Part IV Trade and … The New Agenda and Linkage Issues, Ch.22 Trade And Investment

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From: The Oxford Handbook of International Trade Law
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Content type: Book content
Series: Oxford Handbooks in Law
ISBN: 9780199231928

Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 08 January 2009

Subject(s):

NAFTA (North American Free Trade Agreement) — International minimum standard — Non-discrimination — ECT (Energy Charter Treaty) — Foreign Direct Investment — Expropriation — BITs (Bilateral Investment Treaties)

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(p. 620) I. Introduction

Rules can be helpful, particularly when they apply generally. On the other hand, the selective creation, application, and enforcement of rules can lead to preferential treatment. In international investment law, there is little uniformity.

States promote investment rules in the interest of providing for stability, transparency, predictability, non-discrimination, and protection for their companies and individuals that invest abroad. The *quid pro quo* is that they offer the same standards for foreign investors wishing to invest in their State. Good investment rules make for a positive economic climate, which favours growth and jobs. This chapter does not address whether investment agreements actually achieve these goals. Rather, it proceeds from the starting point that a variety of international rules already regulate investment, while others continue to be negotiated. This has created a patchwork of bilateral and multilateral rules that apply in partial and piecemeal fashion throughout the world. Rather than creating a comprehensive international investment framework, the bilateral and regional rules result in preferential investment arrangements between certain States.

Rules on foreign investment are found in customary international law and in treaty law. Investment rules exist in thousands of bilateral investment treaties (BITs) as well as in a few multilateral treaties, including NAFTA Chapter 11 and the Energy Charter Treaty (ECT). Referring to these treaties generically as 'investment agreements', this chapter focuses on some of their common features, including their prohibition of discriminatory treatment, treatment below the minimum standard, and expropriation without compensation. While investment agreements also differ in many respects, the purpose of this chapter is to highlight some of their common ground for the purpose of comparing these agreements with the WTO's coverage of investment.

What is lacking is a universal approach to investment protection. The WTO exists as the only multilateral economic institution with near universal membership, yet it too has adopted a piecemeal approach to investment protection rules. Governmental measures are caught by WTO disciplines if they affect trade in goods or trade in services. In contrast, investment agreements have as their primary concern all governmental measures affecting investment.

A review of existing rules in the WTO and in investment agreements will show that the current patchwork of rules lacks uniformity. The provisions of investment agreements differ in many respects from WTO rules, both substantively and procedurally, with many investment agreements allowing for investor-state, in addition to state-to-state, dispute settlement.

While the number of investment agreements continues to grow, it is unclear what the future holds for investor protection at the multilateral level. The WTO may be the obvious forum for the creation of a multilateral framework. However, its current (p. 621) approach to investment will require a complete re-thinking if it truly aspires to cover the multi-faceted aspects of international business.

The WTO will never be able to accomplish this if it continues to address investment as a secondary matter, ancillary to trade in goods or services. In the end, it must embrace rules that deal with investment as a primary matter.

II. Background

In international law, the treaty that accords investor protection defines the meaning of 'investment'. Each treaty's coverage varies according to the intentions of the negotiators. A comparison of investment rules in the WTO with those commonly found in investment agreements, reveals a great divide in their substantive coverage, but it also shows that the way the drafters conceived of investment is different.

To 'invest' means to expend money, effort, or time into an undertaking with the intention of deriving a profit. However, 'foreign direct investment' (FDI) implies something more than the mere purchase of shares for the sake of the interest, dividends, or profits. Traditionally, States have distinguished FDI from other investment by setting a limit, usually somewhere between 10 per cent and 49 per cent, on foreign equity participation. This enables the State to vet and control investment over which a foreign domiciled person or corporation has potentially significant influence. Foreign investment not classified as FDI is known as portfolio investment.

FDI distinguishes itself from portfolio investment in that it 'consists of a transaction made by a foreigner in a host state which is intended to set up a long term relationship with a party in the host state'.[1] It is precisely this long-term relationship of dependency that differentiates FDI from other types of transactions and places the investor in a situation of vulnerability. 'The transference of assets and personnel outside frontiers of the home state, the presence of state or sovereign power in one of the parties and long duration are facets of the transaction which set them apart from other types of international business transactions'.[2] It is the vulnerability of foreign investors that has motivated States to conclude investment protection agreements as an attempt to mitigate part of the risk.

Investment agreements typically define investment very broadly, covering various forms of monetary commitments. For example, NAFTA covers all enterprises as well as their debt securities, equity securities, and loans received.[3] It also covers tangible and intangible property and interests arising from the commitment of capital or other resources. The 2004 US Model BIT seems to go further still by providing an (p. 622) open definition that includes bonds, debentures, loans, futures, options, derivatives, licenses, authorizations, and permits.[4] It is difficult to see how these commitments necessarily place the investor in a position of vulnerability. However, the Model US BIT goes on to specify that an 'investment agreement' is a written agreement that grants rights:

> **(a)** with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
>
> **(b)** to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
>
> **(c)** to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

The types of investments listed above are made on long-term bases, often in close cooperation with state officials as well as state enterprises, and occasionally require an important outlay of capital over a number of years before making any return. Their vulnerability explains why these investors, as opposed to mere portfolio invest ors, merit special protection.

In contrast to investment agreements, the primary concern of WTO rules is not to accord investor protection, but to reduce barriers to trade in goods and services. WTO agreements do not define investment. They are concerned only with investment measures that affect trade in goods and services.

