitable Treatment in Investment Treaty Law* (BIICL 2007)

Bernasconi-Osterwalder N, 'State–State Dispute Settlement in Investment Treaties' (International Institute for Sustainable Development 2014) <www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> accessed 15 August 2018

Beveridge FC, *The Treatment and Taxation of Foreign Investment under International Law: Towards International Disciplines* (Juris/Manchester UP 2000)

—— 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302

Bhuiyan S, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (CUP 2007)

Branstetter LG and Feenstra RC, 'Trade and Foreign Direct Investment in China: A Political Economy Approach' (2002) 58 Journal of International Economics 335

Broude T, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013)

—— and Moses S, 'A Look at the Trade in Services Agreement (TiSA) Negotiations' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016)

—— and Shany Y (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011)

Burke-White WW, 'Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, The' (2008) 3 Asian Journal of WTO and International Health Law and Policy 199

Burt EM, 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization Notes and Comments' (1997) 12 American University Journal of International Law and Policy 1015

Caron D, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley J Intl L 401

—— 'International Courts and Tribunals: Their Roles amidst a World of Courts' (2011) 26 ICSID Review 1

Carreau D and others, *Droit International Économique* (6th edn, Dalloz 2017)

Carrington PD, 'Private Enforcement of International Law' in Susan Rose-Ackerman and Paul D Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Carolina Academic Press 2013)

Chaisse J, 'The Regulation of Sovereign Wealth Funds in the European Union: Can the Supranational Level Limit the Rise of National Protectionism?' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Cho S and Kurtz J, 'Convergence and Divergence in International Economic Law and Politics' (2018) 29 EJIL 169

Christ B and Panizzon M, 'Article XI' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Clodfelter MA and Guerrero FMS, 'National Security and Foreign Government Ownership Restrictions on Foreign Investment: Predictability for Investors at the National Level' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Collins D, 'National Treatment in Emerging Market Investment Treaties' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014)

Cossy M, 'Energy Services under the General Agreement of Trade in Services' in Julia Selivanova (ed), *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter* (Wolters Kluwer/Kluwer Law International 2011)

Cottier T and Schneller L, 'The Philosophy of Non-Discrimination in International Trade Regulation' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014)

Coyle JF, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2012) 51 Columbia Journal of Transnational Law 302

Crawford J, 'L'Estoppel En Droit International Public . Précédé d'un Aperçu de La Théorie de l'estoppel En Droit Anglais. By Antoine Martin. Paris: Éditions A. Pedone, 1979' (1981) 51 British Ybk Intl L 290

—— 'The ILC's Articles on Diplomatic Protection' (2006) 31 South African Yearbook of International Law: Suid-Afrikaanse Jaarboek Vir Volkereg 29

d'Aspremont J, '"Effectivity" in International Law: Self-Empowerment Against Epistemological Claustrophobia' (2014) 108 Proceedings of the Annual Meeting (ASIL) 165

Davies A, 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?' (2012) 15 JIEL 793

Davis B, 'U.S. Wants to Retaliate Against China's Restrictions on American Tech Firms' *Wall Street Journal* (17 April 2018) <www.wsj.com/articles/u-s-is-examining-ways-to-retaliate-against-chinese-restrictions-on-u-s-tech-companies-1523910784> accessed 15 August 2018

Delimatsis P, 'Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016*, vol 7 (Springer International 2016)

—— 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit' (2017) 20 JIEL 583

—— and Hoekman B, 'National Tax Regulation, Voluntary International Standards, and the GATS: Argentina–Financial Services' (2018) 17 World Trade Review 265

Desierto D, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making' (2014) 26 Florida J Intl L 51

DeSouza P and Reisman WM, 'Sovereign Wealth Funds and National Security' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Diebold NF, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (CUP 2010)

—— 'Standards of Non-Discrimination in International Economic Law' (2011) 60 International and Comparative Law Quarterly 831

