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Failed Boundaries: The Near-Perfect Correlation Between State-to-State WTO Claims and Private Party Investment Rights

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THE JEAN MONNET PROGRAM

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NYU School of Law • New York, NY 10011

The Jean Monnet Working Paper Series can be found at

www.JeanMonnetProgram.org

ISSN 2161-0320
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

FAILED BOUNDARIES: THE NEAR-PERFECT CORRELATION BETWEEN STATE-TO-STATE WTO CLAIMS AND PRIVATE PARTY INVESTMENT RIGHTS

By Ari Afilalo*

Abstract

This project examines all WTO filings to determine if a private party could bring an action for damages arising under the same core of operative facts pursuant to a bilateral investment treaty. This article, Part I of the project, reviews all national treatment, most favored nation, quantitative restrictions, TBT, and SPS filings. After exploring the doctrinal and theoretical reasons for the trade/investment tension, it analyzes all trade filings under a model investment treaty applied in light of decided cases. The article classifies the filings into "Positive," "Potentially Positive," and "Negative" categories for trade and investment. The findings show a near perfect correlation between trade and investment.

* Ari Afilalo, Professor of Law, Rutgers Law School. I am extraordinarily grateful to Professor Joseph Weiler for steering this project into the direction that it ultimately took, and patiently prod and challenge me to bring it to completion. His insights and comments were, as ever, utterly brilliant, incisive and wise. One cannot hope for a better mentor and inspiration. Yuval Nir has provided outstanding research contribution. Some research associates deserve an instant elevation to partnership, and he is one of them. I am extremely thankful to my trade coauthor Professor Dennis Patterson for constant intellectual sparring and friendship. I am grateful to my Dean, Rayman Solomon, for his constant support and, in particular, for granting me the academic leave that enabled me to serve as an Emile Noel Fellow. Thank you to the Pace Law Faculty Workshop participants and to my colleagues at the Jean Monnet Center for their comments and support. All errors and failures to execute are mine.

Introduction

In this article and its sequel, I review all 456 cases requests for consultation filed by governments with the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) and explore whether a private party could bring before an arbitral tribunal a complaint that arises from the same core of operative facts. My goal was to test if in fact, as I have argued before, the network of investment treaties regulating the cross-border flow of capital overlaps with trade law. Trade filings are the domain of the WTO, which acts at the request of governments of the Contracting Parties and renders rulings requesting modifications of national laws found to violate the GATT Agreement. The WTO hears a wide range of cases. It deals with plenty of controversies involving plainly protectionist measures such as import bans or domestic taxes, some blatant and some crafted neutrally so as to impact foreign products adversely. It also decides whether sensitive domestic laws that hinder trade, such as restrictions on the use of asbestos, hormones, or genetically modified materials, packaging laws regulating the advertisement and marketing of cigarettes, or measures intended to preserve foreign currency reserves in a financial crisis, pass muster under international economic law. Investment law is the domain of arbitral tribunals awarding damages to private parties when their legitimate expectations are thwarted by government measures adopted by the host state. It also handles a wide array of cases, including revoked permits, breached agreements, modifications to advance rulings laying down the treatment of foreign investors on tax, securities regulation, and other matters, the expropriation of property, denial of justice, administrative irregularities, and a plethora of disputes between investors and their host States.

The State-to-State WTO system and the investor-to-State investment framework arose from different historical circumstances and are typically categorized as different subject-matter areas of international law and governed by constitutional and institutional norms that sharply differ. Yet my analysis of the WTO filings shows that private parties may use investment treaties to litigate virtually all trade causes of action and obtain damages for any violation of trade law. In this article, I reviewed the nearly 180 filings made under the national treatment, most favored nation, and quantitative

restrictions provisions of the GATT Agreement, and under the Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS) Agreements. Those cases are grouped in this piece because they implicate similar issues of trade and investment law and they cover most controversies dealing with the three "pillars" of trade. In the sequel to this piece, I review the balance of the WTO filings, including anti-dumping, customs classification, subsidies and countervailing measures, and other, less visible provisions of trade law. (In a third and final article concluding this project, I propose a theoretical framework that distinguishes trade law from investment law and apply it again to all of the WTO cases to show how they might be decided differently and with more certainty of outcome than under the investment treaties as currently drafted.)

My findings leave little room to doubt that the investment framework overlaps with the trade framework. I classified the trade cases into two categories; Trade Positive and Trade Negative. Trade Positives are cases that have either been decided in favor of the Complainant by the DSB, or did not reach the adjudicatory stage but would, applying trade law to the facts as stated in the filings, have a reasonable likelihood of going the complainant's way taking as true the allegations of the request for consultation. Cases where the Respondent prevailed or is reasonably likely to prevail belong to the Trade Negative category. I then classified the Trade Positives and Negatives into three investment categories: Positive, Potentially Positive, and Negative, based on whether a private party would likely prevail in an investment cause of action arising out of the same facts, would have a colorable chance of prevailing, or would likely lose.[1] For example, 27 countries challenged Australia's plain packaging laws for cigarettes. Philip Morris brought an investment case challenging the same laws. I determined that the complainants have a reasonable chance of prevailing in the trade proceedings, and the potential to win the arbitration case. This case is, then, "Trade Positive/Investment Potentially Positive." In the famed Japan Shochu case, countries producing vodka and other spirits challenged a Japanese tax that favored the local liquor. The case was a clear Trade Positive, and as explained later it is highly likely that

[1] I explain my classification methodology in detail in Part III below.

an investment complainant would prevail. This makes the case a "Trade Positive/Investment Positive."

The examination of the respective trade and investment outcomes shows a stunning correlation between Trade Positives and Investment Positives or Potentially Positives. Approximately two-thirds of the Trade Positives also have Investment Positive outcomes, and one-third of the Trade Positives have Potentially Positive Investment outcomes. There are no cases where, applying investment law, a Trade Positive can be said with any reasonable certainty to be an Investment Negative. Not only that, but some losing complainants in trade could, in an action brought by their private party nationals, raise the same issue in an investment cause of action with a Potentially Positive outcome. (The case-by-case results are reported in tables appearing with each grouping of WTO cases, in Part III.)

For any observer of the international legal systems familiar with customary concerns for State sovereignty and the legitimacy of international law, this should be cause for great concern. Put simply, the overlap has the potential to generate a global mass litigation crisis and endanger the balance and stability of the trade and investment regulatory frameworks. Private parties and their attorneys could acquire a legal weapon to challenge virtually every measure that may violate free trade and obtain money damages for those breaches. They would have the right to sue the central government of most States on the international commercial map. They could challenge all manner of financial, environmental, labor, health, intellectual property, taxation, subsidy, and other measures affecting the markets. Commercial actors who lost domestic battles to free themselves of burdensome regulation would gain access to and in all likelihood take advantage of a second bite of the apple on the international scene. As the cases show most industries would be affected, from cars to media, through pharmaceutical, oil, liquor, food, advanced technology, and clean energy. Government lawyers would scramble to respond and defend, their limited resources overwhelmed. For low-merit claims, they might hand out nuisance settlement payments. More meritorious claims would proceed to complex negotiations or to the awards stage where governments

would be ordered to pay hundreds of millions of damages. Overwhelmed, governments would likely fall back to a "selective exit" reflex to disobey international law.[2]

My review of the WTO cases under investment law was meant to show that this is not a scenario from a mediocre legal science fiction novel. Rather, it is the (probably) unintended byproduct of the confluence of two phenomena: the advent in the past three decades of a thick network of thousands of international investment treaties giving private commercial interests protection against government action that may undermine investor expectations, borne out of a historical struggle to protect capital in host jurisdictions, and the rise of the rich GATT/WTO jurisprudence of international trade intended to liberalize commerce among States which, by nature, limits sovereign regulatory power. In Part I, I briefly describe this historical context and the stakes of the investment-trade debate. In Part II, I explore, using decided investment cases, a model investment treaty, and familiar principles of trade law, the reason for the trade/investment tension. In Part III, after explaining my methodology for grouping trade cases and predicting outcomes, I review the filings discussed in this article. I conclude with some observations and a preview of the next piece.

Part I. Trade and Investment

In this Part I, I outline as briefly as possible the doctrinal, institutional and constitutional features of the trade and investment systems that are relevant to their intersection. The liberal democracies that entered into the General Agreement on Tariffs and Trade (the "GATT Agreement") after World War II went to great lengths to shelter the WTO Contracting Parties' ability to regulate their internal market free of international legal constraints and established a relatively transparent system where States could monitor international interference.[3] The investment network of treaties, on

[2] Weiler, Joseph H.H. `The Transformation of Europe', 100 Yale L.J. 2403-2483 (1991), at 2412.

[3] In particular many scholars emphasized the benefits of the open and transparent sytem of the Appellate Body's interpretative methods which has given clear guidance to Members of the WTO and to panels. It has thuscontributed to "providing security and predictability to the multilateral trading system" Under standing on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS.—RESULTS OF THE URUGUAY ROUNDS, vol. 31, 33 I.L.M. 1226 (1994). See Ehlermann, C., "Experiences from the WTO Appellate Body," 38(3) Texas International Law Journal 481 (2003); See also Isabelle Van Damme, "Treaty Interpretation by the WTO Appellate Body

the other hand, arose starting in the latter part of the 20th century, fueled by the long-held insistence by the very same States which established the GATT that private parties should have the legal right to challenge national measures threatening their economic rights in the host jurisdiction. The investment law system is much less structured and transparent than the trade system, and disputes are adjudicated in arbitral settings with significantly less visibility and internal constraints than the WTO. In this Part I, I recount the well-known history of trade and investment with a view to highlighting their profound structural differences, the importance of these distinctions to the balance of the international legal system, and the magnitude of the constitutional and institutional crisis that a collapse of the trade system into the investment system would generate.

A. Trade

Trade is the domain of the World Trade Organization and regional trade organizations such as the North America Free Trade Agreement (NAFTA). Their membership includes States that decided to handle disputes without involving private parties or threatening the familiar boundaries established by international law to shelter the domestic right to regulate. Trade law does not have direct effect. With few exceptions, only governments have the legal right to enforce it, and individuals do not have standing to sue.[4] Government officials carefully select which disputes sufficiently implicate weighty national interests before bringing them to dispute resolution. In doing so, they weigh limited resources and the possibility of retaliation for their own violation before initiating legal proceedings. As "rational choice" theory teaches, States will bargain in the marketplace of violations to determine which claims should be withdrawn in

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(Oxford: Oxford University Press, 2009), page 461 available at http://www.ejil.org/pdfs/21/3/2067.pdf However, please note that on the other hand, particularly as a result of the lack of more formal participatory rights for NGOs, the WTO was sometimes accused as being "one of the least transparent international organization". See for example, UNDP, Human Development Report 2002: Deepening Democracy In A Fragmented World (2002), at 120-121

[4] The NAFTA, in addition to its Investment Chapter, give in some instances access to its dispute resolution systems. The Side Agreement on Labor, for instance, includes a procedure according to which if the parties fail to resolve the dispute between themselves, the council may convene an arbitration panel which prepare a report. If it is found that a party "persistently failed" to enforce its laws, the disputing parties will prepare an action plan, and if the parties do not agree or if the plan is not fully implemented, the panel can be reconvened. If the panel finds that the plan was not implemented, the offending party can be fined. If the fine is not paid, NAFTA trade benefits can be suspended to pay the fine.

exchange for the other side's agreement to give up a grievance of its own and which disputes should be prosecuted to their bitter end.[5] Likewise, "networks" of government officials forge bonds across borders to create a loose but effective network of law-makers and enforcers.[6]

The limited liability of the State enshrined in trade law is consistent with the origins and theoretical foundations of the GATT and the WTO. The original GATT carefully maintained a structure that sheltered State sovereignty. As Keynes famously expressed, the lawyers as "poets of Bretton Woods" married after World War II a good economic idea with a politically acceptable treaty system.[7] The three "pillars" of trade, tariffs reduction and most-favored nation, national treatment, and ban on quotas and like measures, aimed to open borders without dictating national policy. The architecture of the GATT insulated national taxation and regulation from potential infringement by international norms. It identified in Article XX of the GATT Agreement regulatory areas of concern carrying special potential to encroach on the free movement of goods (environment, resource conservation, public order etc.) and carved out exceptions for legitimate measures in those areas. Generally speaking the GATT left redistributive justice to the jurisdiction of the national political actors. Britain could follow a cradle-to-grave welfare model, Japan an indicative planning structure, and the United States a tax-and-spend (or not) set of policies in pursuit of their version of the good life. The GATT merely required them not to charge foreign products duties in

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5 Jack L. Goldsmith and Eric A. Posner, The Limits of International Law (New York: Oxford University Press, 2005).
See also discussion in Robert Z. Lawrence (2007), The United States and WTO Dispute Settlement System, in CSR No. 25, Council on Foreign Relations (2007); and in E.U. Petersmann, WhyRationalChoiceTheoryRequiresa Multilevel Constitutional Approach to Internationa lEconomic Law – The Case for Reforming the WTO's Enforcement Mechanism, University of St. Gallen Law School Law and Economics Research Paper Series Working Paper No. 2007-19 (July 2007).

6 Anne-Marie Slaughter frequently discussed the efficiencies provided by government networks, particularly regulatory network. She described governance through a complex global web of "government networks" whereby government officials (legislators, police investigators, judges, financial regulators etc.) exchange information and coordinate activity across national borders to solve problems results from the daily grind of international interactions. See for example, Slaughter, A.M. (2000), 'Government Networks: The Heart of the Liberal Democratic Order', in Fox,G. and Nolte, G., 'Intolerant Democracies', in G. Fox and B. Roth, Democratic Governance and International Law, Cambridge University Press, Cambridge (2000), 214, 217, 223-224.

7 Robert Howse,From Politics to Technocracy.and Back Again: The Fate of the Multilateral Trading Regime,96 Am J Intl L, at 95-96 (2002).

excess of their bindings, not to treat them less favorable than competitive domestic products, and not to impose quotas. In doing so, however, the GATT did not mandate any specific national legislation.

John Ruggie captured this bargain with his "embedded liberalism" shorthand.[8] The nations that emerged victors from World War II featured highly evolved administrative states and regulatory systems spanning a wide array of economic and social issues. The amorphous concept of sovereignty, in that context, captured the ability of the State to legislate at the level of its choosing free of constraints from conflicting norms of international law.[9] The GATT system's adoption of the core pillars that liberalized trade without infringing on domestic policy made it palatable for modern liberal democracies to accept the treaty.

The State-to-State system of dispute resolution added to the normative protections another prophylactic layer of sovereignty that was indispensable to the Contracting Parties. As I alluded to above, States do not readily bring legal challenges against one another. They have limited legal resources. They tend to behave reactively, in controversies that implicate national interests of sufficient political or economic magnitude. They may negotiate and resolve prudentially the mutual violations that exist at any given time. In addition to these built-in limitations inherent to a State-to-State system, until the 1994 establishment of the World Trade Organization the Panel reports were not even adopted until all Contracting Parties, including the losing Party to the dispute, gave their consent (this was called the 'positive consensus rule' of the initial GATT of 1947).[10] Even though the WTO reversed this rule,[11] losing a case does not entail

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[8] See John Gerard Ruggie, International Regimes, Transactions, and Change: embedded liberalism in the post war economic order, pp. 385-388. International Organization, Vol. 36, No. 2, International Regimes (Spring, 1982). According to Professor John Gerard Ruggie, the GATT "embedded liberalism" in that each state participant enjoys, at least in theory, the sovereign right to establish and operate a domestic system of its choice, and at the same time removed barriers to trade and create a more efficient trading system. Each nation can maintain its identity and specific domestic programs ranging from universal education to the supply of subsidized metro tickets to large families, all the while participating in a liberalized system of trade that generated more global resources to share.

[9] See for example, WT/DS135/ R, MeasuresAffectingAsbestosandAsbestosContainingProducts, Panelreport(adopted18 tember 2000) Section 3.19, page 9.

[10] See Julio Lacarte and Fernando Piérola,"Comparing the WTO and GATT Dispute Settlement Mechanisms: What was Accomplished in the Uruguay Round? "in Julio Lacarte and JaimeGranados

a cataclysmic legal event for the offending country. The GATT and later the WTO give the losing State a reasonable amount of time to change its internal laws to come into compliance. Although compensation and retaliation are technically available, the overwhelming theoretical and practical preference is for voluntary compliance. At bottom, in no circumstances will the trade framework expose a defending State to liability for damages suffered by foreign importers and other undertakings as a result of the breaching measure.[12]

(ed), Inter-Governmental Trade Dispute Settlement: Multilateral and Regional Approaches (2004) 33, 51.

[11] WTO Members changed the rule from positive consensus to negative consensus, whereby Panel Reports are adopted automatically unless there is a consensus to the contrary (this rule also applies to the adoption of Appellate Body reports, the establishment of panels, and the authorization to suspend concessions and other obligations).
See Dispute Settlement Understanding ("DSU"), Art 16.4. See also generally Dispute Settlement System Training Module: Chapter 6, The process — Stages in a typical WTO dispute settlement case, 6.4 Adoption of panel reports, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm(last visited March 11, 2013).