III. WTO Rules Pertaining to Investment

A. GATT 1947

Arguably, the GATT 1947 was not meant to cover investment measures whatsoever. After all, this treaty, which started as the commercial policy chapter of the Havana Charter,[5] was solely concerned from its inception with goods. In contrast, the all-encompassing draft Havana Charter did contend, albeit in a very limited way, with investment. It contained best efforts provisions calling upon Members ‘to (p. 623) provide reasonable opportunities for investments acceptable to them …’ and ‘to give due regard to the desirability of avoiding discrimination as between foreign investments’.[6] It would also have given the International Trade Organization (ITO) the option to ‘promote the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment’.[7]

The investment provisions of the draft Havana Charter died on paper, and the GATT 1947 was left as the sole surviving trade agreement.[8] The natural assumption may have been that the draft rules relating to investment perished along with the draft Havana Charter. Otherwise, why would the GATT Council have adopted a resolution in 1955 urging Contracting Parties to enter into negotiations directed to the conclusion of bilateral and multilateral treaties on investment?[9] Yet, twenty-five years later, within a completely altered climate, a GATT Panel brought a small degree of investor protection back to life when it decided *Canada — Foreign Investment Review Act (FIRA)*.

By the 1980s, the general mood towards foreign direct investment had begun to change. The traditional divide between capital exporting and capital importing countries was diminishing as the wave of expropriations that took place between 1945 and 1970 had come to an end.[10] For the most part, these expropriations were addressed through state-to-state and state-to-investor negotiations, culminating in compensation for the takings. A semblance of consensus between developing and developed countries was also evident in the UN General Assembly. The 1962 Resolution on Permanent Sovereignty over Natural Resources declared that ‘[f]oreign investment agreements freely entered into by or between sovereign States shall be observed in good faith’.[11] Within this changing climate, the US brought a complaint against Canada’s Foreign Investment Review Act, arguing that it did not comply with the GATT 1947 on account of its local content, local manufacturing, and minimum export requirements.

The US asked the Panel to consider the GATT-consistency of Canada’s administration of an act that encouraged foreign investment on the grounds that it would be of significant benefit to Canada. Benefits included increases in employment and exports, transfers of technology, and promotion of national industrial and economic policies. The Act did not require investors to purchase or manufacture locally made products, nor did it require them to promise to export a certain percentage of their goods. However, in administering the Act, Canadian authorities treated more favourably applications containing these types of undertakings. Once the application was (p. 624) approved, the undertakings became legally enforceable. The GATT Panel ultimately concluded that the local content requirements were inconsistent with the national treatment obligation of Article III:4 GATT 1947. The export performance requirements, by contrast, were not inconsistent with GATT 1947 obligations. Despite the fact that the GATT 1947 makes no mention of investment, the *FIRA* decision confirmed that GATT 1947 obligations are applicable to government-imposed performance requirements in an investment context in so far as such requirements involve trade-distorting measures. At the same time, the Panel concluded that there is ‘no provision in [GATT 1947] which forbids requirements to sell goods in foreign markets in preference to domestic markets’, underscoring the limited scope of GATT 1947 obligations with respect to export requirements.[12]

B. TRIMS Agreement

In 1986, the Punta del Este Ministerial Declaration called for negotiations on investment to elaborate further provisions that may be necessary to avoid trade-restrictive and trade-distorting effects. In the end, the TRIMS Agreement proved to be less of an elaboration than a ratification of the status quo of very limited multilateral rules in manufacturing.[13] Despite the eagerness of the US and others to negotiate further coverage of investment, the TRIMS Agreement is a mere restatement of Articles III and XI GATT 1947 in a manner specific to trade-related investment measures.

Like all of the negotiating committees, the goal of the investment negotiations was to generate ‘an agreement to which all nations would unanimously subscribe’.[14] However, unanimity proved difficult to achieve, resulting in the non-adoption of many of the measures originally proposed. The negotiations pitted developed countries, including the US, Canada, the EC, Japan, and Sweden against developing countries such as Argentina, Brazil, Colombia, Cuba, India, and Yugoslavia, who viewed restrictions on the use of trade-related investment measures as contrary to their development interests.[15] So, instead of elaborating on GATT 1947 provisions, the TRIMS Agreement merely confirms that Articles III:4 and XI apply to traderelated investment measures. This validated the long-standing interpretation of (p. 625) the GATT held by some countries, including the USA, that trade-related investment measures that involved quantitative import measures were covered by GATT rules on trade and that additional rules on trade-related investment measures pertaining specifically to discriminatory quantitative import restrictions were not needed.[16]

Some argue that 'the fact that there is a separate text called an 'agreement' is a paradox … [since] in essence, all the TRIMs agreement does is clarify the application of GATT articles'.[17] As the first WTO Panel confronted with a complaint under the TRIMS Agreement stated:

> the TRIMs Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned. Thus the TRIMs Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.[18]

While it is true that the negotiated outcome amounts to little more than a codification of the results of the *FIRA* decision,[19] at least the negotiations had the consequence of endorsing the *FIRA* decision. The Contracting Parties could have undone the *FIRA* decision and the Uruguay Round negotiations provided a timely opportunity to do so. Unlike the results achieved, this would have constituted a step backwards on investment protection within the WTO. The TRIMS Agreement is evidence that States' comfort level with the decision, if not immediately apparent at the time, had grown.

Had the *FIRA* decision not confirmed that GATT 1947 provisions apply in an investment context, it remains unclear whether the Contracting Parties would have been able to reach agreement on anything. The dispute settlement process appears to have been instrumental in the development of investment protection in the WTO, a trend also noticeable in the context of investor-state dispute settlement, as discussed below.

The TRIMS Agreement provides an illustrative list of prohibited investment measures. The list includes local content, sourcing, and some trade-balancing requirements, as well as import and export restrictions. In *Indonesia — Autos*, the Panel decided that the TRIMS Agreement covers local content requirements even if they were not targeted at foreign investors, but were of general application to enterprises.[20] However, the list does not include measures that have an indirect effect on trade such as technology transfer requirements.