DiMascio N and Pauwelyn J, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' (2008) 102 AJIL 48

Djankov S and others, 'The Regulation of Entry' (2002) 117 The Quarterly Journal of Economics 1

Dolzer R and Schreuer CH, *Principles of International Investment Law* (2nd edn, OUP 2012)

Douglas Z, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 British Ybk Intl L 151

——*The International Law of Investment Claims* (CUP 2009)

—— 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 ICSID Review 155

Drahos M, *Convergence of Competition Laws and Policies in the European Community: Germany, Austria and the Netherlands* (Kluwer Law International 2001)

Dunne N, 'Perspectives on Liberalisation' (LSE 2017) LSE Law, Society and Economy Working Paper n 06/2017 <http://eprints.lse.ac.uk/87549/> accessed 15 August 2018

Echandi R, 'What Do Developing Countries Expect from the International Investment Regime?' in José Enrique Alvarez and Karl P Sauvant (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP USA 2011)

—— and Newson M, 'The Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch' (2014) 17 JIEL 847

Eeckhout P, 'Constitutional Concepts for Free Trade in Services' in Joanne Scott and Gráinne De Búrca (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Hart 2001)

—— 'Remedies and Compliance' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009)

—— 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (2010) 13 JIEL 3

Endicott M, 'Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Bilingual edition, BRILL 2007)

Endicott TAO, *Vagueness in Law* (OUP 2000)

Feinäugle C, 'Article XXVIII' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Fink C and Molinuevo M, 'East Asian Free Trade Agreements in Services: Key Architectural Elements' (2008) 11 JIEL 263

Flett J, 'National Treatment under the General Agreement on Trade in Services' in Anselm Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014)

Fontanelli F and Bianco G, 'Converging towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States' (2014) 50 Stanford J Intl Law 211

Footer ME, 'International Investment Law and Trade: The Relationship That Never Went Away' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (CUP 2013)

Fox EM, 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) 9 JIEL 271

Franck TM, *The Power of Legitimacy among Nations* (OUP 1990)

Frankopan P, 'Byzantine Trade Privileges to Venice in the Eleventh Century: The Chrysobull of 1092' (2004) 30 Journal of Medieval History 135

Fuller LL, *The Morality of Law* (rev edn, Yale UP 1969)

Gaillard E, *Legal Theory of International Arbitration* (Brill 2010)

Gari G, 'GATS Disciplines on Capital Transfers and Short-Term Capital Inflows: Time for Change?' (2014) 17 JIEL 399

—— 'Services Negotiations: Where Have We Been and Where Are We Heading?' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016)

Garner BA and Black HC (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014)

Gehne K and others, 'Introduction - Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundation' in Thomas Cottier and

Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: from Fragmentation to Coherence* (CUP 2011)

Gertz G, Jandhyala S and Poulsen LNS, 'Legalization, Diplomacy, and Development: Do Investment Treaties de-Politicize Investment Disputes?' (2018) 107 World Development 239

Gibson CH, 'GTH v. Canada May Sound Familiar to Media Entities' (*Kluwer Arbitration Blog*, 20 June 2016) <http://kluwerarbitrationblog.com/2016/06/20/gth-v-canada-may-sound-familiar-media-entities/> accessed 15 August 2018

Gómez-Palacio I and Muchlinski P, 'Admission and Establishment' in Federico Ortino, Peter Muchlinski and Christoph H Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008)

Goodwin-Gill GS, *International Law and the Movement of Persons between States* (Clarendon Press 1978)

Greig D (ed), 'International Economic Law Australian Practice in International Law 1978-1980' (1983) 8 Australian Ybk Intl Law 341

Grossman GM and Helpman E, 'Foreign Investment with Endogenous Protection' in Robert C Feenstra, Gene M Grossman and Douglas Irwin (eds), *The Political Economy of Trade Policy: Papers in Honor of Jagdish Bhagwati* (MIT Press 1996)