[12] The first objective of the contracting parties was traditionally "to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement." See Understanding regarding Notification Consultation Dispute Settlement and Surveillance, adopted GATT Doc. L/4907, adopted 28 November 1979, BISD26S/210 (the "1979 Understanding"). The GATT also recognized that it may take time to make the necessary changes to domestic law in implementing the recommendations. Therefore, "[i]f it is impracticable to comply immediately with the recommendations or rulings, the contracting party concerned shall have a reasonable period of time in which to do so.." the Decision of the contracting parties, Improvements to the GATT Dispute Settlement Rules and Procedures, Paragraph I.2, L/6489 (Apr. 12, 1989), GATT B.I.S.D. (36th Supp.) (1990)
Although the withdrawal of inconsistent measures is the prevailing remedy for a breach of the GATT, according to Article 22 of "Understanding on Rules and Procedures Governing the Settlementof Disputes", if a defending Member fails to comply with the WTO decision within the established compliance period, the aggrieved party is entitled to request temporary compensation or retaliation (i.e. to suspend concessions or obligations owed thenon-complying Member under a WTO agreement). However, it should be emphasized that according to Article 22, neither compensation nor retaliation is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.
According to Article 22, compensation is voluntary and, if granted, shall be consistent with the covered agreements. Compensation is also referenced in the ReportsRelating to the Review of the Agreement on Organization and Functional Questions, ¶ 64, L/327 (Feb. 28 &Mar. 5 & 7, 1955), GATT B.I.S.D. (3rd Supp.), and the Annex to the 1979 Understanding.
With respect to retaliation, under GATT practice, the contracting parties may only be authorized by the DSB to retaliate when a violating party does not comply with a panel recommendation within a reasonable period of time, and retaliation most often involves the suspension of GATT tariff concessions. There was only one instance where retaliation was authorized under GATT. In Netherlands Measures of Suspension, the US did not remove its import restrictions, which were found to be inconsistent to the General Agreement. In response, the Contracting Parties authorized the Netherlands to "suspend the application to the United States of their obligation under the General Agreement to the extent necessary to allow the Netherlands Government to impose an upper limit of

Of course, as anyone who watched demonstrations calling for "fair trade" must have guessed, the normative framework sheltering sovereign regulation still leaves significant areas of pressure against national law. Trade law 101 teaches that domestic concerns may burden trade, and the job of trade courts is to sort out the regulatory space in which international law should not intrude. When the United States tells Indonesia that it will not allow its cloves cigarettes onto the American market, is it favoring the menthol cigarettes industry or pursuing a health goal? Can Argentina, faced with the possibility of yet another financial crisis, require trading partners to shoulder some of the costs of shoring up local currency reserves? When the European Union bans beef with hormones or asbestos, is it pursuing a valid domestic policy or again sheltering competitive domestic product? The great questions of trade have often hinged on the judgment call of a tribunal in favor of the domestic regulatory space or, alternatively, on the side of the free movement of goods. Because they are so sensitive, these questions are left to a State-to-State system that limits exposure. The trade system is creating obstacles to challenges to sovereignty precisely because, when trade encroaches on the sovereign right to regulate, it should act within the confines of a system that has legitimacy.[13]

60,000 metric tons on imports of wheat flour from the United States during the calendar year 1953." However, the Netherlands did not retaliate against the US. After a number of years, a compromise was apparently reached as the US relaxed its quotas on Edam and Gouda cheese and the Netherlands no longer requested the extension of its authority to retaliate. See generally,AsimImdad Ali, Non-Compliance and Ultimate Remedies under the WTO Dispute Settlement System, 14 J. Pub. &Int˚lAff.5 (2003). Available at http://www.princeton.edu/jpia/past-issues-1/2003/1.pdf(last visited March 11, 2013); See also, Lee, Kil Won, "Improving Remedies in the WTO Dispute Settlement System" DISSERTATION, University of Illinois at Urbana-Champaign, 2011, Available at https://www.ideals.illinois.edu/bitstream/handle/2142/24121/Lee_KilWon.pdf?sequence=1(last visited March 11, 2013)

[13] This system resembled the classical international organizations of the time such as the United Nations or the European Union, which basic laws were premised on the inviolability of the participating states' right to be free from interference by others. See for example Ari Afilalo and Dennis Patterson, Statecraft and the Foundations of European Union Law in Julie Dickson and Pavlos Eleftheriad is (eds), Philosophical Foundations of European Union Law Chapter 11, Oxford, U.K.: Oxford UniversityPress (2012), describing how European Treaties for example although more ambitious than any international treaty in forceat the time, still provided a substantial level of protection of the Member States' ability to legislate. Each Member State could, to a certain extent, remain a "blackbox" in which it enjoyed freedom to determine how best to support the welfare of its nations, free from interference by European law.

Moreover, the WTO has gradually supplemented the core GATT pillars with agreements that go beyond the negative injunctions and discriminatory rationale of the treaty and require that States comply with affirmative requirements. The SPS Agreement, for example, requires that States engage in a risk assessment and rely on credible scientific evidence before adopting sanitary and phytosanitary measures such as rules banning apples that may suffer from fire blight or beef with hormones. The TBT Agreement encourages the Contracting Parties to regulate based on international standards, bans the maintenance of measures that are no longer necessary to achieve their objectives, and provides that technical measures may not hinder trade more than necessary to achieve the underlying objective. The TRIPS Agreement requires the Contracting Parties to conform their levels of intellectual protection to the international minimum mandate. Going beyond discrimination and protectionism as the rationale for invalidating a national measure creates a potentially higher level of pressure on State sovereignty. In the case of the Australian plain packaging laws, for example, Australia may have violated national treatment provisions if its laws have the effect of protecting the domestic cigarette industry. If they do not, challenging them under the TBT Agreement or TRIPS may prevent the country from adopting the level of anti-smoking regulatory activity that it chooses, even though the measures on the books are neutral and apply equally to domestic and foreign products. Subjecting these national laws to individual challenges in an action for damages requires, at the very least, that we pause to consider the implications of this intrusion into the domestic regulatory space for the equilibrium of the international system.

B. *Investment*

Investment treaties embody in principle a different rationale than trade law. At their core, they aim to give private investors a direct cause of action against the central government of the host State. They are the product of a very different history. The very same modern liberal democracies, led by the United States, for whom sheltering sovereignty in the trade context had been so important, insisted that their investors should have the right to bring a claim against the States wherever they do business. They rejected domestic courts as the venue for investor claims as unreliably biased and demanded instead an international neutral arbitral forum. They sought to hold the

central governments of the host States responsible for violations committed by any branch of government, whether executive, legislative, or judicial, and whether central, regional or local. These tribunals, the West insisted, should have the power to award damages to make aggrieved investors whole and compensate them for treaty violations, which awards should be enforceable in domestic courts under normal principles of arbitration law.

This stance arose from long-standing historical disputes. The international conversation about investment protection started decades ago, after decolonization, and quickly became a focal point of the ideological dispute between industrialized and less developed nations. It first took place in the context of the Western (or "Northern" as industrialized States were often labeled) push for a multilateral investment treaty that would write into law their substantive and institutional needs. Capital-exporting countries worried about the economic interests they left behind when political self-determination was achieved by their former colonies. They wanted the framework investment treaty to include a clear requirement that governments would not expropriate private property unless the government furthered a public purpose and (crucially) upon payment of compensation at fair market value. They did not want host jurisdictions to target foreign businesses for discriminatory treatment by way of "performance requirements," such as domestic content, capital or intellectual property transfers, mandatory partnerships with local businesses and other measures intended to give the hosts greater and longer-term benefits than would obtain in the normal course of business. They also asked that the broad body of customary international law guaranteeing minimum standards of protection be applied and guaranteed by the international arbitration tribunals.

For the "South," these demands amounted to yet another manifestation of the colonizing arrogance. The political self-determination that the former colonies had earned would not be complete without economic self-determination, and the framework advocated by the colonizers would make this goal unattainable. Property acquired by the colonizers' economic agents and left behind by the political echelons should be nationalized as necessary, upon payment not of full market value but of whatever is "adequate in the circumstances" (i.e. not much). The host countries should have the

right to protect themselves against the risk of "dependent development" by imposing performance requirements and making sure that foreign capital infusion generated the opportunity to sustain long-term, meaningful development. Minimum standards of protection should be rejected because the customary international law that defined them had for the most part been developed during an era when the colonizers subjugated the newly formed States of the South. The "Calvo Doctrine" categorically rejected the grant of jurisdiction to international tribunals[14]. Domestic courts would apply as they saw fit domestic standards adopted independently of the colonizer and its yoke. This too was an indispensable element of the self-determination package.

The dispute culminated in the 1977 adoption of the "Charter of the Economic Rights and Duties of States," which essentially enshrined into a U.N. cloak the view of the South. This was the ultimate expression of the parties' agreement to disagree. The multilateral investment treaty that the North wanted did never come into being, nor was an agreement in principle ever reached between the North and the South. And yet, the North ultimately prevailed, although as will be seen its victory could turn out to be a classically Pyrrhic affair in that modern liberal democracies created in the process a weapon to challenge and possibly defeat the regulatory system they hold so dear and went to such great lengths to shelter against encroachment on the trade front.

The victory of the North did not come with a formal capitulation or dramatic watershed event such as the adoption of a multilateral treaty or an international conference. Instead, it came quietly and gradually. Starting in the 1990s the South stopped being the South and began its transformation into a formidable bloc of emerging markets. The traditional divides and clashes between the North and the South gradually became things of the past. The Soviet Union and the assistance it provided to its satellite countries collapsed. The financial world coalesced into intertwined markets competing for capital that had access to instant and plentiful information. "BRICS" countries emerged, fueled by export manufacturing. The industrialized countries

[14] Bernardo M. Cremades, Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues, 59 DISP. RESOL. J. 78, 80 (2004).See also, Alexia Brunet & Juan Agustin Lentini, Arbitration of International Oil, Gas, & Energy Disputes in Latin America, 27 NW. J. Int'l L. & Bus. 591 (2007).

became the recipients of a substantial amount of foreign direct investment from economies that previously qualified as developing or even less developed. A symbiotic relationship of interdependence (export countries support import countries by reinvesting their profits in the markets they target) became a mainstay of international commerce.

In this new global culture, bilateral investment treaties proliferated together with cross-border investment, and the commercial and financial world became regulated by thousands of investment treaties entered into bilaterally, trilaterally, or within the framework of regional agreements such as Chapter 11 of the NAFTA. The issues of the day from the post-decolonization time became much less sensitive. Whether or not the "signal value" of investment treaties was a necessary prerequisite and condition for foreign capital to flow into a host nation, the countries that previously were so attached to rejecting the multilateral investment framework advocated by the West suddenly seemed to care a lot less. Mexico's story is a perfect example of the phenomenon. After spending decades as the flag-bearer of the South in the investment dispute, Mexico signed on in the early 1990s to the Investment Chapter of the NAFTA, which is the poster child for the Western investment treaty model. With it, Mexico accepted takings, national treatment, most favored nation and minimum standards language of the type advocated by the United States, its longstanding foe on the investment scene. ICSID and UNCITRAL became the forum for arbitration, under the United States and World Bank's respective aegis, of the investment disputes. At the end of the day, instead of a single multilateral treaty, thousands of bilateral and regional investment alliances sprang, giving the West the globalized rules of investment protection that it had advocated.

*Investment **and** Trade. Why they Overlap and Why We Should Care.*

The respective history and theoretical foundations of investment and trade should make it clear that there must be a doctrinal boundary between the two fields. Yet, as it currently stands, the doctrinal expression of the trade and investment fields leads to a virtually complete overlap of the two systems. Where a cause of action exists for a State in international trade, a parallel cause of action has a very real change of arising under a bilateral investment treaty. If Indonesia files a complaint against the United States

alleging that the ban on cloves cigarettes violates the national treatment provisions of the GATT, its cigarettes distributors may file a parallel complaint under the national treatment of the applicable treaty. If Argentina revokes the permit of a financial services company from Panama because it needs to retain capital in the country, the Panamanian government may file a complaint under Article XI of the GATT. Parallel to that, the financial services company, through its Argentinean subsidiary, may seek to recover damages under the takings or minimum standards of protection of the investment treaty.

In the trade context, the complaining State will, if it decides to take action in the first place, seek only a suspension or withdrawal of the measure at issue. In the second instance, the private party will seek damages for the economic loss arising from the measure. In the first case, States will exercise prudential considerations before they elect to sue another State. In the other, a private party will be guided by its economic interests only. In trade, States will negotiate consensual resolutions of the violations in existence at any given moment in time so as to reach a balanced accommodation. Private parties will have no concerns for considerations other than those related to the individual case at hand. The upshot of collapsing investment into trade will be an explosion of high stakes litigation, overshadowing and taking over the delicately balanced system of trade integration of the WTO. As the European Union's history has shown, this is not an academic scenario. The private attorneys general, armed with their lawyers, will vigorously pursue individual causes of action arising from States' violations of national treatment, quantitative and like measures, and other core trade laws. Equating investment with trade would radically unsettle a WTO system that never contemplated the award of damages to an unlimited class of plaintiffs.

The problem will be compounded in countries where attorneys are permitted to work on contingency fees, such as the United States. The business model of contingency lends itself very well to investment claims challenging government measures. States defending complaints will have a strong incentive to settle because, as will be illustrated throughout this article, it will be difficult to conclude with certainty that a case has no merit. The officials assessing the exposure will, then, have in most instances to factor into their calculations some likelihood of success on the complainants' part. The

magnitude of harm that they would face if defeated would more often than not reach very high levels. Discounting the possible damages with the percentage likelihood of success ascribed to the case, even if low, would likely yield a high number and hence give the respondents a strong incentive to settle.

To illustrate, imagine that a gasoline company sues a State that banned its products from its market because it contains additives that the State claims to be harmful to human health and the environment. Assume that a domestic company uses a different kind of additive. The State allows the marketing of the domestic additive but not the foreign one. The complainant asserts that the State arbitrarily distinguishes between two equally harmful (or safe, depending on one's view of the applicable science) products so as to afford protection to the domestic industry. The complainant could bring a claim for a violation of national treatment under the applicable investment treaty. If the complainant succeeded, all of the net profits associated with sales lost during the period in which the State banned the sale of its products would be recoverable in damages. Even if the ban is in effect for a short period of time, the net profits will rapidly accumulate and the State will face severe consequences in the event of a loss.

The reason why the very same causes of action that sound in trade also fall within the purview of investment law is simple: trade among States is not an abstract proposition that they can regulate separate and apart from the individuals who conduct commerce. "Investors" are the business people that drive trade, and when a measure violates the GATT/WTO it may breach the right that investment treaties seem to be extending to them. When a State deprives the goods of another State of national treatment, it also harms the owners of the companies that export those goods. When a State acts arbitrarily with respect to foreign goods in relation to anti-dumping or other administrative proceeding, it may violate the minimum standards of treatment afforded the owners of these affected undertakings. When a State fails to follow good science in imposing sanitary measures, it may also have failed to afford the producers of the affected goods the minimum standard of treatment. Goods (and services) cannot be separated from the business actors who trade in them, and those actors are the interlocutors of the investment treaties.

Yet, it would be unthinkable **always** to allow a parallel cause of action because doing so would violate the fundamental legitimacy of trade at its stage of its evolution. The basic balance of an international legal system and its ability to survive depends on its containment to the appropriate level of individual remedies. States would, for example, retreat on a wholesale level from the United Nations if they were subject to binding, effective, and recurring lawsuits from individuals for violations of treaties adopted under the aegis of the UN. Individuals aggrieved by a violation of treaties covering such disparate subject matter as social and economic rights, the law of the sea, air pollution, or civil liability for the transport of civil arms, simply do not have access to courts or directly effective law. These treaties speak to States, and their level of enforcement is dependent upon the dance of inter-dependence between those States.

These characteristics of each system of international are foundational constitutional and institutional matters. They are so important because they implicate fundamental questions of sovereignty. Using the classical framework articulated by Professor Weiler, a State's ability to exit selectively from an international system is directly linked to how much participation and voice the State will demand in its norm-making.[15] The more integrated systems, with the European Union at one extreme, will expect and tolerate more individual participation. More classical international systems, including the vast majority of treaty frameworks, will tolerate little if any individual participation, and leave the conversation about enforcement and interpretation to the States, guided and limited by their limited and prudential concerns. Simply put, the failure of a system to respect its place at any given historical moment may result in its disintegration. Even a system as integrated and committed to creating a closely knit legal order as the European Communities have gone through constitutional crises when their member States' sovereignty was threatened by an unexpected individual intrusion on their sovereignty.

In the third and final piece of this project, I will propose a theoretical boundary between trade and investment that respects the ethos of both trade and investment law, and apply it to all WTO cases. In this article and the next my task is to show how, as

[15] Weiler, Joseph H.H. `The Transformation of Europe', 100 YaleL.J. 2403-2483 (1991).

currently written and structured, the trade and investment frameworks lack such a boundary. In Part II below, before delving into the cases in Part III, I build a model investment treaty and analyze, using that treaty and investment awards that were rendered, the doctrinal details of the trade/investment overlap.

Part II. How Investment Captures Trade

BITs, FTAs and MIAs: Substantive Provisions and Dispute Settlement Mechanisms

There are nearly 3,000 bilateral investment treaties (BITs) in force.[16] Commentators have debated the extent to which BITs are indispensable (or even relevant) legal means of attracting private foreign investments.[17] Yet, the financial and commercial map of the world is littered with them. Not all bilateral investment treaties look alike.[18] However, although their overall structure and semantics may vary, the global body of investment laws features converging doctrinal hallmarks. The treaties, as illustrated below, usually provide that foreign enterprises should not be treated less favorable than similarly situated domestic counterparts, and make "performance requirements" unlawful.[19]

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[16] See IISD website, available at http://www.iisd.org/investment/law/treaties.aspx (last visited March 11, 2013) Lists of Bilateral Investment Treaties can be find on the website of UNCTAD at http://unctad.org/en/Pages/DIAE/International%20Investment Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx (last visited March 11, 2013).

[17] See for example.,Amin, Samir, Accumulation on a World Scale: A Critique of the Theory of Underdevelopment 382 (Brian Pearcetrans., Monthly Review Press 1974); Jimenezde Arechaga, Eduardo, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U. J. Int'l L. &Pol. 179 (1978); Jones, Charles A., The North-South Dialogue: A Brief History 72-73 (1983);Wallerstein, Immanuel, The Modern World-System: The Second Era of Great Expansion of the Capitalist World-Economy 1730-1840s (1989); Sandrino, Gloria L., The NAFTA Investment Chapterand Foreign Direct Investment in Mexico: A Third World Perspective, 27 Vand. J. Transnat'l L. 259 (1994);Alvarez, Jose E., Critical Theory and the North American Free Trade Agreement's Chapter 11, 28 U. Miami Inter-Am. L. Rev. 303, 304 (1997); Banks, Kevin, Can Regulation Be Expropriation?, 5 NAFTA: L. & Bus. Rev. Am. 499 (1999); Afilalo, Ari, Constitutionalization Through the Back Door: A European Perspectiveon NAFTA's Investment Chapter, 34 N.Y.U. J. Int'l L. &Pol. 1, 13-19 (2001).

[18] See for example Salacuse, Jeswald W., Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L.J. 67 (2005); Schill, Stephan W., Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses, 27 Berkeley J. Int'l L. 496 (2009); Chalamish, Efraim, The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?. 34:2 Brook. J. Int'l L.277 (2010).