(p. 626) Although a WTO Panel has noted that the TRIMS Agreement is a 'fully fledged agreement in the WTO system' with 'an autonomous legal existence' from the GATT 1994,[21] WTO panels have largely avoided directly contending with TRIMS claims. In *India — Autos*, the Panel determined that the measure violated Article III GATT 1994, and then declined to consider the TRIMS allegations on the basis of judicial economy. In *Canada — Autos*, the Panel found that the measure did not violate Article III and therefore could not violate the TRIMS Agreement. It is difficult to reconcile this approach with the approach advocated on a number of occasions by the Appellate Body, which calls for the more specific agreement to be applied before turning to the more general agreement.[22] However, it is also difficult to disagree with the conclusion drawn by the Panel in *Canada—Autos* when it said that 'we doubt that examining the claims first under the TRIMs Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4'.[23]

To date, few WTO panels have considered the TRIMS Agreement, and fewer have applied it. It is still noteworthy, however, that two of the three cases pertain to automobiles, an industry that has become truly global while at the same time relying on benefits provided by the State. The automobile manufacturers on whose behalf the cases were brought are major national enterprises, demonstrating that the TRIMS Agreement is an accessible tool for big business. It is less certain whether smaller investors also stand to benefit from the limited protections provided by it. Besides, as long as the TRIMS Agreement operates in the shadow of the GATT 1994, it will largely be ignored.

C. GATS

The limited success of the Uruguay Round negotiators to arrive at the TRIMS Agreement can be contrasted with the deal struck over services. The GATS has been hailed as a major ground-breaking achievement of the Uruguay Round,[24] and a significant step in establishing an international framework for trade in services, including FDI.[25] It seems that while the negotiators failed to reach agreement on all types of investment, they did agree to protections for services, including those provided through a commercial presence or through the presence of natural persons (p. 627) of a WTO Member in the territory of another Member.[26] Commercial presence is often established through FDI, and an increasingly large percentage of FDI is thought to be in services activities. An analysis of the GATS, Annexes, and corresponding schedules shows their limited effect on liberalizing trade in services. This has led Hoekman to conclude that '[i]t is a landmark in terms of creating a multilateral disciplines [*sic*] in virgin territory; a failure in terms of generating liberalization'.[27]

With the important exception of the MFN-principle, GATS protections largely apply only where WTO Members have made specific commitments in their schedules. Market access and national treatment guarantees are conditional upon the commitments found in a Member's schedule. Commitments may apply generally across all modes of delivery, or they may be limited according to specific modes and sectors. Therefore, a Member may be open to the cross-border supply of services in a certain sector, such as telecommunications services, but not to its supply through a commercial presence. In theory, the GATS applies to all measures affecting trade in services.[28] In fact, its application is largely dictated by each Member's schedule.

The opt-out character of the GATS makes it difficult to discern the degree of services liberalization across the board. A study by Sauvé shows that virtually all commitments scheduled under the GATS represent a binding of the status quo rather than a rollback of existing restrictions to trade and investment in services.[29] Barriers to commercial presence are often not covered, because WTO Members have chosen not to include those sectors in their schedule. For those sectors where commitments have been made, restrictions on market access or national treatment for commercial presence are frequently listed as 'unbound' or exempt.[30] A study by Hardin and Holmes shows that Members have rarely made commitments for postal, educational, health, and distribution services. Where commitments have been made, such as for travel and tourism services, many restrictions exist: 'common restrictions on market access include limits on foreign ownership and authorizations based on whether certain economic, social and cultural criteria are met, particularly for sensitive sectors such as broadcasting'.[31] Moreover, a number of WTO Members list horizontal restrictions for the commercial presence mode of delivery, with investment proposals across all sectors to be notified and screened in accordance with their foreign investment legislation.

(p. 628) WTO Members took the bulk of commitments with respect to commercial presence, however, rarely going beyond the regulatory status quo. The sensitivities surrounding the presence of natural persons translated into even fewer commitments being taken with respect to that mode. Where commitments exist, they likewise represent nothing more than the status quo. Restrictions on the temporary movement of persons can have an effect on FDI when, for example, an investor would like to hire experienced employees from its foreign offices. In the end, the structure of the GATS permits Members to continue to maintain significant barriers to trade in services, including with respect to foreign investment.

While the negotiators succeeded in reaching an agreement on services, they achieved only a minimal degree of liberalization, including in relation to FDI. The GATS was a promising first step to address highly sensitive areas of trade, but if not followed up by further liberalization, Members will not step far. Barriers to investment continue to be permitted where WTO Members have not scheduled commitments and where there is no violation of the MFN-principle. So, while the GATS could potentially have a significant effect on barriers to investment, in practice its impact continues to be limited.

IV. OECD

The failure to negotiate a comprehensive WTO agreement on investment has been mirrored by the failed efforts of the Organisation for Economic Co-operation and Development (OECD) to negotiate a multilateral agreement on investment (MAI). In 1995, negotiations were launched to arrive at a treaty made by the group of twentyfive OECD Members, but that would eventually be open to all States. By May 1997, negotiators had largely smoothed over any differences on the basic architecture, but cracks were surfacing on the draft agreement's would-be relationship with labour, environmental, and cultural policies.[32] Ultimately, the OECD's initiative died in 1998.

The failed OECD initiative has arguably had a negative effect on ongoing efforts at consensus-building in the WTO. Activists touting the interests of developing countries looked at the push by the OECD, often dubbed the 'club of rich nations', with a great deal of scepticism. They likely questioned why the OECD was so keen to negotiate an MAI, and why developing countries were not invited to participate in the negotiations. Any lack of transparency surrounding the negotiations and the (p. 629) anti-MAI clamour only added to the scepticism. The OECD's failed attempt at a multilateral framework marks an important step backwards for the creation of a global set of investment rules at a time when the historic divide between developing and developed interests had largely been bridged.