Grotius H, *De Jure Belli Ac Pacis Libri Tres. Vol. 2, The Translation* (Francis W Kelsey tr, first published 1625, Oceana : Wildy & Sons 1964)

—— *Hugo Grotius Mare Liberum, 1609-2009* (Robert Feenstra ed, first published 1609, Brill 2009)

Hamida WB, 'The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the Status of the Pre-Investment Expenditures' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005)

—— 'MFN and Procedural Rights: Solutions from WTO Experience?' in Todd Weiler, *Investment Treaty Arbitration and International Law*, vol 1 (JurisNet 2008)

Haskel J and Westlake S, *Capitalism without Capital: The Rise of the Intangible Economy* (Princeton UP 2017)

Heino AJ, 'Timbro Authoritarian Populism Index 2017' (2017) <https://timbro.se/app/uploads/2018/01/populism-index-2017.pdf> accessed 15 August 2018

Helleiner E, 'Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015)

Hepburn J, *Domestic Law in International Investment Arbitration* (1st edn, OUP 2017)

Hestermeyer HP and Nielsen L, 'The Legality of Local Content Measures under WTO Law' [2014] JWT 554

Higgins R, 'The Rule of Law: Some Sceptical Thoughts', *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009)

Hill J and Shúilleabháin MN, *Clarkson & Hill's Conflict of Laws* (5th edn, OUP 2016)

Hoder L, 'Compensation for Losses to New or Unfinished Business: A New Paradigm in the Making? A Case Comment on Gold Reserve v. Venezuela' (2016) 13 Transnational Dispute Management (TDM) <www.transnational-dispute-management.com/article.asp?key=2340> accessed 15 August 2018

Hoekman B and Meagher N, 'China – Electronic Payment Services: discrimination, economic development and the GATS' (2014) 13 World Trade Review 409

—— and Sabel C, 'Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy' (2017) EUI Working Paper - Robert Schuman Centre for Advanced Studies 2017/36

Horn H, Mavroidis PC and Sapir A, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' in David Greenaway (ed), *The World Economy: Global Trade Policy 2010* (Blackwell Publishing 2011)

Howse R, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9

—— and Teitel R, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy 127

Huerta-Goldman JA, 'Domestic, Regional and Multilateral Investment Liberalization', *Regulation of Foreign Investment*, vol 21 (World Scientific 2012)

—— 'Cross-Cutting Observations on National Treatment' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013)

'International Centre for Settlement of Investment Disputes: Arbitral Tribunal Award in Liberian Eastern Timber Corporation (LETCO) v. The Government of The Republic of Liberia (Recovery of Damages for Breach of a Concession Agreement)' (1987) 26 ILM 647

Ishikawa T, 'Keeping Interpretation In Investment Treaty Arbitration "on Track": The Role of State Parties' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015)

Jackson JK, 'The Committee on Foreign Investment in the United States (CFIUS)' (2017) Congressional Research Service RL33388 <https://fas.org/sgp/crs/natsec/RL33388.pdf>

Jennings RY and Watts A, *Oppenheim's International Law* (9th edn, Longman 1992)

Johnson L, 'Regulation of Investment Incentives: Instruments at an International/Supranational Level' in Ana Teresa Tavares-Lehmann and others (eds), *Rethinking Investment Incentives: Trends and Policy Options* (Columbia UP 2016)

Jost T, 'Sovereign Wealth Funds and the German Policy Reaction' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Joubin-Bret A, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008)

Juillard P, 'Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment' (2000) 15 ICSID Review 322

Kanth DR, 'No Credible WTO Answers on "Investment" in "Trade in Services"' [2016] *Third World Economics, Issue No. 619/620, 16 June – 15 July 2016, pp6-8* <http://twn.my/title2/twe/2016/619-620/4.htm> accessed 15 August 2018

Kelsen H, *Principles of International Law* (Robert W Tucker ed, 2nd ed, Holt, Rinehart and Winston 1966)

Kennedy KC, 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2001) 33 George Washington International Law Review 585