[19] Several types of performance requirements are explicitly prohibited by Chapter 11 of NAFTA. For instance, requirements for domestic equity are prohibited by under NAFTA Article 1102(4). Requirements for the mandatory transfer of intellectual property, as well as requirements for use of minimum levels of domestic content, are probited under Article 1106. Requirements requiring that specific managerial positionsbe of a certain nationality are prohibited under Article 1107(1), though 1107(2) conditionally allows a requirement for the nationality of a percentage of the board of directors.

They require States that expropriate foreign assets, outright or through regulatory takings, to do so only for a public purpose and upon payment of compensation at fair market value.[20] They also typically include the international minimum standards of protection as a catch-all guardian of the security of foreigners' economic rights.[21] On the dispute resolution front, BITs[22] customarily grant foreign investors the right to bring a claim against the host State for violations of the treaty before the International Centre for the Settlement of Investment Disputes ("ICSID"),[23] ICSID's Additional Facility,[24] or UNCITRAL.[25]

Bilateral investment treaties do not always incorporate exceptions to cross-border investment liberalizing rules that might shelter conflicting domestic policy schemes of the type found in Article XX of the GATT or Article 36 of the Treaty Establishing the European Communities. Some bilateral investment treaties may include a carve-out for environmental measures, a necessity defense, or other exception.

Finally, restrictions on dividend transfers are prohibited under Article 1109(1)(a). See also, for example, Articles VI and VII of the Bolivia-US BIT, which prohibit many kinds of performance requirements. See, for example, UNCTAD - FDI and Performance Requirements: New Evidence from Selected Countries (UNCTAD/ITE/IIA/2003/7) about performance requirements that are not prohibited by the WTO Agreement on Trade-Related Investment Measures, but may be addressed in various agreements at the bilateral or regional levels, available at http://unctad.org/en/Docs/iteiia20037_en.pdf (last visited March 11, 2013).

[20] Compare, for example, Article III(1) of the Albania-US BIT,which prohibits direct or indirect expropriation or nationalization of foreign investments without compensation, with the similarly worded Takings Clause of the 5th Amendment of the US Constitution, which reads "nor shall private property be taken for public use, without just compensation."

[21] See, for example, Article II of the Croatia-US BIT,which establishes standards of protection for foreign investors' economic security rights in the other State.

[22] See for example, the 2004 US Model BIT, the Argentina-US BIT, theIndia-Germany BIT, the China-Japan BIT.

[23] The ICSID is an autonomous international institution, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The Washington Convention), and operating under the World Bank, that acts as an impartial international forum for the resolution of legal disputes between Member States (or between a Member State and a national of another Member State), either through conciliation or arbitration procedures.

[24] The ICSID Additional Facility is a branch of the ICSID established to administer, inter alia, conciliation and arbitration proceedings between Member States and non-member states.

[25] The United Nations Commission on International Trade Law (UNCITRAL), is the UN's international trade division, and is mostly concerned with collecting, organizing, and disseminating guidelines and conventions for international trade law. The Washington Convention broke with previous dogma that only States could bring claims against other States. There are alternative avenues for bringing a claim under ICSID or UNCITRAL rules in addition to BITs, such as investment agreements between the State and the investor or investment laws enacted by the State. However, in such cases the applicable law tends to be the local law as opposed to international law.

However, it is quite common for a bilateral investment treaty to include the substantive obligations described above but no formal treaty basis to find a justification based on a countervailing domestic purpose.[26] (The framers of the treaties did not contemplate that this would be necessary because of the limited scope that, as described below, such treaties would have.).

A. A Typical Investment Treaty

For the purposes of this article, I drafted a hypothetical Investment Treaty (IT), inspired by the typical provision of BITS.[27] The hypothetical IT consists of basic provisions. I have glossed over differences in the language of specific treaties and produced a sample document that practitioners and students of investment law will likely find familiar and relatively uncontroversial as to wording. Next to each clause, I have included a "Comment" explaining the purpose and place of the provision in the overall treaty. I purposefully drafted exceptions to the investment discipline into my hypothetical investment treaty, even though other treaties do not include those exceptions, so as to show that even more sovereignty-protective international agreements raise the concerns that I am addressing. I did so because my analysis of the trade cases should not depend on whether a particular BIT incorporates a clause sheltering environmental, resource conservation or other measure. Parties to a treaty can amend a document that lacks this type of protection easily enough. As will become apparent, the doctrinal action lies in the determination of whether a particular measure, although furthering a domestic policy, sufficiently violates investment to be illegal under one or the other provisions of a BIT.

Hypothetical Investment Treaty

IT Article I. Investments

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[26] c.f., Art. X of the Canada-Peru BIT, or Art. XVIII of the Singapore-Japan BIT, as models of BITs that incorporate these general exceptions, with the Czech Republic-Netherlands BIT (as discussed by the tribunal in Saluka Inv., B.V. v. Czech Rep. (Partial Award, 17 March 2006) at para. 300), which does not contain such exceptions. See, also, Newcombe Andrew, General Exceptions in International Investment Agreements, available at http://www.biicl.org/files/3866_andrew_newcombe.pdf, (last visited on December 20, 2012).

[27] We will use the term "IT" in order to encompass any possible FTAs, BITs, and MIAs.

The term investment includes all equity interests, debt, or other securities held in an enterprise; a division of an enterprise; real property; the assets of an enterprise. "Enterprise" means any company, corporation, partnership, limited liability company, limited partnership, or other entity of any kind lawfully formed and existing under the law of the host Party. "Debt" means any right to receive fixed income from an enterprise, including but not limited to preferred stock, bonds, notes, and other instruments of any type giving their holder of such right, whether or not convertible into a security. "Securities" means any instrument giving the holder a right to share in the profits of an entity, including by way of illustration shares of common stock, partnership interests, membership interests, options, warrants, profit sharing rights afforded by contract, and other instruments of any kind, whether or not certificated.

Comment: This definition of investment aims to capture the broadest possible categories of investment vehicles. It recognizes that financial markets constantly devise new vehicles to hold ownership interests, evidence debt obligations, and otherwise participate in financial activities. The protection afforded by this Treaty should not depend on the nature of the particular investment, which may be driven by tax, commercial or other considerations. The definition has been drafted in the broadest possible way to capture all vehicles that investors may choose to create.

IT Article II. Investor

The term investor refers to the holder or beneficial owner of an investment. By way of example, (i) the shareholders of a corporation, members of a limited liability company, or other stakeholders in a business enterprise of any kind, whether they hold a majority or a minority interest, will be deemed to be investors, (ii) the holders of debt or other right to receive a fixed return on an investment will be deemed to be investors, and (iii) any group or umbrella undertaking controlling a division or other entity will be deemed to be an investor in such division.

Comment: The intent of this definition is to specify the persons and entities that have a cause of action under this IT. The definition does not distinguish between majority or minority holders of an interest in an investment. Any "holder" or "beneficial owner" shall have the right to bring a cause of action if its investment is

subject to a measure that violates any one of the substantive provisions of the treaty, regardless of whether it controls 100% of the rights therein or a small portion. The distinction between "holder" and "beneficial owner" allows the ultimate owner of an asset the flexibility to designate their nominee holder as the party to an action under this IT.

IT Article III. National Treatment

Each Party shall accord to investors of the other Party and their investments 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 in its territory.

Comment: The national treatment obligation is an essential element of the law of investor protection. Host states may not treat foreign investors differently than their similarly situated local counterparts, with respect to any aspect of the commercial and corporate life of the enterprise. The first category of prohibited measures includes the familiar "performance requirements." Requiring domestic content, the use of local supplier, partnership with local persons and entities, compulsory transfers of intellectual property, capital retention in the host jurisdiction, a minimum number of domestic senior managers, and like measures, plainly violates the national treatment obligations. While other treaties choose to list those measures separately, Article III operates on the assumption that its language subsumes them. In addition to performance requirements, any failure to afford like treatment to similarly situated investors will violate Article III. Discriminatory taxation, administrative or regulatory measures will amount to such a breach.

IT Article IV. Most-Favored-Nation Treatment

Each Party shall accord to investors of the other Party and their investments treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Comment: The host nation must afford national treatment to all foreign investors on equal terms. It may not discriminate between similarly situated foreign investors. If the host nation distorts competitive conditions so as to afford protection to one group of foreign investors to the detriment of another, this will amount to a violation of Article IV.

IT Article V. Minimum Standard of Treatment

Each Party shall accord to investments of another Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For the avoidance of doubt, this Article V does not incorporate by reference the provisions of any treaty and shall only be construed to cover customary international law.

Comment: This Article is also a mainstay of international investment law. It incorporates by reference the provisions of customary international law intended to afford minimum standard of treatment to foreign economic interests. These include, without limitation: the denial of justice doctrine, rules requiring States to act in good faith and refrain from arbitrary conduct in their administrative and other dealings with foreign concerns, rules preventing the abusive cancellation of contracts or other vested rights without a proper remedy, and other provisions of law that arose in the past or that may be created through the customary international legal process. This Article V makes clear that treaties, unless they embody provisions that have risen to the level of customary international law, are not incorporated by reference. The question has arisen in contexts such as Chapter 11 of the NAFTA whether other parts of the treaty are "captured" by the investment chapter's extension of general protection under international law to investors. The framers of the NAFTA clarified their intent and answered the question in the negative. This Article IV reaches the same result.

IT Article VI. Expropriation and Compensation

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization and tantamount measures ("expropriation"), except: (a) for a public purpose; (b) in a non-

discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law. For the avoidance of doubt, compensation shall not be deemed to be adequate unless it is equal to the fair market value of the expropriated property.

Comment: Payment of compensation at fair market value for takings is a central element of international investment law. Expropriation (by any designation, including but not limited to eminent domain, nationalization and other labels) includes direct takings of an owner's interest in property. It also captures the concept of "creeping expropriation," where a State exercises its regulatory power in such coercive manner as to force the transfer of a private party's right to property. For example, a State may deny an operating permit to a factory for such an inordinate amount of time that the owner will have no choice but to agree to a transfer of the asset to a government-operated agency. The drafters leave it to the adjudicator to determine whether any measure that substantially deprives an owner of the enjoyment and use of an asset amounts to a measure tantamount to an expropriation or nationalization, or as is commonly referenced a "regulatory taking." For example, an environmental measure banning the use of a facility previously used as a waste management land may so deprive the owner of its reasonable and legitimate investment-backed expectations as to constitute a regulatory taking. This determination ought to be made on a case-by-case basis, taking into account the particular circumstances surrounding the measure, whether domestic law would permit an action, and other relevant considerations.

IT Article VII. Dispute Resolution

In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between

States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or

(b) to the Additional Facility of the Centre, if the Centre is not available; or

(c) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL)

The central government of each Party to this Treaty shall be responsible for all violations hereof, whether committed by a national, regional, or local entity, and whether such agency is a part of its executive, legislative or judicial branch.

Comment: International investment law has long elected to give private parties a cause of action for damages. The Calvo Doctrine rejected the industrialized States' insistence on laying the venue in international arbitral tribunals, and held instead that national courts applying domestic law had exclusive competence to adjudicate investor-to-State disputes. Bilateral investment treaties rely on international tribunals to protect effectively aggrieved investors' right to seek redress for grievances. They insure that an effective remedy will not depend on the vagaries of which branch of government has violated the treaty, and instead hold the central government responsible for violation by all branches, wherever located.

IT Article VIII. Exceptions[28]

Public Order: This treaty shall not preclude the application by either party of measures necessary for the maintenance of public order.

Health: This treaty shall not preclude the application by either part of measures necessary to protect human, animal or plant health or life.[29]

[28] Article 10 Treaty betweenthe U.S. and the Argentine Republic concerning the reciprocal encouragement and protection of investment.

[29] See for example for certain exclusion of public order and health form the scope of an article in a treaty, Article I:3 to the Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States - Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 ARI- IT REFERS ONLY TO PUBLIC ORDER AND HEALTH.

Environment.[30] The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Labor.[31] The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

For purposes of this Article, "labor laws" means each Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

(a) the right of association;

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[30] Article 12, TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE ORIENTAL REPUBLIC OF URUGUAY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT contains a similar clause.

[31] Article 13, TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE ORIENTAL REPUBLIC OF URUGUAY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT contains a similar clause.

(b) the right to organize and bargain collectively;

(c) a prohibition on the use of any form of forced or compulsory labor;

(d) labor protections for children and young people, including a minimum age for the

employment of children and the prohibition and elimination of the worst forms of child labor; and

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to labor concerns.

Resource Conservation.[32] Nothing in this Treaty shall be construed to prevent the adoption or enforcement by either party of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Cultural Industries. The provisions of this Agreement shall not apply to investment in cultural industries.

Comments: As BITs multiplied, the issue of cultural exemption became a significant point of battle. For example, in South Korea, Morocco, Australia and Chile, coalitions for cultural diversity sprang up in the context of bilateral trade negotiations with the United States.[33] These countries granted significant concessions with respect

32 GATT Article 20 contains a similarclause.

33 See "The "Trade and Culture" Issue, at the Origin of the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions", Coalition for Cultural Diversity website,

to their ability to develop cultural policies, especially in the form of regulatory measures:

- *in 2006, South Korea agreed to change a 40-year-old regulation by reducing the number of projection days reserved for national films in theatres from 146 to 73;*
- *The cultural exemption in the 2004 FTA between Morocco and the US is limited to financial assistance and does not include regulatory measures, such as national content quotas;*
- *In the FTA signed in 2004, Australia lost its power to regulate the film sector and agreed to consult the US before regulating new media. Its right to impose local content rules is narrowly defined;*
- *The chapter on electronic commerce in the 2003 US-Chile FTA stipulates that there can be no restriction on trade in digital products, for which the definition includes all forms of audiovisual production (such as the digital distribution of movies for example). The same chapter is found in the agreements signed by the US with the other countries mentioned above.*

It should be noted that in light of the oft-heard concern for cultural diversity and the potential threats to national ability to exclude more mass-oriented foreign cultural products and otherwise to protect national culture, an international consensus on the need to create an international legal instrument to affirm the sovereign right of States to adopt cultural policies has emerged and the "Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005" was adopted by UNESCO. The Convention recognizes the right to take measures to protect and promote the diversity of cultural expressions and impose obligations at both domestic and international levels. IT will be construed to provide a relatively liberal exemption, on the assumption that sensitivity to cultural concerns, although often overridden by

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available at http://www.cdc-ccd.org/IMG/pdf/Culture-trade_history_Eng.pdf (last visited on March 12).

investment objectives (or ignored), should be an important consideration when applying the investment disciplines of the treaty.[34]

Securing Compliance with Existing Laws. Nothing in this Treaty shall be construed to prevent the adoption or enforcement by either party of measures necessary to secure compliance with existing laws that do not violate this Treaty.

Comments: The framers of the treaty recognize that States may need to adopt measures that are necessary to protect their ability to implement legitimate policy goals. Tax, securities, financial and other subject matter areas may raise special concerns that will make it necessary to burden capital flow. This exception should be construed to permit such restrictions when there is no less restrictive alternative reasonably available.

Other Compelling State Purpose. States shall have the right to adopt or enforce measures necessary to achieve policy goals and purposes that are not specifically referenced herein.

Comments: The framers of the treaty recognize that policy needs evolve and that States may need to adopt measures that are necessary to further legitimate policy goals. They have opted not to close the list of legitimate policy goals, and instead they elected to enumerate specifically goals and objectives that currently preoccupy policy makers, leaving open the possibility that sufficiently compelling State interests will arise in the future and justify an exception to the investment rules. The arbitral panels will have interpretive authority to determine whether an individual objective warrants

34 These exemptions for cultural treaties including the relatively broad exemption in the NAFTA ao Ivan Bernier, Trade and Culture , Chapter 64, in The World Trade Organization - Legal, Economic and Political Analysis, Vol. II, edited by Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer, 511-571 at 786. Available at http://books.google.com/books?id=96x7IwWDJUQC&pg=PA4231&lpg=PA4231&dq=bilateral+treaties+cultural+exemption&source=bl&ots=yJiDqVE3aq&sig=2mNOLi9pHDFmRgLapHD6tz60wao&hl=en&sa=X&ei=khhFUZ7LLLe24AO2soCQAw&ved=0CDwQ6AEwAQ (last visited in March 18, 2013). The author explains that the main reason that the exceptions would not be in the WTO context is the opposition of the United States. However, he is also arguing that the exceptions in the bilateral treaties do not constitute a true cultural exception because all they provide is the other party with the flexibility to retaliate. All they actually provide is for a party if it is willing to pay the price, to maintain provisions on cultural industry that are inconsistent this commitment.

restricting the free flow of capital. Having done so, they will scrutinize the means employed to make sure they do not excessively burden the free movement of capital or constitutes a disguised restriction. It is important to note that these exceptions apply only to the national treatment and most-favored-nation clauses. A State must always act for public purpose when expropriating property, and it may do so freely as long as it complies with the requirements of the treaty including payment of compensation at fair market value. It may not justify a taking by claiming that it is necessary to further a public purpose, without paying such compensation. Similarly, the State may never fall below the minimum standards of protection afforded by international law. This is a threshold that applies in all instances; while it may be flexible enough to accommodate for unforeseen events such as an emergency, and adjust the level of protection required in such circumstances, a State does not affirmatively plead a legitimate purpose as a defense to a claim that it failed to meet its minimum obligations.

Next, I briefly review the provisions of the GATT Agreement that are relevant to the cases discussed in Part III. I then show how an investment treaty like IT provides a cause of action for a breach of these trade law provisions.

Brief Summary of GATT Framework.

Article III of the GATT incorporates the familiar national treatment provisions of trade law. It provides that imported products should receive treatment no less favorable by way of taxation or regulation than "like" domestic products, and that domestic products in competition with imported products should not be afforded tax or regulatory treatment that gives them a protective advantage over the imported products. Article I provides that imported products must be afforded most-favored-nation treatment, meaning that the jurisdiction of import may not treat these products less favorably than like products from another Contracting Party. Article XI of the GATT bans quotas and like measures, including a broad array of regulation discussed in Part III such as certain import licensing schemes, bans on certain products deemed dangerous to health or other domestic concerns (e.g. asbestos, beef with hormones, genetically modified

organisms etc.), and other measures that have the effect of quantitatively restricting imports[35].