V. Investment Agreements

While global efforts towards a multilateral agreement on investment have failed to bear fruit, BITs have flourished.[33] At the same time, the provisions of the ECT and NAFTA Chapter 11 are being tested by a growing body of investor-state disputes and the workload at the International Centre for the Settlement of Investment Disputes (ICSID) has mushroomed.

NAFTA Chapter 11 and the standard BITs have much in common. They define 'investment' broadly and require State parties to accord to investors and investments protection against discrimination, whether on the basis of national treatment or MFN-treatment. They also typically oblige State parties to accord a minimum standard of treatment. They provide protection against the expropriation of an investment unless it was done for a public purpose and upon payment of full compensation.

The ECT provides similar guarantees, but is limited to investments in the energy sector. Its limitations by sector are contrasted by its broad regional coverage as it applies throughout most of Europe, east and west. However, Australia, Canada, the US, and Russia have not ratified the treaty.

The key substantive difference between investment treaties and WTO rules is in the breadth of their coverage. WTO rules ask as an initial matter whether a measure constitutes a trade-related investment measure or a measure affecting trade in services. Only if captured by any of these bodies of rules will a measure that affects an investment fall afoul of WTO obligations. For example, WTO rules prohibit discrimination on the basis of nationality, but only if such discrimination affects the investor's trade in goods or services. Given the limitations of the TRIMS Agreement and the GATS shown above, many measures affecting investment will escape the application of WTO rules, such as an export requirement or a tax on all foreign services providers where a WTO Member has opted out of GATS coverage of that particular service.

(p. 630) In contrast, investment treaties apply to all measures affecting investment, unless a reservation or exception applies. For example, NAFTA Chapter 11 prohibits less favourable treatment on the basis of the nationality of the investor without limitation as to whether it affects the investor's trade in goods or services. An analysis of the basic provisions will show that investment agreements provide a wider net to catch more types of measures than WTO agreements. In comparison with the WTO's service-specific coverage or coverage limited to the exchange of goods, the coverage provided by investment agreements may appear too extensive. However, it is important to keep in mind the basic rationale for investor protection, namely that foreign investors deserve special protection on account of their vulnerability.

A. Non-Discrimination

Investment agreements, like WTO agreements, typically contain two types of nondiscrimination provisions: MFN and national treatment clauses. Occasionally, these two principles are lumped together in a single provision called non-discrimination or international standard of treatment. They have a long history in public international law. While they are rooted in the concepts of state sovereignty and reciprocity, they do not form part of customary international law.[34] Rather, these guarantees are offered by way of treaty.

The precise treaty language varies from provision to provision, but treaties typically require States to provide treatment no less favourable than the treatment accorded to national investors or investors from a third party. Articles 1102(1) and 1103(1) NAFTA provide:

> **1102(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.
>
> **1103(1)** Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

The MFN comparator is the treatment accorded to investors from a third State, whereas the national treatment comparator is the treatment accorded to similarly situated domestic investors.

It is crucial to pay close attention to the text of the provision, as they vary from treaty to treaty. In the case of NAFTA, part of the assessment of whether the treatment (p. 631) constitutes discriminatory treatment depends on whether it is accorded 'in like circumstances'. In other words, the comparator is the treatment rather than the investors or investments. This important distinction is often missed by tribunals, which are anxious to draw on findings made by other tribunals applying different treaty language.[35]

The term 'in like circumstances' in Articles 1102 (national treatment) and 1103 (MFN) NAFTA has led to much debate and a certain degree of confusion, as demonstrated by the string of NAFTA decisions to date.[36] Some interpreters have mistakenly applied a 'like products' analysis found in the GATT 1994, overly constraining the great degree of flexibility embedded in the phrase 'in like circumstances'.[37] Even decisions that do not adopt a GATT-like test improperly oversimplify the test by focusing solely or excessively on the investor's business as the comparator.[38] These decisions demonstrate a tendency to view investment matters through a trade-in-goods lens, when in fact the investment relationship is more complex and requires greater flexibility in assessing discrimination. The test for 'in like circumstances' provides the requisite amount of flexibility.

The history of the national treatment and MFN obligations dates back to well before the GATT 1947 and before the first BIT in 1959. The principle likely finds its origin in Friendship, Commerce, and Navigation Treaties used by the US in the nineteenth and twentieth centuries. These treaties employ the terms 'in like manner', 'in like cases', 'in like situations', and 'in like circumstances' with regard to various rights and obligations, relating not solely to the field of commerce. A review of a few of the treaties spanning from the mid-nineteenth to the midtwentieth century demonstrates how the national treatment and MFN principles evolved over time.

The first thing to note is that although MFN and national treatment clauses have never been restricted to trade,[39] they have 'historically served to provide the (p. 632) legal framework for the expansion of world trade by reducing discrimination'.[40] The agreements generally seek to grant equal conditions of access to each State's competitors.

Second, while the earlier treaties, such as those with Bolivia, Peru, and Spain were concerned with 'vessels in like circumstances', the later treaties extended the application of national treatment and the MFN-principle to 'nationals, companies, products, vessels and other objects, as the case may be'. The US treaties with Nicaragua (1956) and Japan (1953) defined national treatment and MFN-treatment identically, as follows:

> 1. The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.
>
> 2. The term 'most-favoured-nation treatment' means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels, or other objects, as the case may be, of any third country.

The similarities between the above provisions and Articles 1102 and 1103 NAFTA are striking. Both sets of provisions assess discrimination according to whether the treatment is 'no less favourable'. Moreover, both sets of provisions focus on treatment accorded 'in like situations' or 'in like circumstances' rather than on similarly situated actors or objects.

The provisions are not concerned with the existence of like products or like invest ors, but with the treatment accorded, in like situations, to people, companies, or products. The emphasis is therefore on the activity of the State rather than on the product, the investor, the company, or the service provided. NAFTA negotiators adopted this formulation. It is equally found in the US model BIT, and it was also suggested by the OECD's 1976 Declaration on International and Multinational Enterprises.