Kingsbury B, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1997) 19 Michigan J Intl Law 345

Klamert M, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (CUP 2014)

Kolb R, *La Bonne Foi En Droit International Public: Contribution à l'étude Des Principes Généraux de Droit* (1st edn, Presses universitaires de France 2000)

Koulen M, 'Chapter 9 - Foreign Investment in the WTO' in EC Nieuwenhuys and Marcel Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International 2001)

Krajewski M and Engelke M, 'Article XVII' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Kunzer K, 'Developing a Model Bilateral Investment Treaty Recent Development' (1983) 15 Law and Policy in International Business

Kurtz J, 'The MFN Standard and Foreign Investment: An Uneasy Fit?' (2004) 5 JWIT 861

—— 'On the Evolution and Slow Convergence of International Trade and Investment Law' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014)

—— *The WTO and International Investment Law: Converging Systems* (CUP 2016)

Lang A, 'Legal Regimes and Regimes of Knowledge: Governing Global Services Trade' (LSE 2009) LSE Law, Society and Economy Working Paper n 15/2009 <http://eprints.lse.ac.uk/24558/1/WPS2009-15_Lang.pdf> accessed 15 August 2018

—— *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (OUP 2011)

—— 'Governing "As If": Global Subsidies Regulation and the Benchmark Problem' (2014) 67 Current Legal Problems 135

—— and Scott J, 'The Hidden World of WTO Governance' (2009) 20 EJIL 575

Larson AP and others, 'Lesson from CFIUS for National Security Reviews of Foreign Investment' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Lauterpacht H, *The Function of Law in the International Community* (Clarendon Press 1933)

Legum B and Petculescu I, 'GATT Article XX and International Investment Law' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013)

Leroux EH, 'Eleven Years of GATS Case Law: What Have We Learned?' (2007) 10 JIEL 749

—— 'From Periodicals to Gambling: A Review of Systemic Issues Addressed by WTO Adjudicatory Bodies under GATS' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008)

Lévesque C, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013)

Lloyd TH, *England and the German Hanse, 1157–1611: A Study of Their Trade and Commercial Diplomacy* (CUP 1991)

Lowery C, 'The U.S. Approach to Sovereign Wealth Funds and the Role of the CFIUS' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Lu Y, Tao Z and Zhu L, 'Identifying FDI Spillovers' (2017) 107 Journal of International Economics 75

Lubambo M, 'How Does International Economic Law Regulate the Right of Entry of Investments in Services?' (Social Science Research Network 2016) Society of International Economic Law (SIEL), Fifth Biennial Global Conference <http://papers.ssrn.com/abstract=2801925> accessed 15 August 2018

—— 'Is State-State Investment Arbitration an Old Option for Latin America?' (2016) 34 CRQ 225

—— 'Host States and State-State Investment Arbitration: Strategies and Challenges' (2017) 14(2) Revista de Direito Internacional 80

—— 'Chapter 6: Entry Rights and Investments in Services: Adjudicatory Convergence between Regimes?' in Gáspár-Szilágyi Szilárd, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP forthcoming 2019)

Lucas L, 'Race for China's $5.5tn Mobile Payment Market Hots Up' *Financial Times* (1 May 2017) <www.ft.com/content/e3477778-2969-11e7-bc4b-5528796fe35c> accessed 15 August 2018

Lupo-Pasini F, 'Movement of Capital and Trade in Services: Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account' (2012) 15 JIEL 581

—— 'Financial Disputes in International Courts' (2018) 21 JIEL

Malanczuk P, 'State-to-State and Investor-to-State Dispute Settlement in the OECD Draft Multilateral Investment Agreement', *Multilateral Regulation of Investment* (Kluwer Law International 2001)

Marboe I, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, OUP 2017)

Marceau G, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 JWT 1081

—— Quinn C and Hoyos JPM, 'Judging from Venus: A Response to Joost Pauwelyn' (2015) 109 AJIL Unbound 288