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)provides that sanitary and phytosanitary measures may not give imported products treatment less favorable than is afforded to like domestic products or like products of another Contracting State. In addition to maintaining this traditional discrimination and protectionism rationale, the SPS goes beyond Article III and Article XI and bans State measure that unnecessarily create obstacles to trade without serving a health or safety purpose: SPS provides that "Member States shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence."[36] The TBT Agreement follows a similar logic. It provides that technical regulations may not treat imported products less favorably than like products of national origin and to like products originating in any other country.[37] In addition, it requires the Member States to make sure that no "unnecessary obstacles" to trade are created by way of technical regulations,[38] and it provides incentives for States to follow international standards when those exist.[39]

Article XX of course includes the customary exceptions to the trade disciplines. Provided that they do not violate its chapeau, Article XX protects measures that are:

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[35] Article XI of the GATT generally prohibits quantitative restrictions on the importation or the exportation of any product, by stating "[n]o prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any Member...", See GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153.

[36] See Neven, Damien J. And Weiler, Joseph H.H., Japan – Measures Affecting the Importation of Apples (AB-2003-4): One Bad Apple?, American Law Institute 2005, on file with author.

[37] Article 2.1, TBT.

[38] Article 2.1, TBT.

[39] Article 2.4 provides: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a bas is for the irtechnicalregulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the

> principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Why GATT and NAFTA Are Co-Extensive.

Causes of action arising under Articles I, III, XI, or under the SPS, TBT or Import Licensing Agreements, may fall within the IT because (i) they involve treatment less favorable for foreign investors and therefore trigger the national treatment provisions of the IT, or (ii) the aggrieved investor may claim that the measure so severely deprived it of the benefits of its investment as to amount to an expropriation, or (iii) the investor may argue that, under minimum standards of international law, it had a legitimate expectation that the host jurisdiction would comply with its obligations under a treaty, and that the investor made an investment decision in reliance on a particular regulatory climate. The minimum standards of treatment provisions may, based on the facts of the individual case, give the investors additional arguments. For example, an agency's failure to grant an import license, its lack of transparency, or otherwise its failure to adhere to administrative due process, may violate the minimum standards of treatment. Similarly, a court's decision or procedures may amount to a "denial of justice" in violation of minimum standards of treatment.

I selected a few cases from investment law to illustrate its overlap with trade law. The first one squarely raises the issue of whether an investment cause of action may be used to challenge a State's failure to comply with the WTO and related treaties. In this

case, Philip Morris Asia (PM Asia) challenged Australia's "plain packaging" laws[40] under the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments of 1993[41]. The plain packaging laws severely restrict the ability of a cigarette manufacturer to use its brand, logos and designs on a cigarette pack. It requires that all cigarettes be sold under plain, drab brown unattractive packaging. It prohibits the use of graphics and logos on the package. It permits only a small print reference to the cigarette's brand name. It mandates that a substantial portion of the packaging be devoted to warning the smoker about the dangers of his or her habit. Aside from the name of the brand, in its legally restricted appearance, the manufacturer has no way to advertise its brand or otherwise make the packaging attractive.

Australia's plain packaging laws were also challenged before the WTO by an impressive array of States, including the European Union, Brazil, Egypt, the Ukraine, Honduras, the Dominican Republic, New Zealand and others[42]. The WTO complainants argued that the plain packaging laws violated the TBT Agreement, the TRIPS Agreement, and Article III of the GATT. The case has not yet evolved past the stage of a request for consultations but we may safely anticipate that the complainants' arguments will proceed as follows:

The plain packaging measures amount to a technical barrier to trade because the severely hinder sales of branded cigarettes in Australia. The measures unnecessarily restrict trade and are more restrictive than needed to achieve their health objective, in violation of TBT. This is because depriving cigarette brand owners of their normal packaging, logos, and branding, will hurt their sales but will not decrease smoking

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[40] Tobacco Plain Packaging Bill 2011 (Cth), and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth).

[41] Philip Morris Limited, News Release: Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging(27 June 2011); Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (27 June, 2011).

[42] See for example WT/DS434/1; WT/DS435/1; WT/DS441/R Australia —Tobacco Products and Packaging– Request for Consultations (18 July, 2012; 13 March, 2012).

significantly. Instead of distinguishing the products by branding habits, smokers will now do so through product pricing. In turn, this will favor cheaper cigarettes, using lesser quality tobacco that is more likely to be harmful to health. Because local cigarettes are demonstrably cheaper, the complainants will use the price differential to claim a violation of the national treatment provisions of Article III.

Further, the measures may violate several provisions of TRIPS, including in particular Article 2.1 (requiring compliance with international intellectual property treaties), and the trademark-specific provisions of Articles 15.4 and 20, all of which the complainants invoke in their request for consultations. Article 15.4 provides that "[t]he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark." Article 20 provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings." The complainants will argue that Australia's measures thwarted the right of cigarette makers to use their brand for customary product identification purposes, thereby depriving them of the normal benefits of a trademark registration.

The investment filings by PM Asia follow a similar structure and, in addition, raise investment-specific causes of action. PM Asia is incorporated in Hong Kong. It owns shares in Philip Morris Australia Limited ("PM Australia"), its "investment" in Australia. PM Asia argues that Australia expropriated its valuable intellectual property by banning the normal use of a trademark to brand intellectual property on tobacco products and packaging. It also claims a violation of the minimum standards of treatment of international investment law on the grounds that Australia violated international treaties such as TBT Agreement and the Paris Convention for the Protection of Industrial Property. It translates its trade claims in investment language by arguing that, when it chose to do business in Australia, PM Asia had a legitimate expectation that Australia would abide by its international obligations under international economic law. By rejecting and failing to abide by those obligations, PM

Asia claims, Australia deprived it of basic assumptions upon which its investment in that country relied.

PM Asia's arguments essentially replicate those made before the WTO with respect to potential GATT violations. It claims that the plain packaging measures violate TBT because they are not sufficiently related to the health objective. They violate TRIPS because branding is the essential purpose of a trademark and the restrictions on branding deprive PM Australia of the benefits of the intellectual property protection mandated by TRIPS. They violate national treatment because they will remove branding as the distinguishing factor for consumer choices, leaving pricing and cheaper local cigarettes as the alternative. PM Asia alleges that it is entitled to compensation "in an amount to be quantified but of the order of billions of Australian dollars".

Australia has responded by arguing that the legislation amounts to a legitimate exercise of its police power which is part of a comprehensive government strategy to reduce smoking rates in Australia. It argues that the implementation of these measures is a legitimate exercise of the Australian Government's regulatory powers to protect the health of its citizens. As to legitimate expectations, PM Asia's investment acquired its shares in PM Australia in 2011, against the backdrop of a clear intention on Australia's part to regulate cigarettes in the most stringent of manners and cannot be said to have thwarted the investor's legitimate investment expectations. To support its argument, Australia points to:

a) the Australian Government's long-standing regulation and control of the manufacture and sale of tobacco in Australia, and its ratification of the World Health Organization ('WHO") Framework Convention on Tobacco Control ("FCTC");
b) the Australian Government's establishment of a National Preventative Health Taskforce ("Taskforce") in April 2008 to consider how to reduce harm from tobacco usage, which led to the Taskforce considering the impacts of packaging on tobacco usage, engaging in a consultation exercise in which PML participated and, ultimately, recommending in June 2009 that the Australian Government

mandate the sale of cigarettes in plain packaging and increase the required size of graphic health warnings;

c) the Australian Government's announcement, on 29 April 2010, of its decision to implement plain packaging and to mandate updated and larger graphic health warnings for all tobacco products; and

d) continuing objections or public complaints on the part of PM Australia, PML and also Philip Morris International Inc. (the ultimate holding company for the Philip Morris group) - in the course of the remainder of 2010 and early 2011 - to the effect that the plain packaging legislation would breach Australia's international trade and treaty obligations.

Thus, Australia claims that PM Asia acquired its shares in PM Australia in February 2011, with full knowledge that the decision had been announced by the Australian Government to introduce plain packaging, and also in circumstances where various other members of the Philip Morris group had repeatedly made clear their objections to the plain packaging legislation, which objections had not been accepted by the Australian Government. In other words, Australia argues that an investor cannot make a claim for breach of the fair and equitable treatment standard or of expropriation in circumstances where (i) a host State has announced that it is going to take certain regulatory measures in protection of public health, (ii) the prospective investor - fully advised of the relevant facts – then acquires some form of an interest in the object of the regulatory measures, and (iii) the host State acts in the way it has said it is going to act. In addition, the WHO and the Secretariat of the FCTC have each made submissions to the Australian Government strongly supporting the legislation.

Most importantly for the issue at hand in this article, Australia has forcefully challenged the power of an investment tribunal to hear claims arising under a trade-related treaty. "Even if were correct (which it is not) that [the Hong Kong – Australia BIT] could somehow be understood as extending an arbitral tribunal's jurisdiction to obligations owed by Australia to other States under various multilateral treaties, the treaties that PM Asia seeks to invoke all contain their own dispute settlement mechanisms. It is not the function of a dispute settlement provision such as that contained at Article 10 of the BIT to establish a roving jurisdiction that would enable a

BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties. This is all the more so in circumstances where such bodies enjoy exclusive jurisdiction."[43]

The Australia case illustrates how an investment complainant may bring a trade challenge and invoke the "roving jurisdiction" of an arbitral panel to try and enforce a trade agreement even in the absence of a violation of national treatment. Arguably, investors have a legitimate expectation to rely, when they make an investment decision, on the compliance by the host State with international law. In cases where a State has changed its domestic policies or law, the investment tribunal must balance investor expectations with the regulatory space to change course. The line drawing is a delicate exercise, and the location of the boundary will depend on the factual circumstances and the individual philosophies and predilections of the arbitrators. Consider for example the Separate Opinion filed by a dissenting arbitrator in International Thunderbird "Throughout the extensive jurisprudence surveyed, we find that if governments reverse their previously communicated and relied upon course, a balancing process takes place between the strength of legitimate expectations (stronger if an investment for the future has been committed) and the very legitimate goal of retaining 'policy space' and governmental flexibility."[44] This referee strongly held that the balancing in that case favored the complainants, while his colleagues sheltered the regulatory space that he described.

The line drawing is even more delicate when governments change their domestic policy to implement measures that are in a violation of international law. Although they of course constantly do so, and are allowed by flexible practices of international law to "selectively exit" their obligations, international law as a formal matter may bind the host State and deprive it of the regulatory space to change the applicable norm. The question under investment law becomes whether the failure to comply with

[43] Australia's Response, Par. 35.

[44] International Thunderbird Gaming Corp. v. United Mexican States UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, Separate Opinion, December 2005 (of Thomas Wälde), para. 102.

international law violates the minimum standards of treatment. The minimum standards doctrine is sufficiently malleable to enable the complaining investor, in most cases, to bring a colorable claim on the defending State. In the plain packaging case, for example, Australia may be found to have fallen short of its obligations to provide adequate protection to the Philip Morris trademark in violation of TRIPS, or to have erected an unnecessary technical obstacle to trade. Under these facts, Philip Morris may claim that Australia's failure to follow international law deprives it of its legitimate expectations of legal security and protection. Philip Morris spends enormous amounts of money on branding and advertising. In this case it may have proceeded with its investment with knowledge of the regulatory environment and its risks. Nevertheless, international investment law has sufficiently malleable standards to allow Philip Morris to claim with a reasonable likelihood of success that Australia unjustly and arbitrarily thwarted its well-founded reliance on the right to use its famed logo.

In many instances, the investor will also be able to claim an expropriation or a measure tantamount to an expropriation going beyond the causes of action permitted by domestic law. In Loewen vs. The United States,[45] for example, the claimant argued that a Mississippi trial that resulted in an enormous amount of punitive damages so violated due process norms as to amount to a taking of property. In Methanex vs. United States,[46] a Canadian maker of methanol, a gasoline additive, argued that the legislation lacked a proper scientific basis and amounted to a complete deprivation of the right to do business in California in violation of NAFTA's Investment Chapter's takings rules. In both cases, the complainant sought hundreds of millions of dollars in damages, and in both cases the complainants did not even come close to having a domestic cause of actions. While the arbitrators ended up rejecting their claims the cases proceeded all the way to the awards stage and a different panel may well have ruled in their favor.

The Philip Morris/plain packaging case shows the application of investment law to cases that do not involve discrimination. For cases that involve a claimed violation of

[45] The Loewen Group, Inc. And Raymond L. Loewen v. United States of America, ICSID Case No.ARB(AF)/98/3, Award (June 26, 2003).

[46] Methanex Corporation v. United States of America, In the Matter of an Arbitration under Chapter 11 of the NAFTA and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, August 3, 2005.

national treatment or other claim of discrimination, an even more straightforward application of the corresponding provisions of the investment treaties will yield a finding of liability. Imagine, for example, that an investor brought a case to challenge the United States measures banning cloves cigarettes that are described in Part III. These measures have a definite disparate impact on Indonesia, which is the principal maker of cloves cigarettes, and an inference that they violate Article III because menthol cigarettes, like products, receive more favorable treatment. Such a case could be brought, using the same argument that the DSB found to show a violation of Article III, under the national treatment provisions of an investment treatment.

To illustrate how the claim would be argued, consider the following cases that arose under NAFTA's Investment Chapter (Chapter 11) in connection with a challenge to Mexican measures that the complainants claimed favored the Mexican sugar cane industry to the detriment of foreign high fructose corn syrup ("HFCS") producers. In the first case, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc., two companies formed under the laws of the United States that owned a Mexican subsidiary ("ALMEX),[47] challenged an excise tax (the "IEPS tax")[48] that Mexico levied at the rate of 20% on soft drinks and syrups, and services used to transfer and distribute those products. The tax applied only to drinks and syrups if they used sweeteners other than cane sugar, such as HFCS. Not surprisingly, the producers of HFCS were American concerns, and cane sugar was associated with Mexican producers. The IEPS tax remained in effect from January 1, 2002 until 2007 when as described below Mexico lost the WTO case and removed the measure.[49]

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[47] Almidos Mexicanos S.A. de C.V., Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, award (November 2007, at para.8, available at http://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf (last visited Feb.23, 2013

[48] Within Mexico, the IEPS Amendment (that incorporated IEPS tax) was temporarily suspended by Presidentia lDecree. On July 12, 2002 the Mexican Supreme Court declared this suspension unconstitutional and reinstated the IEPS Amendment. The IEPS Amendment was also the subject of an advisory ruling by the Mexican Comision Federal de Competencia. The IEPS Amendment was also subject to constitutional challenge in the Mexican courts by individual tax payers, with the result that some soft drink bottlers, but not others, are exempt from the tax on the basis of successful amparo challenges.

[49] WT/DS308,Mexico- Tax Measures on Soft Drinks and Other Beverages, discussed in Part II. This case arose after Mexico continued to come up with measures to protect its sugarcane industry, following the

The second Chapter 11 proceeding, brought by another American company (Cargill),[50] arose out of the same regulatory framework.[51] However, the case did not focus solely on the IEPS tax and instead examined it in the broader context of a Mexican concerted effort to stem the tide of HFCS imports into the country. In particular, the complainants challenged a decree adopted by Mexico in 2001,[52] pursuant to which HFCS importers from the United States would require a permit issued by the Mexican Secretary of the Economy. If a given importer did not have a permit, its products would be subject to a higher tariff than the NAFTA tariff.[53]

The same measures had been challenged by States before the WTO, with the DSB finding against Mexico on this trade front. The Panel had found that the IEPS Tax violated the national treatment obligations of Mexico under Article III:4 of the GATT. The Panel had held that (1) soft drinks containing HFCS are 'like' soft drinks containing cane sugar, and the tax on soft drinks with HFCS was in excess of taxes imposed on the like domestic products and (2) that HFCS and sugar are directly competitive or substitutable products, and dissimilar taxation was applied in a way that offered protection to domestic products. Mexico had defended under the Article XX(d) exception with a very weak argument that the measures were necessary to secure compliance with laws because the United States had violated NAFTA and retaliation was the only means of securing American compliance. The Panel had rejected the Mexican argument and held that the term "laws or regulations" under Art. XX(d) refers to the rules that form part of the domestic legal order (including domestic legislative acts intended to implement international obligations) of the WTO Member invoking Art. XX(d) and do not cover obligations of another WTO Member (here the United States'

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invalidation of previous anti-dumping measures by the WTO and a NAFTA tribunal convened under Chapter 19.

[50] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2 Final Award of September 18, 2009 (hereafter: "**Cargill v. Mexico**"). There is also third case brought by Corn Products International, Inc., but the award is not public.

[51] Cargill incorporated in U.S. was selling HFCS through its subsidiary Cargill de Mexico S.A. de C.V. Cargill v. Mexico, para 1.

[52] They also brought MFN claim which was rejected.

[53] Cargill v. Mexico, atpara 117, available at http://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf (last visited Feb.,23 2013).

obligations under NAFTA).[54] The Appellate Body (AB) had upheld the Panel's conclusions.

In the parallel case brought under NAFTA Chapter 11, the Claimants argued that the IEPS Tax violated Articles 1102 (national treatment), 1106 (performance requirements) and 1110 (expropriation) of the investment treaty. Mexico again defended by arguing that the IEPS tax was a permitted countermeasure against US violations of NAFTA necessary to secure American compliance with its NAFTA obligations. In addition, in these proceedings, Mexico argued that the case properly belonged to a trade, not an investment, context.[55] Specifically, Mexico argued that claim with respect to imposition of permit requirement is beyond the jurisdiction of the tribunal because it involves trade of goods and is governed by NAFTA Chapter 3, not Chapter 11. Chapter 3 is the NAFTA replica of the GATT provisions invoked before the WTO, and Mexico essentially asked the arbitration panel to establish a boundary between the two domains.

The Tribunal found for the Claimant and rejected the argument that the case belonged exclusively to a trade venue. It held that the fact that trade in goods/services and investment are dealt with in separate areas of trade law does not *ipso facto* mean that there can be no overlap between the two.[56] It found that HFCS and cane sugar producers operate in 'like circumstances' due to the competitive relationship between them. In these circumstances, the Tribunal ruled, the IEPS Tax was discriminatory and designed to afford protection to the domestic can sugar industry. These findings translated into a violation of the national treatment provisions of Article 1102. The Tribunal also found a violation of the performance requirements of Art. 1106.3 because the IEPS tax afforded an exemption for soft drinks that used cane sugar that was contingent on the use of domestic products. While the IEPS tax conferred advantage on sugar without discrimination between foreign and domestic investors, the reality was

[54] The Panel did not address import licensing requirement in this case. It appeared only in questionnaires sent to parties about other measures in place that affect importation of product relevant to the case.