The 'in like circumstances' and 'in like situations' formulations allow for a great deal of flexibility. They permit the comparison of treatment applied to two companies belonging to the same industry, but also of two companies operating in completely different sectors. Such a comparison may be appropriate where two companies, one that produces paper and the other steel, each use the same river water to cool their machinery, but the State obliges the foreign company to take more stringent environmental protection measures constituting a breach of national treatment. In short, the comparison permits the consideration of all of the relevant circumstances in which the treatment was accorded, including the policy rationale for the treatment. (p. 633) The NAFTA cases show that the State's national treatment defence typically relies on the policy rationales for treating the foreign and domestic investors differently.

The analysis of whether two investors are accorded treatment in like circumstances must be completed on a case-by-case basis, taking various factors into account, including but not limited to the business sector. The analysis also includes a consideration of the actual circumstances that led to the treatment in question. It is therefore impossible to ignore the policy objectives of the government in enacting the measures at the origin of the treatment. Indeed, the US position during the OECD's MAI negotiations was that the phrase 'in like circumstances' includes built-in policy exceptions. The US delegation provided the following commentary, which was included in an explanatory footnote to the draft text:

> National treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and on investment and treatment of domestic or third country investors and investments. The goal of both standards is to prevent discrimination in fact or in law compared with domestic investors or investments or those of a third country. At the same time, however, governments may have legitimate policy reasons to accord differential treatment to different types of investments. 'In like circumstances' ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investment, in deciding to which domestic or third country investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not germane to such a comparison.[41]

Not all investment treaties contain MFN and national treatment provisions calling for a comparison that is as flexible as a comparison based on treatment accorded in like circumstances. Some limit the comparison to the 'same' or 'identical' circum stances.[42] Others specify that the treatment to be accorded is that which the State provides to 'any other similar investments'[43] or 'to its own like investors and investments', as in the case of the 1998 Framework Agreement on the ASEAN Investment Area.[44] By focusing on the nature and characteristics of the investor or investment rather than on the treatment, the latter provisions do not obviously (p. 634) call for a State's public policy considerations to be taken into account.[45] Instead of making public policy part of the likeness test, the ASEAN Framework Agreement provides for a series of public policy exceptions similar to those found in Article XX GATT 1994.

Drawing from a defined set of exceptions would presumably limit a State's ability to accord different treatment based on legitimate grounds of public policy, particularly if the exceptions are modelled on the list found in Article XX GATT 1994. Many legitimate public policies are, however, difficult to shoe-horn into Article XX GATT 1994 or Article XIV GATS. Moreover, WTO case law demonstrates that the exceptions have infrequently been invoked successfully.[46] At the same time, NAFTA case law shows that it is permissible for the State to provide different treatment on grounds of public policy or public interest. Legitimate policy objectives have been thought to include environmental protection,[47] compliance with other international agreements,[48] public safety,[49] and efforts to better control tax revenues, discourage cigarette smuggling, protect intellectual property rights, and prohibit grey market sales.[50] It has also included the distinction between courier and postal traffic on the grounds that postal administrations and expert consignment operators have different objects, mandates, and transport and deliver goods in different ways and under different circumstances.[51]

A successful non-discrimination provision is one that prevents an investor from being treated less favourably on the basis of its nationality, while allowing the State to differentiate in its treatment provided it is based on public policy. The 'in like circumstances' formulation permits this flexibility, provided it is not incorrectly limited to an analysis of 'like investors'.

B. Minimum Standard of Treatment

The minimum standard of treatment also dates back to the beginning of the twentieth century. It is found in Freedom, Commerce, and Navigation treaties, but unlike non-discrimination clauses, it is equally a principle of customary international law.[52] Article 1105 NAFTA and many BITs contain similar wording requiring each Party (p. 635) to accord treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

The basic idea of the minimum standard of treatment is straightforward. It recognizes that an investor must subject himself to the laws of the host State. In return, the State promises to defend his person and secure justice for him.[53] However, determining the content of the standard has been more controversial. Some investment tribunals have used it as a catch-all for any concept linked to fairness, such as transparency or the legitimate expectations of the investor.[54] The better approach has been to recognize that the standard is informed by customary international law. NAFTA Parties have made it abundantly clear by issuing a binding interpretation stating that Article 1105(1) prescribes the customary international minimum standard, and that the concepts of fair and equitable treatment and full protection and security do not require treatment beyond what is required by customary international law.[55] Canada and the US have also added recent clarifications to their respective model BITs that full protection and security and fair and equitable treatment do not require treatment beyond what is required by the customary international law minimum standard.

Since the minimum standard takes its meaning from customary international law, a tribunal simply cannot apply its own idiosyncratic standard.[56] The terms 'fair and equitable' and 'full protection and security' cannot be interpreted in the abstract, but 'must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law'.[57]

While it is not unusual to call on judges or arbitrators to apply an abstract concept such as fairness, one must wonder how much guidance a prospective investor can take from such an abstract provision. Legal experts regularly disagree on whether a rule of custom exists. Moreover, it is the factual record 'as a whole—not dramatic incidents in isolation—which determines whether a breach of international law has occurred'.[58] The abstract character of the principle makes it difficult to determine in advance the type of conduct that an investor can expect to avoid.

Perhaps a lack of foresight is not unreasonable in the context of investor-state protection, since an investor will resort to such a provision when its relationship with the State has completely broken down. This type of safety net undoubtedly has its (p. 636) purpose. However, it does not contribute much to legal certainty and predictability in the investor-state relationship if it is not clear what standard of justice an investor can expect.