Marchetti JA and Mavroidis PC, 'The Genesis of the GATS' (2011) 22 EJIL 689

Martínez MÁA, *Specific Performance as the Preferred Remedy in Comparative Law and CISG* (Aranzadi 2013)

Mattoo A, 'National Treatment in the GATS: Corner-Stone or Pandora Box' (1997) 31 JWT 107

McIntyre J, 'Declaratory Judgments of the International Court of Justice', *Hague Yearbook of International Law* (Martinus Nijhoff 2012)

McLachlan C, Shore L and Weiniger M, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017)

McRae D, 'Introduction to the Symposium on Simon Batifort and J. Benton Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization"' (2018) 112 AJIL Unbound 38

Meester BD, *Liberalization of Trade in Banking Services: An International and European Perspective* (CUP 2014)

—— and Coppens D, 'Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?' in Zdenek Drabek and Petros Mavroidis, *Regulation of Foreign Investment*, vol 21 (World Scientific 2013)

Mestral A de and Vanhonnaeker L, 'How Best to Protect the Right to Regulate: The WTO or ISA?' [2017] Centre for International Governance Innovation <www.cigionline.org/publications/how-best-protect-right-regulate-wto-or-isa> accessed 15 August 2018

Meyer T, 'How Compliance Understates Effectiveness' (2014) 108 AJIL 93

Mitchell A, Heaton D and Henckels C, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar 2016)

—— Hawkins JK and Mishra N, 'Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 JIEL 787

Molinuevo M, 'Foreign Investment in Services and the DSU' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008)

—— *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (Kluwer Law International 2012)

—— and Delimatsis P, 'Article XVI' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Moon WJ and Sweet AS, 'Consensus Analysis, State Practice, and Majoritarian Activism in the WTO' (2014) 108 AJIL Unbound 295

Moore K and Lewis D, 'The First Multinationals : Assyria circa 2000 B.C.' (1998) 38 Management International Review 95

Naldi GJ, 'The ASEAN Protocol on Dispute Settlement Mechanisms: An Appraisal' (2014) 5 Journal of International Dispute Settlement 105

Neufeld R, 'Trade and Investment' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009)

Nogel RJ, 'Human Rights and Uganda's Expulsion of Its Asian Minority' (1973) 3 Denver Journal of International Law and Policy 107

Ortino F, 'Public Services, Investment Liberalization and Protection', *Regulation of Foreign Investment*, vol 21 (World Scientific 2012)

—— and Sheppard A, 'International Agreements Covering Foreign Investment in Services: Patterns and Linkages' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006)

Padmanabhan V, 'The Idea of Effective International Law: Continuing the Discussion' (2014) 108 AJIL 91

Paparinskis M, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 British Ybk Intl L 264

—— 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011)

—— 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration', *Select Proceedings of the European Society of International Law*, vol 3 (Hart 2011)

—— 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Review 14

—— 'Chapter 2: Inherent Powers of ICSID Tribunals: Broad and Rightly So' in Ian A Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law*, vol 5 (JurisNet 2012)

—— 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 EJIL 663

—— 'The Schizophrenia of Countermeasures in International Economic Law: The Case of the ASEAN Comprehensive Investment Agreement', *International Economic Law After the Global Crisis* (CUP 2015)

—— 'Investors' Remedies under EU Law and International Investment Law' (2016) 17 JWIT 919

—— 'MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the "Conventional Wisdom"' (2018) 112 AJIL Unbound 49

Parra AR, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 ICSID Review 428

—— 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment' (1997) 12 ICSID Review 287

Paulsson J, 'Jurisdiction and Admissibility' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005)

—— 'The Power of States to Make Meaningful Promises to Foreigners' (2010) 1 Journal of International Dispute Settlement 341

Pauwelyn J, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking' (2006) 9 JIEL 197