[55] Cargill v. Mexico, op.cit.,para. 136.

[56] Cargill v. Mexico, op.cit., para. 148.

that the sugar industry in Mexico was essentially domestic and the disparate impact on the foreign producers warranted a finding of national treatment violation. The Tribunal rejected Mexico's countermeasures defense for the same reason as the WTO did, finding that the IEPS Tax was not taken to induce US compliance with its NAFTA obligations, but rather to protect domestic industry.[57]

In the second NAFTA proceeding, Cargill, the complainant, brought a broader level challenge to the Mexican anti-HFCS campaign, of which the IEPS tax was one component only. Cargill's claim focused in particular on the import permit requirement. The Claimant argued that Mexico's import permit requirements violated Art. 1105(1) of Chapter 11, its minimum standards of protection provision. Cargill claimed that its application for the permit was denied several times, because "there were no parameters established by the Mexican Congress when they established the need to have a permit"[58] Cargill argued that the administrative measures violated the minimum standards of treatment of Article 1105. It also claimed that because the import permit requirement applied only to HFCS imported from the U.S. and not to HFCS imported from Canada, Mexico violated its most favored nation treatment obligations under Chapter 11.[59]

The tribunal found that the "import permit was one of the series of measures expressly intended to injure United States HFCS producers and suppliers in Mexico in an effort to persuade the United States government to change its policy on sugar imports from Mexico."[60] The tribunal concluded that introduction of the permit requirement was a manifestly unjust measure because its sole purpose was to persuade US to change its trade practices. By imposing such an import requirement Mexico targeted few suppliers of HFCS that originated in US and made them carry the burden of Mexico's efforts to influence US policy. The Tribunal called such practice 'willful

[57] The Tribunal did not find that Mexico had expropriated the claimants' investment because the measure of interference was not substantial enough – the Claimants all time remained in control of their investment in Mexico.

[58] Cargill v. Mexico, op.cit., para. 120.
[59] Cargill v. Mexicoop.cit.,para. 224-233.
[60] Cargill v. Mexicoop.cit.,para. 224-233 para. 299.

targeting' that, by its nature, constituted a manifest injustice in violation of its obligation to offer fair and equitable treatment under Article 1105 (minimum standards of treatment).[61] Furthermore, the Tribunal found this measure to amount to gross misconduct because, when adopting the permit requirement, Mexican government did not introduce objective criteria according to which the company could obtain an import permit.[62]

These cases illustrate the doctrinal overlap between the treaties and why the hundreds of WTO cases discussed in Part III and in the sequel to this article also may potentially be brought under investment law. Other investment cases touch on this tension, albeit not always explicitly and often without addressing it as openly and heads-on as the plain packaging or HFCS. It is beyond the scope of this article to engage in a comprehensive review of those cases. I will cite just a few, again with a view towards explaining towards supporting the proposition that the issues I raised are not merely academic or the product of a speculative application of investment law to trade matters not grounded in doctrinal reality.

In *Ethyl v. Canada*,[63] a Virginia corporation with a Canadian subsidiary argued that a Canadian statute banning imports of the gasoline additive MMT violated Canada's obligations under NAFTA Chapter 11.[64] The Claimant argued that Canada had violated national treatment (Article 1102), prohibition of expropriation (Article 1110) and the rules against performance requirements (Article 1106) of the NAFTA. It claimed damages in the amount of $251,000,000 to cover the losses associated with its inability to sell MMT made in its production plan and the prejudice to its goodwill. In addition to asserting various procedural defenses,[65] Canada also argued that the ban was justified

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[61] Cargill v. Mexicoop.cit.,para.2, 300, 550.

[62] The tribunal rejected the most-favored-nation claim made by Cargill on technical grounds.

[63] Ethyl Corporation v. The Government of Canada, UNCITRAL, award on jurisdiction, 24 June, 1998 (1999) 38 ILM 708, 722, available athttp://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf.

[64] The act prohibited international trade of or import of MMT for commercial purposes except under authorization under section 5. Section 5 of the Act precluded any authorizations for additions to unleaded gasoline. Meanwhile production and sale of MMT in Canada were not prohibited.

[65] Canada argued that Tribunal had no jurisdiction over the dispute as it is out of the scope of Chapter 11 of NAFTA and that claimant failed to fulfill requirements of Section B of Chapter 11. Ethyl defended jurisdiction of the Tribunal by arguing that by the time of hearing all the requirements of Chapter 11 for arbitration procedure were met. As for the scope of Chapter 11, Claimant argued that it challenged

by concerns about the environmental and health risks associated with MMT. In 1998, in a separate proceeding challenging the legislation, a Canadian court found the act to be invalid under Canadian law. Following this ruling, Canada and Ethyl settled the Chapter 11 claim in 1998 before proceeding to the merits. Under the settlement, the Canadian government agreed to withdraw the legislation and to pay Ethyl $13 million in compensation. This is a case that could have been a run-of-the-mill WTO filing. Although it was prompted in part by the domestic proceedings, its settlement also exemplifies the incentive that governments may have to compromise, despite a potentially strong defense of the merits.

In *Pope & Talbot, Inc. vs. Canada*,[66] a U.S. investor with a Canadian subsidiary that operated softwood lumber mills in British Columbia, filed a claim against Canada in an UNCITRAL tribunal alleging that Canada's implementation of the U.S.-Canada Softwood Lumber Agreement (SLA) violated national treatment and minimum standard of treatment.[67] Under the SLA, Canada had agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet. According to Pope & Talbot, Canada's allocation of the fee-free quota was unfair and inequitable. It argued that its investment was subjected to threats, its reasonable requests for information were denied, that it incurred unreasonable expenses and suffered loss of reputation in government circles. It also claimed that discrimination was associated with transitional adjustment provisions, unfair allocation of quota related to wholesale exports,

measures against it within the territory of Canada for which it is entitled to compensation, including for damages resulting to it outside of Canada. The Tribunal agreed with Ethyl that this argument is not that critical to be decided on procedural stage and it did not reject Ethyl's claim on that ground. The Tribunal noted that the MMT act was realization of the governmental program sustained over a long period of time and, in any event, by the time of commencement of arbitration there was a 'measure' adopted or maintained within the meaning of Art.1101. Part of Ethyl's claim was that the damages it had suffered included losses outside the territory of Canada. The Tribunal joined Canada's objections related to damages suffered outside of Canada and to trade nature of the dispute to the merits phase and rejected other objections.

66 Pope & Talbot Inc v The Government of Canada, Award on the Merits of Phase 2, UNCITRAL (April 10, 2001), and Pope & Talbot Inc v The Government of Canada, Interim Award, UNCITRAL (June 26, 2000).

67 The Claimant also argued for violations of Article 1106 ("Performance Requirements"), and Article 1110 ("Expropriation"). The Tribunal rejected both claims. Although it agreed that access to the U.S. market is a property interest covered by Article 1110, it found no expropriation, because the degree of interference with the Investments' business was no substantial enough to be qualified as expropriation. It should be noted that Pop & Talbot also originally alleged violation of MFN treatment, but this claim was dropped by the time of the interim award was issued.

inequitable reallocation of quota for British Columbia companies, and that Canada breached administrative fairness.

The tribunal found a violation of the minimum standards of protection but not of national treatment. It held that the administrative audit undertaken as part of export control regulation, to verify Pope & Talbot's quota, amounted to denial of fair and equitable treatment.[68] Regarding national treatment, after concluding that Canada's treatment of Pope & Talbot's investment should be compared with the treatment of other producers of softwood lumber in covered provinces, it found that Canada's policies for new entrants and its fees implementation did not discriminate against the foreign investors. Pope & Talbot had claimed damages totaling over US$507 million and the Tribunal awarded it with U.S. $461,566 in damages and interest on the findings of violation. (Had the Claimant prevailed in its national treatment claim, the damages would have been higher.)

This case also illustrates how national treatment and related claims characteristic of WTO disputes could be brought in an investor-to-State context. One of Canada's main defenses was that the Tribunal lacked jurisdiction because there was no 'investment dispute' within the meaning of Art. 1115, as the dispute was related to trade in goods. Drawing on interpretive practices for Article XX of the GATT Agreement, Canada claimed that its measures did not relate to investment because "relate to" should be construed to mean "primarily aimed at." Therefore, Canada claimed, the impact of the SLA and Canada's export regime on an investor's operations were not sufficient to support the conclusion that the measures related to investment. The Tribunal, however, concluded noted that all elements of a proper investment dispute were met and, with respect to the relationship between trade and investment, the Tribunal found that Chapter 11's reference to rules on the "treatment of investments with respect to the management, conduct and operation of investments is wide enough to relate to measures specifically directed at goods produced by a particular investment." This is the exactly the point: investment and trade law deal with the same activities. The WTO

[68] The tribunal found that Canada particularly breached NAFTA in the course of the quota audit, when it asked Pope&Talbot to ship its Canadian company's records back to Canada.

speaks to States about trade in goods and services, and BITs speak to the private economic actors carrying on trade. Unless we delve deeper into the theory and rationale for each system, we cannot draw a proper boundary between them.

One more illustration before I move on to my analysis of the WTO cases: In *S.D. Myers v. Canada*,[69] an American company with a Canadian affiliate, Myers Canada,[70] which engaged in the business of toxic waste containing polychlorinated biphenyl (PCB), claimed that Canada's ban on the export of PCB violated Canada's obligations under Chapter. The Claimant argued that the ban violated (i) national treatment, because following the export ban, U.S. waste disposal companies were not permitted to operate in Canada in the same fashion as Canadian PCB waste disposal companies; (ii) minimum standards of treatment, because the export ban by Canada was implemented and adopted in a discriminatory and unfair manner that amounted to a denial of justice and a violation of good faith under international law; (iii) the ban on performance requirements, because the export ban required PCB disposal operators to accord preference to Canadian goods and services and to achieve a given level of domestic content; and (iv) the expropriation rules of Article 1110. Canada claimed that there was no eligible investment under Chapter 11, because Myers Canada was not owned or controlled directly or indirectly by Claimant.

The tribunal rejected this defense and concluded that Myers Canada was an investment because it provided S.D. Myers with capital, know-how and managerial direction, and carried on business as if it was a branch of the U.S. Company. The tribunal went on to rule that Canada's actions had breached two of the four obligations invoked by the Claimant under Chapter 11. It found that the purpose of the ban was to protect the Canadian PCB disposal industry from U.S. competitors and favored Canadian nationals over non-nationals and therefore it constituted a breach of Articles 1102 and 1105. The Tribunal decided that no "requirements" within the meaning of

[69] S.D. Myers v. GovernmentofCanada, UNCITRAL Partial Award of 13 November 2000, available at *http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf*, and. SD MyersInc v Canada, SecondPartialAward, 21 October 2002, available at *http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersAwardDamages.pdf*.

[70] S.D. Myers, Inc. is affiliated with Myers Canada, a company incorporated in Canada, that is owned by individual shareholders of S.D.Myers.

Article 1106 were imposed on S.D. Myers, and that there was no "expropriation" under Article 1110. Again, a reader of WTO trade cases would find this case to be a classical disputes coming before the DSB. Yet the investment tribunal had no problem asserting jurisdiction over the dispute in the investor-to-State context, and finding a violation of the parallel national treatment obligations of Chapter 11 and of its minimum standards of treatment under international law clause.

In the following Part III, I show, applying my hypothetical IT, how the overlap between trade and investment results in the "capture" by the investment treaty of most WTO cases. The judgments I made in classifying the various cases as Investment Positives, Potentially Positives or Negatives will illustrate how, despite the uncertainty of the investment outcome of the trade disputes, the likelihood that under current law a Trade Positive will come out as an Investment Positive or Potentially Positive is substantial and meaningful. As I explain in greater details in the introductory comments to Part III, the goal of this research is to demonstrate (or disprove) the correlation between trade and investment outcomes. My conclusion is that, even if reasonable minds can disagree as to individual classifications and outcomes, the forest is clearly seen when we look at the overall picture and there is no doubt that the trade-investment overlap is a real and significant issue.

Part III: Case Analysis

A Few More Introductory Comments on Classification

On the trade front I have reviewed both decided cases and cases that were settled before reaching the Panel or AB stage. The principal questions that I faced in classifying the cases were (i) whether to classify a case as a Trade Positive when the WTO had not adjudicated the dispute, (ii) how to go about determining whether a Trade Positive translates into an Investment Positive where reasonable minds may differ on outcomes, and (iii) generally, how generally to group the cases to ease the reader's task. Regarding the third question, I followed classifications that trace some of the major case categories familiar to students of trade. Some of the cases are grouped by industry. Food, liquor, automotive, clean energies, textiles, tobacco, and other industries have been the focus of

multiple WTO filings. Some cases are grouped by subject matter. Patent, trademark and intellectual property cases are, for example, grouped in one category. There are no definitive classification guidelines. For example, whether the Australian plain packaging case is classified as an intellectual property filing, as I did, or a cigarette filing is of no particular import. Likewise, whether the Brazil – Retreaded Tires case is classified as an automotive case as I did or a general market access does not impact anything beyond ease of reading. Some cases did not fall readily into one category or another and I included them in a "General Market Access" catch-all category. My categorization judgments, I believe, fulfilled the purpose of the exercise, which is to show that in every major group of WTO cases discussed in this article there is a strong likelihood that a parallel cause of in action is available. (In the sequel to this article, a similar exercise will demonstrate that anti-dumping, subsidies and other cases may also be brought before an investment tribunal.)

Determining whether to classify a case as a Trade Positive or an Investment Positive or Potentially Positive required a more considered judgment. I made these determinations keeping in mind the purpose of this first stage of my project: determining the extent to which a legitimate cause of action under investment law may arise from the same core of operative facts as the trade cases. I did not seek to argue conclusively whether the investment case would be successful if brought to completion. As the Thunderbird discussion illustrates, different panels of arbitrators may reach different results based on their general understanding of the purpose of investment law. Also, many trade cases did not go beyond the request for consultations stage and did not include a fully developed record. This makes it difficult to predict with accuracy how a panel will rule on either the trade or investment side. So, for example, my goal is not engage in the business of predicting if the WTO will rule in favor of Australia or its 27 challengers in the plain packaging case and, in this article, whether the investment panel considering the issue will do so. Rather, I placed myself in the observation point of a summary judgment tribunal determining not only whether sufficient facts were in dispute to proceed to trial, but whether the ultimate decision maker may find a legal violation depending on his or her conclusions as to a legal standard which is in a state of flux and uncertain. On the Investment front, I nuanced my judgment by (applying the

criteria discussed below) downgrading to Potentially Positive cases where I concluded that the arbitrator would feel more reticence holding in favor of the complainant. This methodology accords with the goal of my project. This article and its sequel seek to examine the correlation between trade and investment outcomes, and my methodology furthers the inquiry.

In making judgments as to individual cases, I have tried to balance between over-caution and enthusiastically piling up Positives. Both extremes may have skewed the analysis, either towards finding less of a correlation than actually exists, or too much. To avoid those tendencies, I have adhered to the following principles and guidelines:

- To be a Trade Positive, the WTO proceedings must have either (i) resulted in a ruling in favor of the Claimant, or (ii) if the case was resolved before a Panel or Appellate Body ruling, it stood a good change of being decided in favor of the Claimant under established principles of WTO law accepting as true the allegations made in the request for consultations (and, in some instances, background facts reported in the media). I have relied on my experience reading these cases to apply a "smell test." Oftentimes, this was an easy task: yet another discriminatory charge seemingly intended to keep out competition, or a licensing scheme applied in a discriminatory fashion. In other instances, the record was not detailed enough to make a conclusive call: is Argentina's beef really disease free, or does the United States' ban actually protect its consumers' health? In those cases, I have done the best I can with the available evidence. No doubt I could have delved in greater depth into research into individual cases, but I have preserved resources by keeping in mind that this is less the point of the exercise than to paint an accurate picture of the overall investment/trade forest.
- I considered all cases that involve sensitive issues of State sovereignty, even if the WTO chose or would likely choose to uphold the complainants' interests in the face of the sovereignty issues, as serious candidates for a downgrade to Investment Potentially Positive or Negative status. I am

presuming that an arbitral tribunal awarding monetary damages to a private party in a proceeding against a State will be even more sensitive to concerns of conflicting State policies than a WTO Panel or the Appellate Body. The WTO will be more likely to tell the United States that it should study less trade restrictive measures than requiring foreign countries to follow sea turtle protection regulations similar to U.S. law, knowing that the US has some time to come into compliance with its ruling, than an ICSID Panel asked to give a Venezuelan shrimping company damages for lost sales while the US ban was in place. Yet, investment law does not formally provide for such an analysis, and as will be seen many cases implicating these types of issues still fell on the Investment Positive side.[71]

- Conversely, I have not hesitated to classify as Investment Positives cases where the allegations of protectionism are not counterbalanced by any legitimate State interest that appear on the available record, or when the case appears to raise familiar allegations of economic protectionism unrelated to any trade-legitimate State interest.
- I have also considered cases where a violation of the SPS, TBT or TRIPS Agreement provision that does not implicate a discrimination rationale as serious candidates for a downgrade to Investment Potentially Positive or Negative outcomes. Therefore, if a case involves a trade finding that a risk assessment was not conducted or insufficient evidence exists to justify an SPS measure, I would be more inclined to classify the case as an Investment Potentially Positive or Negative rather than a Positive. However, I also took into consideration (i) the possibility that an arbitrator might infer discrimination where the WTO focused more on an SPS or TBT analysis and did not find it necessary to delve in greater depth into the protectionism rationale and (ii) that the arbitrator might find the failure to comply with the applicable trade treaty to amount to a violation of the minimum standards of treatment of the investment treaty. These

[71] In the third part of this project, I propose a framework that, among other factors, uses the nature of the State interest involved as a factor in distinguishing Trade Positives from Trade Negatives.

factors have, in many instances, pushed a case back to the Investment Positive category.