The model US BIT tries to provide greater predictability by defining 'full protection and security' as 'the level of police protection required under customary international law'. The model BIT also provides examples of fair and equitable treatment, such as the obligation not to deny justice in administrative or adjudicatory proceedings in accordance with the principle of due process. In turn, a denial of justice has been defined as a '[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety'.[59]

The definitions provided in the US model BIT confirm that the concept of minimum standard is intended to apply when the investor-state relationship is beyond repair. As such, it is a principle that is suited to investment agreements, which call for monetary damages as means of retribution. However it would be ill suited to a WTO system that permits only prospective remedies. A damages award is not forward-looking in the same way that WTO panels have called upon Members to 'withdraw' their measure or 'bring it into conformity' with WTO rules. Rather than requiring a State to bring its measure into conformity from that day forward, the purpose of a damages award is to wipe out all of the consequences of the illegal act and re-establish the situation that would, in all probability, have existed had the wrongful act not been committed. It is hard to see how such a rule could find a place within the existing WTO system whose enforcement structure is future-oriented and predicated on the ongoing relationship of the trader and the State.[60]

C. Expropriation

The prohibition against expropriation without adequate compensation exists in customary international law as well as in the majority of investment agreements. While a State's sovereignty permits the taking of private property, international law provides that it must be for a public purpose, on a non-discriminatory basis and accompanied by compensation.[61] In investment agreements, the prohibition tends to cover all forms of takings, whether direct or indirect.

Direct expropriation involves the taking of an investment by the host State through the seizure of the property or interest, or through its compulsory transfer, (p. 637) for example, to a state-owned enterprise or domestic investor. A State, so politically or economically motivated, can expropriate all foreign-owned property or an entire industry or sector, which is known as nationalization. Or the taking can be directed at a single investor.

While it is easy to determine whether a direct expropriation has occurred, it is not always easy to agree on the proper amount of compensation. Developing and developed States have a long history of debating the proper standard to accord compensation. While developed countries advocated for prompt, adequate, and effective compensation,[62] developing countries pushed for the lesser standard of 'just' or 'appropriate' compensation. NAFTA Chapter 11 has bridged the divide that previously existed between the US and Mexico. Compensation must be based on the fair market value of the investment, must be paid without delay, and must be fully realizable. The standard therefore looks considerably like the standard of prompt, adequate, and effective compensation.

The vast majority of modern expropriations are indirect expropriations.[63] These are government measures that result in 'the effective loss of management, use or control, or a significant depreciation of the value, of the assets of the foreign investor',[64] even if no physical taking has occurred. The case law has produced a number of factors that help determine whether an indirect expropriation has occurred. Above all is the consideration of whether the investor has been deprived of all or substantially all of its investment. Other factors that have been applied by tribunals include the intent of the State, the purpose of the measure, and the context in which the government acted. Some have also included the legitimate expectations of the investor.[65]

An indirect expropriation often consists of a series of government acts that has the effect of rendering the investor's property rights useless. One of the difficulties is to identify at which point the expropriation actually occurred. This is a matter to be determined on a case-by-case basis considering all of the relevant facts. What is clear, however, is that not every disappointment in dealing with foreign governments will be considered an expropriation: 'it is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints'.[66] The purpose of investment agreements is neither to eliminate the normal commercial risk undertaken by a commercial investor[67] nor to prevent governments from regulating in the public interest.

(p. 638) As is the case with a breach of the minimum standard of treatment, often the only realistic form of remedy once an expropriation has occurred is compensation, or perhaps the restitution of property. Again, it is hard to imagine how such a rule could find a place within the existing WTO system, as long as its enforcement structure is future-oriented, predicated on the ongoing relationship of the trader and the State, and does not allow for direct compensation to investors by way of damages.

D. Dispute Settlement

Investment agreements do not require investors harmed by a measure to appeal to their home State to bring a case on their behalf, as entrepreneurs affected by trade measures must do in the case of the WTO. Instead, they allow investors to bring disputes on their own behalf.[68] NAFTA Chapter 11, like the US model BIT, provides for both investor-state arbitration as well as state-to-state arbitration to resolve investment disputes.[69]

NAFTA provides different options for dispute settlement depending on the substantive obligation at issue. While investment disputes may be settled through either state-to-state or investor-state arbitration, disputes relating to trade in goods and services can only be resolved through state-to-state arbitration. As a result, a corporation with a claim relating to its cross-border service must appeal to its State to take a claim on its behalf, while an investor has direct recourse to arbitration. Presumably the reason for direct access to dispute settlement goes back to the vulnerability of the investor versus the limited risks undertaken by the cross-border supplier. As the *Loewen* Tribunal noted, the purpose of Chapter 11:

> is to establish 'a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an arbitral tribunal'. The text, context and purpose of Chapter Eleven combine to support […] an interpretation which provides protection and security for the foreign investor and its investment.[70]

Resort to investor-state arbitration has been more common than the use of state-to-state arbitration under NAFTA. To date, over ten times as many investor- state disputes have been brought as compared to state-to-state arbitrations dealing with goods or services. The growing number of investment disputes in comparison to the three goods and services disputes serves as evidence that the traditional requirement to espouse one's claim limits access to dispute settlement. (p. 639) It is no easy task for a person or business to convince its State to bring a claim on its behalf.

The availability of monetary damages under investment agreements coupled with the ability of investors to bring cases on their own behalf has led to an explosion of cases. Successful claimants typically have no leverage to ask that the offending measure be amended or dropped, but may be awarded compensation or restitution of property.

The corollary of having experienced an explosion of cases is a greater risk of frivolous or unnecessary cases. Some cases appear to push the bounds of investment rules or are meant primarily to exert pressure on the State to change its pattern of action. Such cases are costly for the State, and therefore the taxpayer. A new ICSID procedure offers a degree of protection by allowing States to 'file an objection that a claim is manifestly without legal merit' within 30 days.[71] They arguably create negative publicity for a system of protections that has been unfairly described by critics as creating a radical expansion of corporate rights over the rights of ordinary citizens while being expensive and chilling policy making.[72] However, the attention these cases have garnered has arguably also created a better awareness of the existence of the rules and how they are meant to apply.