—— 'Different Means, Same End: The Contribution of Trade and Investment Treaties in Anti-Corruption Policy' in Susan Rose-Ackerman and Paul D Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Carolina Academic Press 2013)

—— 'The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform' (2014) 108 Proceedings of the Annual Meeting (ASIL) 255

—— 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 ICSID Review 372

—— 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 AJIL 761

—— 'The WTO 20 Years On: "Global Governance by Judiciary" or, Rather, Member-Driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' (2016) 27 EJIL 1119

Pauwelyn J and Hamilton RJ, 'Exit from International Tribunals' (2018) Advance Article (17 August) Journal of International Dispute Settlement 1

Pérez-Aznar F, 'The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements' (2017) 20 JIEL 777

—— 'The Fictions and Realities of MFN Clauses in International Investment Agreements' (2018) 112 AJIL Unbound 55

Peterson L, 'Canada Hit by First Legal Blowback under Its BITs with Developing Countries, as Egyptians Telecoms Giant Launches Arbitration' (*Investment Arbitration Reporter*, 7 June 2016) <www.iareporter.com/articles/canada-hit-by-first-legal-blowback-under-its-bits-with-developing-countries-as-egyptians-telecoms-giant-launches-arbitration/> accessed 15 August 2018

Pogoretskyy V, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law* (CUP 2017)

Pohl J, 'Societal Benefits and Costs of International Investment Agreements' (Organisation for Economic Cooperation and Development 2018) OECD Working Papers on International Investment 2018/01

—— and Wehrlé F, 'Investment Policies Related to National Security: A Survey of Country Practices' (2016) OECD Working Papers on International Investment 2016/02

Pollan T, *Legal Framework for the Admission of FDI* (Eleven International Pub 2006)

Posner EA, *Economic Foundations of International Law* (Belknap Press of Harvard UP 2013)

Posner TR and Walter MC, 'The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff 2015)

Potestà M, 'Republic of Italy v. Republic of Cuba' (2012) 106 AJIL 341

Poulsen LNS, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015)

Puga D and Trefler D, 'International Trade and Institutional Change: Medieval Venice's Response to Globalization' (2014) 129 The Quarterly Journal of Economics 753

Puig S, 'International Regime Complexity and Economic Law Enforcement' (2014) 17 JIEL 491

—— 'The Merging of International Trade and Investment Law' (2015) 33 Berkeley J Intl L 1

Recanati M, 'Diplomatic Intervention and State-to-State Arbitration as Alternative Means for the Protection of Foreign Investments and Host States' General Interests: The Italian Experience' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014)

Reinhold S, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40

Reinisch A, 'National Treatment' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos/Hart 2015)

Roberts A, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard Intl LJ 1

Robin PM, 'The Bit Won't Bite: The American Bilateral Investment Treaty Program' (1983) 33 American University Law Review 931

Rodrik D, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73

Rose-Ackerman S, 'The Global BITs Regime and the Domestic Environment for Investment' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009)

—— and Palifka BJ, *Corruption and Government: Causes, Consequences, and Reform* (2nd edn, CUP 2016)

Sabahi B, 'The Calculation of Damages for Breach of International Investment Contracts' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law* (Bilingual edition, BRILL 2007)

Sacerdoti G, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties' (2000) 1 JWIT 105

—— and Recanati M, 'Approaches to Investment Protection Outside of Specific International Investment Agreements and Investor-State Settlement' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos/Hart 2015)

Safarian E, 'The Canadian Policy Response to Sovereign Direct Investment' in Karl P Sauvant, Lisa E Sachs and Wouter PF Schmit Jongbloed (eds), *Sovereign Investment: Concerns and Policy Reactions* (OUP 2012)

Salacuse JW, *The Law of Investment Treaties* (2nd ed, OUP 2015)

Sandrock, O, 'The Right of Foreign Investors to Access German Markets: The Meaning of Article 2(1) of the German Model Treaty for the Promotion and Protection of Foreign Investments' (2010) 25 ICSID Review 268