The majority of cases that were presented to the WTO did not involve extraordinary conflicts between national interests and international trade. As trade students, we tend to focus on the difficult, borderline cases, which raise the most interesting and provocative issues. The actual review of the cases, however, tells a different narrative. It reflects the leaps and bounds through which the world's economies have become gradually intertwined, and the barriers that world trade has broken down to get there. Liquor industries tending to favor culturally popular products were opened up to foreign imports. Emerging economies bent on slowing down foreign products' access and to build a local consuming society were asked to allow the rest of the world to compete for a share of the proceeds of their export-driven growth. Agricultural protectionism was repeatedly challenged. I made a good faith attempt to classify cases keeping in mind that the goal of the exercise is to give a legally and factually sound picture of the investment and trade fields; I believe that after reading the case summaries and analysis, the reader will accept my methodology as a reasonable means of getting this job done. Onwards to the cases:

The Liquor Cases

Most students of trade will read at least a few liquor cases. A highly lucrative industry, it is also the home to cultural biases and stereotypes. The French, we all know, drink wine. The Brits will not take a wine cooler to Old Trafford, even if they were paid to do so. The Japanese will not switch from shochu to vodka, even though the liquids look quite similar. Neither will the Chileans turn away from pisco or the Koreans from soju. Yet, all liquor cases are easy Trade Positives. Time and again, the WTO has received notifications and/or adjudicated complaints that a Contracting Party crafted taxation or regulation that discriminated against foreign liquor in favor of a popular brand of alcohol. These cases resulted or would result if adjudicated in a violation of international trade rules principally because they tend to share the following hallmarks:

- They do not implicate weighty concerns of national sovereignty.

- In fact, they may not implicate any concern other than the protection of domestic liquor (wine in France, beer in England, shochu in Japan, soju in Korea etc.) that local consumers have a habit of using and that are culturally associated with the defending States.
- The taxation or regulation scheme, although drafted neutrally from a formal standpoint (e.g., imposing a higher tax based on manufacturing processes but not naming the foreign liquor made by these processes), has a substantially disparate impact on the foreign liquor. There is no doubt, when the tax is applied to domestic and foreign categories of products, that the foreign product is discriminated against *de facto*,
- Consumer preferences fall squarely on the side of the domestic liquor. However, the taxation or regulation providing it with more favorable competitive conditions may have calcified the choice by making it financially logical and creating a habit of purchase. Mexicans might drink Tequila and the French may sip wine, but they might shift in time to foreign liquor if the prices are equalized. (Who would have thought four decades ago that wine bars would become popular in London?) The trade tribunals' job is to create the legal playing field to unleash those forces of integration.
- The likeness analysis under the GATT/WTO may involve formal differences between the products at issue, e.g. their alcohol content, their use as digestives as opposed to cocktails, or the manufacturing processes or raw materials used, but it will not be conclusive. Similarly, the consumer preferences analysis may show definitive results as to the tastes of the consumer at a given point in time, because of the cultural biases, but the structural price discrimination underlying the preference will make these findings inconclusive because the trade tribunal will not know the extent to which historical pricing differentials drove tastes and if changes in pricing will transform the market and level the playing field. (This is a classical chicken-and-egg problem.)

All of my 16 Liquor Cases below are Trade Positive. The best explanation for this result is that, absent countervailing sovereignty concerns of sufficient import, the measure at

issue can only be characterized as protectionist, culturally biased, or otherwise squarely running counter to the WTO's ethos. The trade tribunals of the WTO, much like their counterparts in the European Union or other free trade areas and customs unions, will seek to level the competitive field by declaring measures based on cultural stereotypes that became enshrined in national preferences to be trade-inconsistent. The removal of the disadvantageous competitive conditions will in turn enable foreign liquor to gradually gain access to domestic markets and transform national preferences. While the producers and sellers of domestic liquor will find their market share reduced, the protection of their economic interests will not without more outweigh trade law's compelling interest in removing artificial barriers to their import. Taking the factual claims made by a complaining State as true, the same result is highly likely to obtain in controversies that have been notified but did not reach the Panel adjudication stage.

As shown in the following table and analysis, the investment outcomes in this category correlate perfectly with the trade outcome, for essentially the same reasons. (TP means "Trade Positive" and "IP" means "Investment Positive.")

Liquor Cases

DS 8, 10, 11: Japan – Taxes on Alcoholic Beverage –Schochu	TP	IP
DS 75, 84: Korea - Taxes on Alcoholic Beverages –Soju	TP	IP
DS 87, 109, 110: Chile - Taxes on Alcoholic Beverages –Pisco	TP	IP
DS 261: Uruguay - Tax Treatment on Certain Products	TP	IP
DS 263: EC - Measures Affecting the Import of Wine	TP	IP
DS 352: India - Measures Affecting the Importation and Sale of Wines and Spirits from the EC	TP	IP
DS 354: Canada - Tax Exemptions and Reductions for Wine and Beer	TP	IP
DS 370: Thailand - Customs Valuation of Certain Products from the European Communities	TP	IP
DS 380: India - Measures Affecting the Importation and Sale of Wines and Spirits from the EC	TP	IP
DS 396, 403: Philippines -Taxes on Distilled Spirits	TP	IP

DS 411: Armenia - Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages	TP	IP
DS 423: Ukraine - Taxes on Distilled Spirits – Moldova	TP	IP

Japan - Taxes on Alcoholic Beverage.[72] The European Communities, Canada and the US argued that Japanese internal taxation protected *shochu,* a popular domestic liquor, and discriminated against other, almost exclusively imported liquors. Both the WTO Panel and the Appellate Body found Japan in violation of Art. III.2 of the GATT on the grounds that Japan imposed a lower tax on *shochu* than other imported beverages, which were either "like" (for vodka) or "directly competitive" (for whisky, brandy, rum, gin, genever, and liqueurs). This early WTO case is notable because the WTO tribunals did not adopt the litigating parties' argument that protectionist intent or motive should be the primary guidepost to determining likeness or competitiveness between domestic and foreign products. It is often cited as one of the earliest references for WTO national treatment jurisprudence and interpretive stance on Article III. It is a clear Trade Positive.

If any foreign producer of imported beverages had a distribution subsidiary in Japan, its operations would be negatively impacted by the Japanese measure in violation of Article III of the hypothetical IT. No defense would exist under Article VIII of the IT. Alternatively, the importer would rely on the minimum standards of treatment provisions to argue that the scheme as a whole constitutes manifest injustice and arbitrary treatment, or that it had a legitimate expectation that the host State would comply with its obligations under international law. The only issue of controversy would relate to the quantification of damages. Measuring lost profits would face the obstacle customarily encountered in cases where the aggrieved party's ability to generate profits is speculative. Japan might argue again that the entrenched consumer preferences mean that the local market will always prefer the local product. If equalizing the competitive conditions does not impact consumer choices in the marketplace, the

[72] WT/DS10/R, WT/DS11/R, WT/DS8/R, *Japan - Taxes on Alcoholic Beverages*,Panel report (11 July 1996); WT/DS10/AB/R, WT/DS11/AB/R, WT/DS8/AB/R, *Japan - Taxes on Alcoholic Beverages,* AB report (adopted 1 November 1996), (hereafter: '**Japan — Alcoholic Beverages II'**)

complainant may have no lost profits. As it would do when faced with this argument on the merits of whether national treatment was violated in the first place, the Tribunal would likely respond that we will never know with certainty until we remove the discriminatory measure whether, but for the discrimination, tastes would be different. Despite the speculative nature of the damages, then, the arbitral tribunal will have a basis to hold that the discriminatory measure prevented the importer from gaining a market share, and determine the extent of the lost business by, say, comparing the imported product's shares of similar markets in comparable jurisdictions, comparing the market shares of other foreign products in the host country, or any other methods customarily used to calculate damages.

Applying the same analysis, the following cases also come out as Investment Positives:

Korea - Taxes on Alcoholic Beverages.[73] This case involved a Korean tax imposed on foreign liquor but not on a popular and domestically favored drink, *soju*. The EC claimed that the Korean Liquor Tax Law and Education Tax Law imposed different tax rates for various categories of distilled spirits that favored *soju*. The EC argued that Korea violated Article III:2 by taxing imported distilled alcoholic beverages, including whisky, brandy, rum, gin, vodka, tequila, liqueurs and ad-mixtures, in a less favorable manner. The Panel and Appellate Body agreed, and found that these foreign liquors were directly competitive and substitutable to *soju*, and that the tax differential was applied so as to afford protection to domestic production. This case is the mirror image of the *shochu* case.

Chile - Taxes on Alcoholic Beverages.[74] Chile imposed a higher tax on imported spirits products identified by HS classification 2208, including whisky, brandy, rum, gin, vodka, liqueurs, aquavit, korn, fruit brandies, ouzo and tequila, than that imposed

[73] WT/DS75/R, WT/DS84/R, Korea – Tax on Alcoholic Beverages, panel report (17 September 1998), WT/DS75/AB/R, WT/DS84/AB/R, Korea – Tax on Alcoholic Beverages, AB report (18 January 1999).

[74] WT/DS110/AB/R, WT/DS87/AB/R,Chile — Taxes on Alcoholic Beverages, AB report (13 December, 1999). The United States notified its own consultation request on the same subject matter. WT/DS109/1(16 December, 1997).

on *pisco*, a locally brewed spirit. Chile defended the tax on the grounds that the differentials in tax rates were based solely on their alcoholic content, and not on the name or origin of the spirits. The Panel and the Appellate Body concluded that imported distilled spirits and *pisco* were directly competitive and substitutable products, and were taxed so as to afford protection to the domestic products in violation of Article II. This is another standard case where the facially neutral measure has a substantial disparate impact on the foreign products and no domestic justifications.

Uruguay - Tax Treatment on Certain Products.[75] Chile requested consultations with Chile regarding an internal tax scheme that established a tax base for sales calculated using "notional prices," i.e. prices established by the government instead of being reached through actual sales. Chile argued that the notional prices discriminated against foreign products. Chile claimed that several products that it sold into Uruguay, including liquor and cigarettes, were affected. For example, Chile claimed that Chilean wines were classified in a category where the notional price was about twice as high as that of the category where Uruguay's wine was classified. Chile claimed a violation of national treatment.[76] Chile's allegations, if taken as true, raise a substantial likelihood of a GATT violation and discrimination against foreign products, effectuated through artificially skewed notional prices.

European Communities – Measures Affecting the Import of Wine.[77] Argentina requested consultations regarding EC measures affecting oenological practices for winemaking. Argentina contended that the European measures deviated from international standards and disparately impacted Argentinean wine in violation of Article III-4. Argentina also argued that the EC had entered into selective agreements with certain WTO members relaxing the requirements applicable to the wine acidification process, without extending the same benefits to other countries, thereby violating the most favored nation clause. The allegations raise the inference that this

[75] WT/DS261/1 *Uruguay — Tax Treatment on Certain Products*, Request for Consultation (18 June, 2002).

[77] WT/DS263/1 *European Communities — Measures Affecting Imports of Wine*, Request for Consultation (4 September, 2002).

case involves discriminatory treatment, albeit of the most favored nation clause of IT Article IV rather than the national treatment of IT Article III. The outcome remains the same. If the allegations of Argentina are true, the measures discriminate between similarly situated products based on their national origin, without any countervailing domestic purpose. This is a Trade Positive and Investment Positive.

Canada — Tax Exemptions and Reductions for Wine and Beer.[78] This is another case alleging straightforward protection for local products. Canada reduced its excise taxes and gave other preferential treatment for wine produced locally. The European Communities requested consultations and challenged the measures as violations of national treatment. The dispute was resolved by a mutual agreement pursuant to which Canada reduced some customs duties on a most-favored nation basis. The protectionism allegations push this case squarely in the Trade Positive and Investment Positive categories.

Thailand — Customs Valuation of Certain Products from the European Communities.[79] The European Communities requested consultations with Thailand to challenge measures affecting the import of liquor that essentially amount to minimum import prices. The EC claimed that Thailand applied a formula for valuing customs duties which relied on a standard margin of profit, and on the wholesale price of the goods on the Thai market rather than the landed duty price. This formula inflated the declared price of the goods for purposes of applying the duty. The EC argued that the Thai measures violated Article III and Article XI of the GATT Agreement. This is a Trade Positive/Investment Positive case for essentially the same reasons as the case against Uruguay described above.

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[78] WT/DS375/1 *European Communities and its Member States fo— Tariff Treatment of Certain Information Technology Products,* Request r Consultation (16 August, 2010).

[79] WT/DS370/1 *Thailand — Customs Valuation of Certain Products from the European Communities,* Request for Consultation (25 January 2008).

India - Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities (India).[80] The relevant portions of this case raise allegations of violations of national treatment and most favored nation clause, and a challenge to legal restrictions on retail sale applied by means of a discriminatory licensing system. The EC argued that the import, transportation and sale within India of wines and spirits was *de facto* criminalized, with exceptions granted to holders of local licenses. The EC further alleged that for all intents and purposes foreign companies did not have access to the licenses. The authority for establishment of the Panel lapsed on 17 July 2008, and on September 22, 2008 the case was re-opened under a new action, *India - Certain Taxes and Other Measures on Imported Wines and Spirits (India.)*[81] In the new proceedings, the EC requested consultations with India regarding discriminatory taxation that it claimed applied to imports of bottled wines and spirits by the Indian states of Maharashtra and Goa as, and regarding restrictions on retail sale applied by the State of Tamil Nadu. The EC claimed that the measures adversely affected exports of wines and spirits from the EC to India and are inconsistent with Article III:2 and III:4. Here again, the claims of discrimination and impediments to market access targeted at products of a specific country make this case a clear Trade Positive and Investment Positive.

Philippines -Taxes on Distilled Spirits.[82] The Philippines imposed taxes on distilled spirits using different rates, depending on the type of materials used to make the liquor. Certain designated materials such as sugar and plum, which tended to be used for local spirits, were taxed at a lower rate. Other materials, used to distill the majority of imported spirits, were taxed at a higher rate. The Philippines contended that the tiered tax system was based on an objective criterion of raw materials, and not whether the product is domestic or imported. The Philippines further argued that even if the sugar-based and non-sugar-based spirits were directly competitive or

[80] WT/DS352/1 *India - Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities*, Request for Consultation (20 November 2006).

[81] WT/DS380/1*India - Certain Taxes and Other Measures on Imported Wines and Spirits*, Request for Consultation (22 September, 2008).

[82] WT/DS396/AB/R, WT/DS403/AB/R *Philippines – Taxes on Distilled Spirits*, AB Reports(adopted 20 January 2012).

substitutable the tax differentials were insignificant relative to the higher price of foreign products. The foreign products would remain out of reach of the vast majority of domestic consumers whether or not the tax remained in place.[83] The Panel disagreed, and ruled against the Philippines on the grounds that domestic spirits were made from the tax-favored raw materials while the majority of imported spirits were made from non-designated materials. Thus, while the measure was facially neutral, it was nevertheless discriminatory and violated Article III.2 of the GATT. The Appellate Body agreed with the Panel, and upheld most of its findings. The finding of discrimination arising from the disparate impact of the measure, without any countervailing domestic purpose other than economic protectionism, makes this case a Trade Positive and an easy Investment Positive as well.

Armenia — Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages.[84] The Ukraine requested consultations with respect to an Armenian excise tax schedule on imported alcoholic beverages that imposed rates substantially higher than those applied on like domestic products. This was the first ever proceeding brought by the Ukraine before the WTO. The request for consultations focused primarily on cigarettes imports, but it also claimed that the excise taxes imposed by Armenia on alcoholic beverages imposed a lower rate on domestic products than on directly competitive or substitutable products imported from Ukraine. The Ukraine argued that the measures afforded protection to the domestic production. Taking as true the Ukrainian allegations of discriminatory treatment, this case falls on the Trade Positive and Investment Positive side because it involves a classically discriminatory taxation system.

Ukraine -Taxes on Distilled Spirits.[85] A Panel was established on July 20, 2011, pursuant to Moldova's allegations that the Ukrainian tax system discriminates against

[83] "Deminimis" is defined as the extent to which the tax burden affects the competition of products on the market.

[84] WT/DS411/1 *Armenia — Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, Request for Consultation (20 July, 2010).

[85] WT/DS423/1 *Ukraine -Taxes on Distilled Spirits*, Request for Consultation (3 March, 2011).

imported Moldovan alcohol in violation of Article III of the GATT. The Ukraine Tax Code differentiates between spirits, taxing some such as brandy higher than other potentially like or competitive products such as Cognac. Moldova argued that its spirits were taxed at almost four times the rate than like or competitive domestic products, including for example Ukrainian Cognac. This is also case that, assuming the discrimination allegations made by the complainant are true, squarely falls on the Trade Positive and Investment Positive side because it challenges a tax scheme that disfavors foreign products and creates structural distortions to the foreign products' ability to compete.

Cigarettes and Related Products

This category of cases borrows some of the features of the Liquor Cases and the Food Cases described below. Some of the Liquor Cases reflect a straightforward desire to protect a profitable domestic industry, much like domestic liquor had a tendency to elicit protectionism from government. Other proceedings implicate health concerns of a legitimate kind and, yet, the science and effectiveness of the measure at hand may not satisfy a scrutinizing trade eye. Peru, for example, blatantly tried to protect its own cigarettes by distinguishing between cigarettes based on the number of countries in which they are sold. This case presents vastly different concerns than the plain packaging law proceeding where, after years of debate, Australia decided to adopt an extreme form of ban on attractive cigarettes advertisement. Standing in the middle of these two poles, we find cases like the clove cigarette proceedings where the United States selectively targets flavored cigarettes by banning clove cigarettes but not menthols. The Peru and United States cases fall in the Trade Positive side of the divides, and I found sufficient evidence of protectionism to classify Peru in the Investment Positive side of the divide as well, and I classified the cloves cigarettes controversy as a Potentially Positive investment outcome because it involved a fair dose of unjustified discrimination between foreign and imported products, mixed with a legitimate health interests.

The Australian plain packaging case presented a more difficult dilemma. The complaint involved both discrimination claims and TBT and TRIPs arguments to the effect that the plain packaging measures unnecessarily burdened commerce and

deprived the trademarks at issue of their essential purpose. The allegations raise sufficiently serious questions of trade compliance to place the case in the Trade Positive category. If the discrimination claims had no merit I would have readily classified the case as an Investment Negative, even though the TBT and TRIPs claims may well prevail before the WTO. However, depending on the evidence adduced at trial, there is a possibility that the discrimination claims may prevail in that the measures at issue have a disparate impact on foreign makers of cigarettes with a solid brand name. The net effect of the Australian legislation could turn out to be a negligible effect on smoking but a substantial shift of smokers' preferences from foreign branded cigarettes to plainly packaged, cheaper domestic brands. This is the gist of the national treatment argument of the complainants. I have, therefore, classified the Australian case as an Investment Potentially Positive.