While frivolous claims may be the necessary cost in the operation of any dispute settlement system, it is also important to highlight the checks and balances guarding against them. An arbitration typically costs upwards of $3 million. The claimant and respondent are often asked by the tribunal to each pay a certain amount up front to set up the arbitration. These costs vary and they are usually split equally between the claimant and respondent from the outset, with each party reserving its right to request re-imbursement of costs at the end of the proceedings. The likelihood that the investor will recuperate these costs is very low, given that many tribunals ultimately decide that the costs of the arbitration should be shared equally. A number of recent cases have recognized the unfairness of having a State cover its costs, particularly where the investor has brought a frivolous claim. They have awarded costs in favour of the State, obliging the investor to pay for the entire cost of the arbitration, a greater proportion of the costs, and even part of the State's legal fees.[73]

(p. 640) The growing body of investment law cases has contributed to a greater understanding of investment protection. Undoubtedly, there have been growing pains, such as the strained interpretation that a few tribunals gave to the minimum standard of treatment provision in NAFTA. The early cases showed a certain lack of comprehension of the provisions and a corresponding queasiness by the States parties.[74] These wrinkles continue to work themselves out. If there is a growing uneasiness about the blossoming investment case law it arises out of the ad hoc character of the tribunals and the risk that their decisions may diverge or may provide for double relief. The lightning rod for this debate has been the separate decisions in *CME v Czech Republic and Lauder v Czech Republic*.[75]

Both cases against the Czech Republic arose out of essentially the same facts relating to an investment in a Czech television station by Ronald Lauder, an American investor, who owned a Dutch company called CME, which in turn owned a Czech television station through a Czech subsidiary company. When relations soured, Lauder and CME each filed separate investment claims pursuant to the US-Czech and Netherlands-Czech BITs. The decisions of the two Tribunals could hardly have differed more, despite being based on essentially the same set of facts and on similar treaty provisions.[76] The *Lauder* Tribunal declined to find that an expropriation had taken place, but the *CME* Tribunal held that an expropriation had occurred. While the *Lauder* Tribunal awarded no damages whatsoever, the *CME* Tribunal calculated damages at $270 million. Even if the *CME* Tribunal correctly rejected the notion of *res judicata*, and correctly decided that it had no jurisdiction to consider whether *Lauder* and *CME* were essentially a 'single economic entity',[77] the two decisions demonstrate the real threat of two tribunals awarding duplicative relief.

The risks associated with ad hoc arbitration have led some to call for the creation of an appellate structure to contend with discrepancies in decisions and duplication of awards.[78] With tribunals owing their jurisdiction to differently worded bilateral treaties, it is not at all clear how such an appellate structure would work. Undoubtedly, it would be more complicated to design than the WTO Appellate Body.

(p. 641) VI. What Does the Future Hold for Investment Protection?

The number of BITs and free trade agreements (FTAs) with investment chapters continues to grow. At the same time, multilateral investment negotiations in the WTO are stalled. The WTO's half-hearted embrace of investor protection rules signals a major gap in its attempt to be a global institution dealing with all forms of trade between all nations. A number of options exist that would allow for greater coverage.[79] Nevertheless, until WTO rules substantively embrace the full coverage of all measures affecting investment, the WTO will not contain one-stop shopping for global rules required by global companies operating in global markets.[80]

As Winham points out, globalization has caused people to think differently about international trade now that trade has become integrated into a broader set of relationships that includes foreign investment, corporate alliances, and other forms of collaboration.[81] Yet, the results of the Uruguay Round did little to address rules relating to investment. By building on the GATT 1947, WTO Members kept the focus on goods and added to it a services agreement that allows carve-outs by sector. This showed Members' unwillingness to adopt a totally new thinking, something that is required if they want the WTO to remain as the source for multilateral rules for international business relations.

A WTO agreement on investment seems unlikely, at least for the foreseeable future. Still, the global economic system would benefit from a universal framework of rules on investment protection and the WTO would benefit as the keeper of these rules. The WTO Working Group on Trade and Investment continues to show signs of being plagued by the traditional divide between capital exporting and capital importing Members as negotiators struggle over the meaning of investment. Developing countries have insisted on a narrow definition of investment based on lasting economic relations and the possibility of exercising some effective control over the foreign investment.[82]

(p. 642) Even if WTO Members are able to overcome the developing-developed country divide on investment rules, they will be confronted with the same problem that faced the Uruguay Round negotiators, namely that investment measures are to some extent acknowledged and covered by the GATT 1994. To complicate matters further, now they are also partly covered by the GATS.

WTO rules already intertwine. The provisions of the GATS, the GATT 1994, and the TRIMS Agreement can apply to the same measure.[83] Such overlap, while unavoidable, is confusing. It has the positive effect of ensuring that trade-distorting measures are captured. In principle, even if a WTO Agreement on investment were adopted, the GATS should continue to apply to investment. After all, foreign direct investment in services accounts for a large share of the total stock of inward investment in most host States.[84] However, maintaining the existing WTO structure based on trade in goods and trade in services, while adopting a new WTO agreement modelled on NAFTA Chapter 11 would add to the confusion. It would also risk entirely undercutting the utility of the existing WTO agreements, particularly if the new agreement permitted investor-state dispute resolution.

The NAFTA experience is telling. Disputes primarily related to the provision of cross-border services, such as *Myers v Canada*, or the provision of goods, like *Pope & Talbot v Canada*, were brought as investment disputes. The creation of a procedural right for investors to bring claims on their own behalf would drastically change WTO dispute settlement, even if an attempt were made to limit it to investment disputes, however these might be defined.