Sauvé P, *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003)

Schill S, *The Multilateralization of International Investment Law* (CUP 2009)

—— 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 Law and Practice of International Courts and Tribunals 281

—— 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath' (2017) 111 AJIL 914

Schreuer C, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd ed, CUP 2009)

Schwarzenberger G, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 British Ybk Intl L 96

Scobbie I, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201

Scott J, 'Member States and Regions in Community Law: Convergence and Divergence' in PR Beaumont, Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2001)

—— 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 87

Sebastian T and Sinclair A, 'Remedies in WTO Dispute Settlement and Investor-State Arbitration: Contrasts and Lessons' in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013)

Shaffer G and Waibel M, 'The (Mis)Alignment of the Trade and Monetary Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015)

Shany Y, *Assessing the Effectiveness of International Courts* (OUP 2014)

—— *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016)

Shapiro SJ, *Legality* (Harvard UP 2013)

Shihata IF, 'Recent Trends Relating to Entry of Foreign Direct Investment' (1994) 9 ICSID Review 47

Siripurapu A, 'Wal-Mart Official: U.S. Policy toward the WTO, Trade Lacks a "Constituency"' (*InsideTrade.com*, 13 November 2017)

<https://insidetrade.com/daily-news/wal-mart-official-us-policy-toward-wto-trade-lacks-constituency> accessed 15 August 2018

Sornarajah M, *The International Law on Foreign Investment* (4th edn, CUP 2017)

St John T and Gertz G, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (Oxford University 2015)

Steger D, 'International Trade and Investment: Towards a Common Regime?' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013)

Stephenson S and Hufbauer GC, 'Services and State- Owned Enterprises' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016)

Stone Sweet A and Mathews J, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72

Suttle O, 'Equality in Global Commerce: Towards a Political Theory of International Economic Law' (2014) 25 EJIL 1043

—— 'Book Review Essay: Poverty and Justice: Competing Lenses on International Economic Law: John Linarelli (Ed.), Research Handbook on Global Justice and International Economic Law. Chelthenham: Edward Elgar, 2013. Krista Nadakavukaren Schefer (Ed.), Poverty and the International Economic Legal System: Duties to the World's Poor. Cambridge: Cambridge University Press, 2013.' (2014) 15 JWIT 1071

Sykes AO, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 The Journal of Legal Studies 631

Szilárd G-S, Behn D and Langford M (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP forthcoming 2019)

Tamada D, 'Host States as Claimants: Corruption Allegations' in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014)

Thomson D, 'GAR Article: Canada Hit with First BIT Claim' [2017] *Global Arbitration Reporter* <http://globalarbitrationreview.com/article/1036392/canada-hit-with-first-bit-claim> accessed 15 August 2018

Tietje C, 'Perspectives on the Interaction between International Trade and Investment Regulation' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013)

Tomuschat C, 'Article 36' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (Second Edition, OUP 2012)

Tony Blair Institute for Global Change, 'Brexit: The Realities of "Taking Back Control"' (2018) <http://institute.global/news/brexit-realities-taking-back-control> accessed 15 August 2018

Trachtman JP, 'The WTO Cathedral', *Trade Law, Domestic Regulation and Development* (World Scientific 2015)

Tucker RW, 'The Principle of Effectiveness in International Law' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (U California P 1953)

Tzanakopoulos A, 'National Treatment and MFN in the (Invisible) EU Model BIT' (2014) 15 JWIT 484

Tzeng P, 'Deferring Future Damages to Future Tribunals: The Jurisdictional Obstacles' (2016) 31 ICSID Review 246

UNCTAD, 'Dispute Settlement: State-State' (2003) UNCTAD/ITE/IIT/2003/1 <http://unctad.org/en/Docs/iteiit20031_en.pdf> accessed 15 August 2018

—— 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (United Nations 2010) UNCTAD/DIAE/IA/2009/11