The following table describes the outcome of the cigarettes cases. (The reader will note that I have not repeated my discussion, found at various places above, of the Australian plain packaging case.)

Cigarettes and Related Products Cases

DS 227: Peru - Taxes on Cigarettes	TP	IPP
DS 232: Mexico - Measures Affecting the Import of Matches	TP	IP
DS 300, 302: Dominican Republic - Importation and Internal Sale of Cigarettes	TP	IPP
DS 371: Thailand - Cigarettes from the Philippines	TP	IP
DS 406: United States – Clove Cigarettes	TP	IPP

WT/DS434/1; WT/DS435/1; WT/DS441/R Australia -Plain Packaging	TP	IPP

Peru – Taxes on Cigarettes.[86] Chile requested consultations with Peru with respect to a measure imposing disparate taxation rates on different categories of cigarettes. Chile claimed that the variation in rates was based on the number of countries in which the particular brand of cigarettes was marketed, with cigarettes marketed in more than three countries subject to higher tax than those marketed in less than three. Peruvian cigarettes predictably fell in the lower tax category, whereas Chilean cigarettes were marketed in more than three countries and taxed at the higher rate. Chile claimed a violation of national treatment. It ultimately notified its intention to withdraw the claim based on Peru's agreement to equalize tax rates. This case is a Trade Positive and an Investment Positive because of the discrimination allegations and the lack of any domestic justification.

Mexico — Measures Affecting the Import of Matches.[87] Chile requested consultations with Mexico regarding a measure classifying matches as regulated explosives. The classification had the effect, according to Chile, of affording protection to the Mexican matches because imported matches were subjected to burdensome security measures normally reserved for explosives. Those measures affected the entry, packaging, storage, and transportation of matches. Chile claimed that they aimed at sheltering the domestic industry. It withdrew its claim based on Mexico's agreement to eliminate the challenged measure. This filing raises an inference of discrimination against foreign matches disguised as a classification unjustified by the nature of the product, and counts as a Trade Positive as well as an Investment Positive.

[86] WT/DS227/1 *Peru – Taxes on Cigarettes,* Request for Consultation (1 March 2001).
[87] WT/DS227/1 *Mexico — Measures Affecting the Import of Matches,* Request for Consultation (17 May, 2001).

Dominican Republic -Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic).[88] The Dominican Republic adopted several measures that affected the importation and internal sale of cigarettes. These measures included a requirement that a tax stamp be affixed to cigarette packs for sale in the Dominican Republic and to post a bond to secure tax payments. The Panel and Appellate Body found that, although the tax stamp requirement applied to both domestic and imported cigarette pack, it violated national treatment by modifying the conditions of competition to the detriment of importers. For domestic cigarettes, the stamp could be affixed during the production process before the cellophane wrap is applied. Domestic producers could, then, affix the stamp on the cigarette packs on their own premises. The law had a disparate impact on foreign cigarette producers because they had to affix the stamp within the Dominican Republic, after importing the products. Foreign producers were not allowed to affix the stamp on their own premises abroad. Instead, imported cigarette packs had to be placed in a bonded warehouse pending affixation of the stamp. The Dominican Republic claimed that the tax stamp requirement was important, and designed to secure tax compliance and prevent deceptive practices, such as cigarette smuggling. The Dominican Republic added that the link between cigarette smuggling and public health is well established. Consequently, as the tax-stamp requirement aims to prevent the smuggling of cigarettes, it also helps to ensure the health and well-being of citizens, "both of which are interests of fundamental and critical importance.".[89] The Dominican Republic argued that the tax stamp requirement was a "necessary" enforcement instrument because of the value and importance of the interests it protects.

The Panel and the Appellate Body rejected those arguments on the grounds that there existed a less-trade restrictive alternative to the tax stamp requirement and the measure was therefore not "necessary" under Article XX(d). The Panel and the Appellate Body found that allowing stamps to be affixed abroad, coupled with pre-shipment inspection and certification, would achieve the same level of enforcement. As

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[88] WT/DS302/AB/R *Dominican Republic -Measures Affecting the Importation and Internal Sale of Cigarettes,* AB Report (April 25, 2005, adopted May 19, 2005).

[89] Dominican Republic's appellant's submission, para. 40.

this kind of alternative measure would be administratively feasible for the Dominican Republic, this constituted an alternative measure that would be less-trade restrictive than the one in place. The case is Trade Positive. I classified it as a Potential Positive, and rejected both Positive and Negative categorization, because of the finding that a less trade restrictive measure existed to accomplish the compliance purpose. This finding raised an inference that the measure had a sufficiently strong protective purpose to overcome the potential application of the exception for measures securing compliance with legitimate domestic measures of IT Article VIII. On the other hand, it is possible that the respondent country will persuade the arbitrator that it must impose restrictions on foreign cigarettes will find that pre-shipment checkpoints do not sufficiently reduce the risk of fraud. The arbitrator might pause before awarding damages for a measure that the respondent country claimed to have been in place to combat smuggling and deceptive practices, whereas the WTO will more easily ask that government to find reasonable alternatives and only then suspend the measure.

Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines.[90] The Philippines challenged various Thai measures affecting the imports of cigarettes. The national treatment violations included claims that Thailand calculated the tax base for imported cigarettes in a manner less favorable than for domestic cigarettes, and maintain a VAT exemption regime that exempted resellers of domestic cigarettes but required that resellers of imported cigarettes comply with additional administrative requirements. The Panel found that Thailand deviated from its methodology when calculating the tax base for foreign cigarettes, thereby establishing less favorable competitive conditions for the imports, and also that the facial requirement that imports comply with additional administrative burdens to secure the benefit at issue violated national treatment. The Appellate Body essentially endorsed the Panel's findings. This case is a Trade Positive and an Investment Positive because of the findings of discrimination without any countervailing domestic purpose.

[90] WT/DS371/R Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, Panel Report (15 November 2010); WT/DS371/AB/R Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, AB Report (17 June, 2011).

United States – Measures Affecting the Production of Clove Cigarettes.[91] Indonesia challenged the United States ban on clove cigarettes, on the grounds that the United States statute allowed menthol cigarettes to be marketed. Indonesia is the world's main producer of clove cigarettes. The AB affirmed the Panel's finding that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the TBT Agreement. The AB ruled that likeness under the TBT should be evaluated applying the same criteria as under Article III (physical characteristics, end-uses, consumer tastes and habits, and tariff classification) so as to assess the competitive relationship between the products. The AB further held that whether imported products are subject to treatment less favorable than domestic products should be determined on a case by case by reference to the design, architecture, revealing structure, operation and application of the measure under scrutiny. Detrimental impact on foreign products may not necessarily rise to the level of less favorable treatment if it stems exclusively from a legitimate regulatory objective. Applying these standards, the AB ruled that the United States had violated Article 2.1 of the TBT.

This case is a Trade Positive and I classify it as an Investment Potentially Positive because of the finding of unnecessary discrimination against foreign products. The finding of discrimination by the DSB is sufficient in all likelihood to support an arbitral finding that the United States violated the rights of a distribution subsidiary of a clove cigarette maker. The question will become whether, under the health exception of IT Article VIII, the measure is "necessary to protect human health." The measure easily qualifies as a health related measure. However, the United States allows the marketing of menthol cigarettes, which arguably are the domestic equivalent of clove cigarettes in the "perfumed tobacco" category. The failure to ban menthol cigarettes along with cloves raises a strong inference of arbitrary discrimination and protectionism to shelter a domestic industry, and there is a good chance that the arbitrator will find that, in these circumstances, the measure is not "necessary" to further the health goal. The measure

[91] WT/DS406/AB/R *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, AB report (4 April 2012).

of damages will be lost sales, which might be difficult to calculate if the complainant did not do business on the United States market before the measure was adopted. Nonetheless, despite the potentially speculative nature of the lost sales calculation, expert testimony might establish with some reasonable degree of certainty the lost share of the market, including possibly by drawing comparatively on market penetration data in jurisdictions where menthol and cloves cigarettes coexist.

Food Cases

I gathered all food-centered cases, including agricultural products such as bovine hides and soft drinks, in one category. Food Cases have abounded in the WTO. The narrative of the filings shows a clear trend towards unjustified discrimination. The Food Cases read like a manual for protectionist measures. Countries have denied foreign products the right to use appellations commonly known by local consumers. Thus, only local sardines would qualify as such in southern Europe, and only local shrimp could be sold under the *Coquilles Saint Jacques* name that all French seafood lovers know. Governments barred the import of food products suspected of creating health risks even though the countries of import were disease-free. Ports have been shut down to foreign imports and inspection measures artificially created for the express purpose of slowing down the import of foreign goods. Alternatively creative or predictably protective in crafting measures, governments have worked hard at protecting their domestic food sector.

Some food cases will raise legitimate issues of health, consumer safety or other domestic concerns. These cases could implicate not only obvious dangers like foot-and-mouth or mad cow disease, but also production techniques like those involving genetically modified organisms or hormones that may create risks for the consumer. In those instances the science may not be definitive, and the trade tribunal will have to determine whether the measure at issue, assuming it has a sufficiently pronounced disparate impact on the foreign product, amounts to an unjustified denial of national treatment. If the measure applies neutrally and does not violate national treatment, the DSB will still have to analyze whether it violates the SPS because of an insufficient scientific basis for applying it. For those cases, where there is a genuine and substantial question as to health or other domestic purpose of the regulation at issue, or where a

non-discrimination rationale applies on the trade side, I have determined the Investment outcome using the factors described above and seriously considered Investment Negative classification, and at the very least downgraded the case to a Potentially Positive, regardless of whether the WTO has or might have ruled in favor of the complainant.

The following table summarizes how I classified the Food Cases.

Food Cases

DS 3: Korea, Republic of - Measures Concerning the Testing and Inspection of Agricultural Products	TN	IN
DS 5: Korea - Measures Concerning the Shelf Life of Products	TP	IP
DS 7, 12, 14: EC - Trade Description of Scallops	TP	IP
DS 16: European Communities - Regime for the Importation, Sale and Distribution of Bananas	TP	IPP
DS 18: Canada - Measures Affecting Importation of Salmon – Australia	TP	IP
DS 20: Korea, Republic of - Measures concerning Bottled Water	TP	IP
DS 21: Australia - Measures Affecting the Importation of Salmonids	TP	IP
DS 26, 48: EC - Measures Concerning Meat and Meat Products (Beef with Hormones)	TN	IPP
DS 41: Korea, Republic of - Measures concerning Inspection of Agricultural Products	TN	IN
DS 58, 61: United States - Import Prohibition of Certain Shrimp and Shrimp Products	TP	IPP
DS 72: European Communities - Measures Affecting Butter Products	TP	IP

DS 74: Philippines - Measures Affecting Pork and Poultry	TP	IP
DS 76: Japan - Measures Affecting Agricultural Products	TP	IPP
DS 100: EC - Ban on the Import of Poultry - United States	TP	IPP
DS 102: Philippines - Measures Affecting Pork and Poultry	TP	IP
DS 105: European Communities - Regime for the Importation, Sale and Distribution of Bananas	TP	IP
DS 107: EC - Export Measures Affecting Hides and Skins – Pakistan	TP	IP
DS 111: United States - Tariff Rate Quota for Imports of Groundnuts	TP	IP
DS 120: EC - Measures Affecting Export of Some Commodities – India	TP	IP
DS 133: Slovak Republic - Measures Concerning the Importation of Dairy Products and the Transit of Cattle	TP	IP
DS 134: EC - Restrictions on Certain Import Duties on Rice	TP	IP
DS 143: Slovak Republic - Measure Affecting Import Duty on Wheat from Hungary	TP	IP
DS 144: U.S. - Measures Affecting the Import of Cattle, Swine, and Grain – Canada	TP	IPP
DS 148: Czech Republic - Measure Affecting Import Duty on Wheat from Hungary	TP	IP
DS 154: EC - Measures Affecting Differential and Favourable Treatment of Coffee	TP	IPP
DS 155: Argentina - Measures Affecting The export of Bovine Hides and the Import of Finished Leather	TP	IPP

DS 161, 169: Korean measures affecting imports of fresh, chilled and frozen beef	TP	IP
DS 193: Chile - Measures Affecting the Transit and Importation of Swordfish	TP	IP
DS 205: Egypt - Import Prohibition on Canned Tuna with Soybean Oil	TP	IPP
DS 209: Brazil - Measures Affecting Soluble Coffee	TP	IP
DS 231: EC - Trade Description of Sardines	TP	IP
DS 237: Turkey - Certain Import Procedures for Fresh Fruit	TP	IP
DS 240: Romania - Import Prohibition on Wheat and Wheat Flour – Hungary	TP	IP
DS 245: United States - Measures Affecting the Importation of Apples	TP	IPP
DS 250: United States - Equalizing Excise Tax	TP	IP
DS 255: Peru - Tax Treatment on Certain Imported Products	TP	IP
DS 256: Turkey - Import Ban on Pet Food from Hungary	TP	IPP
DS 270, 271: Philippines (EC and Thailand) - Health Related Measures on Importation of Fruit and Vegetables	TP	IPP
DS 275: Venezuela - Import Licensing Measures on Certain Agricultural Products	TP	IP
DS 276: United States - Canadian measures related to the import of wheat	TP	IP
DS 279: EC - Import Restrictions on agricultural, pharmaceutical, and technological products, matches, and other items	TP	IP
DS 284: Nicaragua - Import Procedures of Black Beans Claimed Discriminated	TP	IP
DS 287: Australia - Quarantine Regime for Imports	TP	IPP

DS 297: Croatia - Import Ban on Pet Food from Hungary	TP	IPP
DS 308: Mexico - Tax Measures on Soft Drinks and Other Beverages	TP	IP
DS 334: Turkey Measures Affecting the Importation of Rice	TP	IP
DS 367: Australia - Measures Affecting the Importation of Apples from New Zealand	TP	IPP
DS 369: EC - Measures Prohibiting the Importation and Marketing of Seal Products	TP	IP
DS 381: United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (United States Tuna II)	TP	IPP
DS 384, 386: United States - Certain Country of Origin Labeling (COOL) Requirements	TP	IP
DS 389: EC - Measures Affecting Poultry Meat and Poultry Meat Products	TP	IPP
DS 391: Korea - Measures Affecting the Importation of Bovine Meat and Meat Products from Canada	TP	IPP
DS 392: United States - Certain Measures Affecting Imports of Poultry from China	TP	IP
DS 400, 401: EC - Measures Prohibiting Importation and Marketing of Seal Products	TP	IPP
DS 430: India - Measures Concerning the Importation of Certain Agricultural Products from the United States	TP	IP
DS 447: U.S. - Measures Affecting Importation of Animals, Meat and other Animal Products from Argentina	TP	IPP
DS 448: United States - Measures Affecting the Importation of Fresh Lemons	TP	IP

DS 455: Indonesia - Importation of Horticultural Products, Animal and Animal Products	TP	IP

The following Food Cases are Trade Positive and, for the reasons explained below and in the application of investment law to these cases, Investment Positive:

Korea —Testing and Inspection of Agricultural Products. [92] The U.S. requested consultations with Korea involving testing and inspection requirements with respect to imports of agricultural products into Korea. The measures were alleged to be in violation of GATT Articles III or XI, Articles 2 and 5 of the Agreement on Sanitary and Phytosanitary Measures, TBT Articles 5 and 6 and Agriculture Article 4. I classified this case as a Trade Negative because of the lack of information on the measures at issue, and because the request for consultations did not include allegations of discrimination or sufficiently articulated claims of violation of the SPS or TBT Agreements.

Korea – Measures Concerning the Shelf Life of Products.[93] The United States requested consultations with Korea regarding measures concerning the shelf life of food products which the U.S. claimed violated national treatment, and the SPS and TBT Agreements. The matter was resolved satisfactorily by the removal of the measure at issue. The case qualifies as a Trade Positive because, assuming that as alleged Korea imposed discriminatory burdens on the retail distribution conditions, it violated national treatment. I have classified it as an Investment Potential Positive because, although discrimination against foreign products in retail rules would violate IT Article III, rules regarding the shelf life of food products may raise health concerns.

European Communities – Trade Description of Scallops.[94] Canada challenged a French measure restricting the use of the widely used "*Coquilles Saint Jacques*" scallop

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[92] WT/DS3/1, *Korea — Measures Concerning the Testing and Inspection of Agricultural Products*, Request for Consultations (6 April 1995).

[93] WT/DS5/1 *Korea — Measures Concerning the Shelf-Life of Products*, Request for Consultation (3 May, 1995).

[94] WT/DS7/R, *European Communities – Trade Description of Scallops*, Panel report (5 August, 1996); Peru and Chile requested consultations with the EC concerning the same French Order, on 18 and 24

label. The measure banned its use for the type of scallops imported from Canada. Instead, importers had to use the term "*petoncle(Saint Jacques),*" connoting a small scallop. Canada, in its request for consultation, argued that the measure created less favorable trade competition for its scallops, as against the French scallops that could benefit from the right to use a label known to consumers. This case is Trade Positive because restricting the Canadian products' right to use such a commonly known label, and instead imposing a little known label on the Canadian product, raises a strong inference of denial of national treatment. The absence of a countervailing purpose recognized by IT Article VIII, and the "look-and-feel" of a case where the host jurisdiction used a domestic appellation arbitrarily to calcify consumer preferences, led me to classify this case as Investment Positive.

Measures Affecting Importation of Salmon.[95] Canada challenged Australia's import prohibition of certain salmon from Canada. Australia only allowed the import of salmon that under its regulations qualified as "consumer-ready," thereby excluding Pacific salmon from Canada. Canada claimed violations of the SPS Agreement and, in addition, of Article XI of the GATT. The analysis focused on (i) the existence of sufficient scientific evidence that there existed a threat to human health arising out of consumption of Pacific salmon and (ii) whether Australia had complied with its risk assessment obligations. The DSB found a violation of the SPS Agreement. The AB upheld the Panel's finding that Australia had imposed "arbitrary or unjustifiable" levels of protection to different, yet comparable, situations, thereby engaging in "discrimination or a disguised restriction" on imports of salmon, as compared to imports of other fish and fish products such as herring and finfish. The Appellate Body also found that the import prohibition was not based on a risk assessment. Australia agreed to take measures to bring its regulations into compliance with the AB's ruling. This case is a Trade Positive. I classified it as an Investment Positive because of the

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July 1995, respectively and the DSB established a single panel on all matters. See also WT/DS12/R; WT/DS14/R *European Communities – Trade Description of Scallops*, Panel report (5 August, 1996).