Even if WTO Members were able to bridge the existing normative gap between WTO rules and investment agreements, the WTO would not likely emerge as the primary forum to secure compliance, since the DSU does not permit investor-state claims or monetary compensation. Investor-state arbitration places the trigger for dispute resolution in the hands of the victim of the illegal treatment. Investment agreements turn to the beneficiaries of investment protections to undertake an important enforcement function.

Although WTO rules apply to investment measures, the degree to which they apply is limited. They currently do little to mitigate risk once an investment has taken place, since WTO-inconsistent measures do not give rise to damages. Adding damages to the list of available reparations would drastically change the WTO system. While the availability of damages in NAFTA's state-to-state dispute resolution has had little or no effect,[85] it is the overriding reason why investors bring disputes on their own behalves.

Without change to the type of reparations, it remains unclear how WTO dispute settlement could be used to remedy illegal expropriations or breaches of the (p. 643) minimum standard of treatment. These are obligations that, if breached, often require a payment of damages to compensate the lost investment. Occasionally the restitution of the investor's property is possible. Neither of these possibilities exists in the DSU.

The introduction of investor-state dispute settlement and the ability of panels to award damages would drastically alter the WTO system. However, WTO Members might wish to consider taking steps in this direction. They could phase in investorstate dispute settlement over a number of years after having adopted new rules on investment. This would allow Members to build up a body of case law through state-to-state dispute settlement prior to opening the door to claims brought directly by investors. Alternatively, they could provide additional checks and balances, such as the ability to provide binding interpretations, an unused power under Article IX:2 WTO Agreement.

Whatever steps are taken, Members must pay careful consideration to the relationship of investment rules and rules on goods and services, particularly if they opt for investor-state dispute settlement.

Totally new thinking on investment protection in the WTO does not mean that the State will abandon its ability to make decisions in the public interest. New rules must give wide ambit to the State to implement and exercise policy. In the current WTO context, non-trade interests are carved out through specific exceptions that have been narrowly interpreted and carefully applied. In contrast, NAFTA cases dealing with national treatment show a broader consideration of measures taken for public policy reasons.

The traditional home-state/host-state divide that has also plagued WTO negotiations and committee discussions is best avoided. One avoidance tactic may be to focus on the sectors where foreign investors continue to have the greatest vulnerability. A second avoidance tactic may be to focus on the responsibility of the State to act in the public interest rather than on what its responsibilities are towards foreign investors. Along with the growing body of case law, such a discussion would contribute to the understanding that States may legitimately distinguish in their treatment of two investors without acting in a discriminatory manner or breaching the investor's right to fair and equitable treatment.

VII. Conclusion

Investor protection in the WTO differs dramatically from the protections provided by investment agreements, such as NAFTA Chapter 11, the ECT, and the thousands of existing BITs. WTO rules catch some measures that affect investment, but only on account of their effect on trade in goods or services. In contrast, the coverage of (p. 644) investment agreements is not limited to investment-related measures affecting trade in goods or services, but cover all government measures affecting investment.

The WTO agreements and investment agreements share some common substantive provisions, including the national treatment and MFN provisions. However, their wording differs, and consequently so does their application. For example, investment agreements often allow the State to treat two investors differently on account of public policy objectives, whereas the WTO agreements require the State to justify the different treatment through a closed list of exceptions.

Other provisions found in investment agreements do not find a home in the WTO, such as the guarantee of fair and equitable treatment and the prohibition on expropriation without compensation. These provisions would be very difficult for the WTO to embrace without re-assessing its remedial powers, since they are typically remedied through damage awards, which the DSU does not permit.

Perhaps the most important distinction between the WTO and investment agreements is that the latter permit non-state actors to bring disputes. A move away from state-to-state arbitration would be a dramatic shift for the WTO, which would likely substantially increase its caseload and lead to frivolous claims. However, investorstate arbitration has the advantage of allowing the victim of the illegal act to bring its own claim for damages obviating the need for it to convince its State to bring a claim on its behalf.

Ultimately, a rethinking of the WTO legal system is necessary before the WTO can fully embrace investment rules. Instead of focusing on sector-based trade, the rules WTO must come to recognize that trade has become integrated into a broader set of relationships that includes foreign investment. Otherwise, the WTO will continue to address investment in a secondary manner. Until the WTO agreements substantively embrace the full coverage of all measures affecting investment, they will not contain one-stop shopping for global rules required by global companies operating in global markets.

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76 The *CME* Tribunal, which was the later tribunal, rejected the notion of *res judicata* on the basis that the parties and treaties were different, the facts might well have been different, and even those treaty claims that seemed similar on their face might be susceptible to varying interpretations, given differences in contexts, object and purpose, and the parties' subsequent practice. Ibid at paras 432–33.

77 Ibid at para 436.

78 See, eg, DA Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' 2006 *Vanderbilt Journal of Transnational Law* 39(1) 39 Find it in your Library.

79 Eg, Edwards and Lester recommend an approach to TRIMS regulation modelled on the SCM Agreement, which prohibits certain measures and exempts others; see R Edwards Jr and S Lester, 'Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures' 1997 *Stanford Journal of International Law* (33) 169 Find it in your Library.

80 See chapter 2 of this Handbook, citing G Feketekuty, 'The New Trade Agenda', *OECD Occasional Paper* No 40 (1992), at 29.

81 See chapter 2 of this Handbook.

82 V Motosi, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the World Trade Organization: Are Poor Economies Caught in Between?' 2005 *Northwestern Journal of International Law & Business* 26(1) 95, at 116 Find it in your Library.

83 Appellate Body Report, *EC — Bananas III*, at paras 221–22.

84 See Hoekman, above fn 27, at 2.

85 Article 2018 NAFTA provides that where a resolution cannot be achieved through the removal or non-implementation of a measure, compensation may be awarded.