—— 'World Investment Report' (United Nations 2015) UNCTAD/WIR/2015

—— 'World Investment Report' (United Nations 2016) UNCTAD/WIR/2016

—— 'World Investment Report' (United Nations 2017) UNCTAD/WIR/2017

—— 'Investment Trends Monitor - Special Issue - June 2017' (United Nations 2017) UNCTAD/ITM/2017

Van Damme I, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009)

Vandevelde KJ, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 AJIL 621

—— 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard Intl LJ 469

—— *US International Investment Agreements* (OUP 2009)

—— *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010)

—— *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017)

Vattel E de, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (New edn corr, tr from the French, G G J and J Robinson 1793)

Verhoosel G, 'The Use of Investor–State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6 JIEL 493

Vidigal G, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' (2013) 16 JIEL 505

—— 'The Turn to Performance Remedies: Institutionalization, Multilateralization, and the Shifting Role of International Courts' (ESIL Annual Conference, Oslo, 10 September 2015) <http://papers.ssrn.com/abstract=2659185> accessed 15 August 2018

—— 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement' [2018] JIEL

Vignes D, 'La Clause de La Nation La plus Favorisée et La Pratique Contemporaine : Problèmes Posés Par La Communauté Économique Européenne (Volume 130)' [1970] Collected Courses of the Hague Academy of International Law

Viterbo A, 'Tensions Between International Investment Protection and Financial Stability' in N Jansen Calamita, David Earnest and Markus Burgstaller (eds), *The Future of ICSID and the Place of Investment Treaties in International Law: Investment Treaty Law Current Issues*, vol 4 (BIICL 2013)

Vitoria F de, *Francisci de Victoria De Indis et De Ivre Belli Relectiones* (first published 1557, The Carnegie Institution of Washington 1917)

Wagner M, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1

Waibel M, 'Putting the MFN Genie Back in the Bottle' (2018) 112 AJIL Unbound 60

Wang Y, 'Most-Favoured-Nation Treatment under the General Agreement on Trade in Services - And Its Application in Financial Services' (1996) 30 JWT 91

Wei L and Deng C, 'American Express Is Ready to Charge Into China' *Wall Street Journal* (26 April 2018) <www.wsj.com/articles/american-express-advances-in-effort-to-access-china-market-1524668149> accessed 15 August 2018

Weiler T, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff Publishers 2013)

Weiss F, 'Trade and Investment Law: What Relations?' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014)

Willemyns I, 'Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?' (2016) 19 JIEL 657

Wilson J, 'Opening Services Markets in Developing Countries: What Role for Competition Law?' in Pierre Sauvé and Martin Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016)

Wimmer AM, 'The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment' (1995) 19 World Competition 109

Wolfrum R, 'Article II' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Wong J, ‘The Subversion of State-to-State Investment Treaty Arbitration’ (2014) 53 Columbia Journal of Transnational Law 6

Wu M, ‘The Scope and Limits of Trade’s Influence in Shaping the Evolving International Investment Regime’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014)

Wyler E and Papaux A, ‘The Different Forms of Reparation: Satisfaction’ in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010)

Yannaca-Small K and Houde M-F, ‘Relationships between International Investment Agreements - OECD Working Papers on International Investment, 2004/01’

Zang MQ, ‘The Uncompleted Mission of China – Electronic Payment Services: Policy Equilibrium between Market Access and National Treatment under the GATS’ (2015) 12 (1) Manchester Journal of International Economic Law 16

Zdouc W, ‘WTO Dispute Settlement Practice Relating to the GATS’ (1999) 2 JIEL 295

Zhang AH, ‘Foreign Direct Investment from China: Sense and Sensibility’ (2014) 34 Northwestern Journal of International Law & Business 395

—— ‘The Anti-Competitive Effects of State Ownership’ (Social Science Research Network 2017) SSRN Scholarly Paper ID 2927456 <https://papers.ssrn.com/abstract=2927456> accessed 15 August 2018