95 WT/DS18/AB/R, *Measures Affecting Importation of Salmon*, AB report (adopted 6 November 1998). See also WT/DS21/1, Australia — Measures Affecting the Importation of Salmonids, Request for Consultations (17 November 1995).

evident violation of IT Article IV (most favorable nation treatment) that stems from the AB's finding on unjustified discrimination between similarly situated businesses. If herring from another country benefits from better treatment, Canadian salmon exporters right under Article IV were likely to have been violated.

Korea — Measures concerning Bottled Water.[96] In this request for consultations, Canada claimed that Korean regulations on the shelf-life and physical treatment (disinfection) of bottled water were inconsistent with GATT Articles III and XI, SPS Articles 2 and 5 and TBT Article 2. On April 24, 1996, the parties to the dispute announced that they reached a settlement. I classified this case as a Trade Positive because of the allegations of national treatment violations in relation to health and retail distribution rules. For the same reasons, I categorized this case as an Investment Positive.

Korean Measures Affecting Imports of Fresh, Chilled and Frozen Beef.[97] In this case, the United States and Canada challenged a Korean regulatory scheme that discriminated against imported beef by, among other measures, confining its sale to specialized stores (dual retail system) and limited the manner of its display. The Panel found that the dual retail system constituted "less favorable treatment" and was inconsistent with Article III:4. It found that effective equality of opportunities means that there must be a possibility for imported beef to be physically present with like domestic beef at the point of sale to the consumer. By excluding imported beef from the existing retail system for domestic beef, the dual retail system limited the potential market opportunities for imported beef in violation of national treatment. As a defense, Korea claimed that the dual retail system had been instituted to prevent the fraudulent misrepresentation of imported beef as domestic beef, and therefore the measure was justified under Article XX(d). The Panel found that Korea did not apply a dual retail system for other products in respect of which fraudulent sales have occurred. Such failure was evidence that the dual retail system was not "necessary to secure compliance

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[96] WT/DS20/1 *Korea — Measures concerning Bottled Water*, Request for Consultations (8 November, 1995).

[97] WT/DS161/AB/R, *Korean Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB report (11 December 2000).

with laws or regulations which are not inconsistent with the provisions of this Agreement" under Article XX(d). This case qualifies as a Trade – Positive. I classified as an Investment Positive because of the finding that the measures created discriminatory competitive conditions for the foreign products. I considered the possibility of downgrading the case to a Potentially Positive outcome because of the fraud risk. However, I concluded that the alternatives to the burdensome regulation (including better policing and enforcement), and the strong evidence of protectionism, justified keeping the case as a straight Positive. This is a case that could have gone either way. As I explained above, whether or not I may have erred in my judgment call does not affect my overall findings.

Slovak Republic – Measure Affecting Import Duty on Wheat from Hungary.[98] Hungary requested consultations with the Slovak Republic with respect to import duties imposed on Hungarian wheat. The duties approximated 70%, an amount well in excess of Hungary's bound rates. Hungary was the only country affected by those rates and claimed a violation of Article I's most-favored-nation provision. The Slovak cabinet, after discussions with Hungary, removed the 70% duty and replaced it with another temporary measure. No further proceedings were conducted in the WTO. This is a Trade Positive because the allegations point to a violation of most-favored-nation rules without a hint of a justification. For the same reasons, I classified the case as an Investment Positive.

Czech Republic- Measure Affecting Import Duty on Wheat from Hungary.[99] This case was very similar to the Hungarian request for consultation to the Slovak Republic. It also involved an import duty claimed to be in excess of the bound rate that specifically targeted Hungarian wheat. After negotiations between the parties, the Czech Republic agreed to reduce the duties to the level that obtained prior to the

[98] WT/DS143/1 *Slovak Republic – Measure Affecting Import Duty on Wheat from Hungary*, Request for Consultation (18 September, 1998).

[99] WT/DS421/1 *Czech Republic- Measure Affecting Import Duty on Wheat from Hungary*, Request for Consultation (12 October 1998).

challenged measure.[100] The case falls in the Trade Positive/Investment Positive category for the same reasons.

Measures Affecting the Importation and Internal Sale of Goods,[101] a Panel was established to discuss the Ukraine's allegations that a Moldovan law discriminatorily applied an environmental charge on beet and juice imported from Ukraine, in violation of Article III.1, Article III.2, and Article III.4 of the GATT. Moldova passed a law in 1998, "On Charge for Contamination of Environment," which imposed two types of charges on imported products only. The first applied a charge to products found to contaminate the environment and the second applied a charge to plastic packages (or 'tetra-pack') that contained products at MDL 0.80-3.00 per package. The Ukraine contended that while imported products were subject to the charges, like domestic products were not subject to the first charge in violation of Article III.1 and Article III.2 of the GATT. The Ukraine also contended that packages containing domestically-produced like-products were not subject to the second charge in violation of Article III.4 of the GATT. This case is classified as Trade Positive because it implicates familiar allegations of discrimination. Since the allegations claim that the ostensibly environmental measures did not apply to the domestic products, I classified the case as an Investment Positive.

Argentina – Measures Affecting The Export of Bovine Hides and the Import of Finished Leather.[102] Argentina required the prepayment of taxes on imported goods. The EC claimed that Argentina discriminated against imported goods by requiring the deposit of higher amounts than for domestic goods to cover the tax payments that were ultimately due. Argentina claimed that the requirements were necessary to secure compliance with its tax laws under Art. XX(d). Argentina noted that tax evasion is common in its territory and that the pre-payment requirement is intended

[100] See MTI Econews, MTI Hungarian Agency News, Czech Republic to reduce duties on Hungarian wheat (November 12, 1998).
[101] WT/DS421/1 *Moldova — Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge)*, Request for Consultation (17 February 2011).
[102] WT/DS155/R, *Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel report (19 December, 2000).

to combat low levels of tax compliance and is not intended to restrict trade. The Panel found that the higher advance payments increased the tax burden and resulted in an opportunity cost (interest lost) and debt financing (interest paid) additional requirement on the imported goods, and found a violation of Art. III.2. Although the Panel found that the measures furthered compliance with Argentina's tax law and thus qualified as a potential Article XX(d) exception, it concluded that they could not be justified under the chapeau of Article XX because of the availability of reasonable alternative measures. This case counts as a Trade Positive because of the finding that the measure was a pretext for protecting the domestic economy. I classified it as an Investment Potential Positive because of the possibility that, much like the arbitrator in the hypothetical Dominican Republic Cigarettes case above, an arbitrator might uphold the measure under the securing compliance exception of IT Article VIII and be loathe to award damages on account of a practice ostensibly aimed at preventing tax evasion.

European Communities — Measures Affecting Differential and Favourable Treatment of Coffee.[103] Brazil challenged portions of the General System of Preferences (GSP) of the EC that apply to products originating in various Andean Group countries and Central American Common Market countries that conduct programs to combat drug production and trafficking ("GSP qualifying countries"). Brazil claimed that its exports of soluble coffee were denied most favorable nation treatment because Council Regulation (EC) No. 1256/96 granted duty free access into the EC market for the GSP qualifying countries. In the case of soluble coffee, this special preferential treatment allowed duty free access into the EC market. I classified this case as a Trade Positive because using trade concessions to encourage States to combat drug trafficking is unlikely to be a permissible tool to achieve what otherwise might qualify as a legitimate State purpose. I classified the case as an Investment Potential Positive because of the clear violation of IT Article IV (most favored nation). I did not classify it as a straight Positive because of the possibility that the public order exception of IT Article VIII may apply. An arbitrator may find that granting trade concessions is a necessary tool in the

[103] WT/DS154/R, *Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel report (7 December, 1998).

international crime fighting panoply. He or she, on the other hand, may find that rewarding crime fighting with preferential treatment on the investment side would open a Pandora's box of measures favoring one country over the next based on concerns completely unrelated to investment. (Imagine, for example, that a country with a strong policy against abortions gave preferential treatment to trade partners where contraception and abortions are illegal. Could we consider this to be an exception necessary to secure public order?) It is because of this uncertainty that I classified the case as an Investment Potential Positive.

Chile – Measures Affecting the Transit and Importation of Swordfish.[104] The EC challenged Chile's restrictive measures regarding the unloading of swordfish by EC fishing vessels in Chilean ports. The EC claimed that its fishing vessels operating in the South East Pacific were not allowed under Chilean legislation to unload their swordfish in Chilean ports to land them for warehousing or to trans-ship them onto other vessels. The EC considered that, as a result, Chile made transit through its ports impossible for swordfish in violation of trade law. Chile subsequently filed before a chamber of the International Tribunal for the Law of the Sea ("ITLOS") a claim against the European Union alleging violations of the United Nations Convention on the Law of the Sea ("UNCLOS").[105] Chile argued that the EU had violated conservation-related obligations under Articles 64 and 116-19 of UNCLOS, and also dispute settlement obligations under Articles 297 and 300 of UNCLOS. The EU counterclaimed that Chile violated these (and other) UNCLOS provisions by unilaterally applying its conservation regime. Both the WTO and ITLOS disputes are currently suspended at the request of the parties pursuant to mutual notices provided by them.[106] This claim, brought under Article V and Article

[104] WT/DS154/1, *Chile – Measures Affecting the Transit and Importaton of Swordfish*, Request for Consultations (26 April, 2000).

[105] See Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (No. 7) (Chile v. E.C.), 40 I.L.M. 475 (Int'l. Trib. L. of the Sea 2000).

[106] Communication from the European Community, 'Chile—Measures Affecting the Transit and Importation of Swordfish—Arrangement between the EC and Chile, WT/DS193/3' (Apr. 6, 2001); and 'Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.C.)', Order 2008/1 (Int'l. Trib. L. of the Sea 2008). On May 28, 2010, the EU and Chile informed the DSB that ITLOS, by Order dated 16 December 2009, placed on record, pursuant to Article 105.2 of the Rules of the Tribunal, the discontinuance, by agreement of the parties, of the proceedings initiated on 20 December 2000 by Chile and the EC, and ordered that the case be removed from the list of cases.

VI, is classified as a Trade Positive because it alleges discrimination against European interests, and less favorable treatment than that accorded to undertakings from domestic or other States. I classified the case as an Investment Positive the exclusion of foreign vessels from ports was justified as a countervailing measure of sorts for violations of laws unrelated to the actual products, and the assumption that Chile's complaints should be brought in the UNCLOS forum rather than used as a basis to burden commerce.

EC-*Trade Description of Sardines.*[107] Peru argued that a European regulation negatively impacted its products by preventing exporters from using the trade description "sardines." This regulation permitted the labeling and marketing as 'sardines' within the EU only of fish of the species *Sardinia pilchardus*, which was commonly harvested by Spanish and Portuguese fishermen. Peru challenged that regulation on the basis that *sardine pssagax*, harvested by Peru, complied with the standard for preserved sardines set by the relevant international standard-setting organization, the Codex Alimentarius. In its defense, the EC argued that the standard of this organization had not been approved by consensus and did not therefore bind the EC.

The Appellate Body ruled in favor of Peru, stating that Article 2 of the TBT Agreement definition of "standard" does not require that a standard adopted by a "recognized body" be approved by consensus. Therefore, the standard in question fell within the scope of Article 2.4 as well and the EC violated it by implementing the regulation.[108] The Appellate Body's finding that the EC erred in excluding Peruvian sardines could be construed to mean that the EC did not afford the Peruvian exporters the same treatment as was afforded to their similarly situated Spanish, Portuguese, and other European competitors. Much like the French scallops case, these proceedings

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[107] WT/DS231/AB/R EC-Trade Description of Sardines, AB report (adopted October 23, 2002).

[108] It should be mentioned that in this case the AB addressed acceptability of amicus curie briefs (legal opinions of private persons and non-governmental organizations or states other than 3rd parties and participants). The AB stated that it had authority to decide whether to accept them and whether to take them into account (DSU is silent on the issue of amicus curiae).

involved a claim that the EC prevented a foreign sardine exporter from competing in the same market as European counterparts using the commonly accepted label describing the product, thereby distorting competitive conditions. For the same reasons as the sardines and the scallops case, I classified this case as a Trade Positive and Investment Positive.

Romania — Import Prohibition on Wheat and Wheat Flour.[109] Hungary requested consultations with Romania regarding a measure that it claimed prevent the importation of forestry products. Hungary claimed that the quality requirements of the measure discriminated against Hungarian wood in violation of Article III and Article XI. I liberally included this case as a Food Case (because it involved a harvested product), and counted it as Trade Positive because it raised an inference of discrimination supported by weak arguments of wood quality. For the same reasons, I classified the case as an Investment Positive.

United States – Equalizing Excise Tax.[110] Brazil requested consultations with the United States regarding the Florida "Equalizing Excise Tax" imposed on processed oranges and processed grapefruits produced from citrus outside of Florida. Brazil contended that domestic producers were exempt from the tax and that the facial discrimination against foreign undertakings violated Article III.[111] In addition, the proceeds of the tax were apparently used to promote the superiority of domestic products over foreign citrus fruit. The controversy was resolved by mutual resolution of the parties that included an amendment to the Florida law. This case involves *de jure* discrimination against foreign products, without any countervailing policy justification. I therefore classified it as a Trade Positive and Investment Positive.

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[109] WT/DS240/1, *Romania — Import Prohibition on Wheat and Wheat Flour*, Request for Consultations (18 October 2001).

[110] WT/DS250/1, *United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products* ,Request for Consultations (20 March 2002).

Peru — Tax Treatment on Certain Imported Products.[112] Chile challenged Peru's treatment of imports of various foodstuffs on the grounds that (i) Peru had previously exempted them from sales tax, and (ii) Peru eliminated the exemption for imported goods. Chile contended that its imports, including in particular apples, table grapes and peaches, faced less favorable competitive conditions as a result of the Peruvian measure. The parties ultimately reached a resolution of the dispute, and I included it as a Trade Positive because it raises allegations that Peru violated its national treatment obligations. Especially because the record did not show any readily apparent domestic justification other than protectionism, I included this case in the Investment Positive category.

Turkey – Import Ban on Pet Food from Hungary[113] and *Croatia — Measures Affecting Imports of Live Animals and Meat Products.*[114] In the first case, Hungary sought consultations with Turkey regarding Turkey's ban on imports of pet food from European countries. Turkey's declared motive was to prevent the spread of Bovine Spongiform Encephalopathy (BSE). Hungary claimed that it is a BSE-free country and that, in these circumstances, the measure amounted to a violation of Article XI. A similar case was brought by Hungary in relation to a Croatian ban on the import of live animals and meat products, such as live pigs, poultry and fish and products thereof, which was ostensibly based on protecting against BSE. In addition to arguing that it is BSE Free, Hungary claimed that there was no evidence that BSE spread through any animal other than ruminants, and that the Hungarian health authorities had not encountered any case where it was spread through pigs, poultry or fish. I classified these cases as Trade Positives because, taking the Complainant's allegations as true, the case would be very likely to fall clearly within the chapeau of Article XX as a disguised restriction cloaked in a health pretext. I did not classify the case as an Investment

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[112] WT/DS255/1, *Peru — Tax Treatment on Certain Importe products,* Request for Consultations (22 April 2002).

[113] WT/DS256/1, *Turkey – Import Ban on Pet Food from Hungary*, Request for Consultations (3 May 2002).

[114] WT/DS297/1, *Turkey – Import Ban on Pet Food from Hungary*, Request for Consultations (9 July 2003).

Positive even though a disguised restriction would normally justify such a categorization, and used instead the Investment Potential Positive category, because of the magnitude of the health risk associated with BSE. An arbitrator might very well pause before awarding damages for a measure ostensibly intended to prevent the dreaded "mad cow disease."

Australia - Certain Measures Affecting the Importation of Fresh Fruit and Vegetables[115]*, and Fresh Pineapple*.[116] In these cases, the Philippines challenged various health related measures imposed by Australia on the import of fresh fruit and vegetables. The Philippines claimed that Australia required that pineapple originating from the Philippines and certain countries be de-crowned and subject to fumigation before import. The Philippines claimed that this requirement violated Article XI. The EC and Thailand joined the complaint. I included these cases as Trade Positives because they raise allegations that measures ostensibly furthering a health purpose were a pretext to hinder the import of cheaper foreign product. The possibility that the record might include sufficient health concerns to sway an arbitrator away from an award of damages led me to classify this case an Investment Potential Positive, not a Positive.

*Venezuela — Import Licensing Measures on Certain Agricultural Product*s.[117] Venezuela established import licensing requirements for numerous agricultural products, including corn, sorghum, dairy products, grapes, yellow grease, poultry, beef, pork, other meat products, and soybean meal. The United States challenged the import licensing scheme on several grounds, including Article XI. Among other assertions, the United States claimed that Venezuela conditioned the issuance of certain licenses on investment in domestic production, use or consumption of domestic goods, or other performance requirement. This case is a Trade Positive because the assertions of the

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[115] WT/DS270/1, Australia — Certain Measures Affecting the Importation of Fresh Fruit and Vegetables, Request for Consultations (18 October 2002).

[116] WT/DS271/1, Australia — Certain Measures Affecting the Importation of Fresh Pineapple, Request for Consultations (18 October 2002).

[117] WT/DS275/1, *Venezuela — Import Licensing Measures on Certain Agricultural Products*, Request for Consultations (7 November 2002).

complainant include clear violations of national treatment, including performance requirements. The performance requirements, and the allegations of administrative burdens designed to burden foreign products, led me to classify this case as an Investment Positive as well.

Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain.[118] The United States challenged various Canadian measures related to the import of wheat. The Canada Grain Act established a program known as "producer railway cars." The program applied to grain grown by a producer, meaning that no imported grain was eligible for the producer car program. Canada had no comparable program that provides rail cars for the transport of imported grain. The Panel found that in allocating railcars used for the transport of grain, Canada provided a preference for domestic grain over imported grain. These measures concerning rail transportation gave imported grain less favorable treatment than that accorded to like domestic grain. According to U.S. trade officials, the Canadian government had rules and regulations in place that discriminated against imported grains at both grain elevators and within Canada's rail transportation system. Under Section 56(1) of the Canadian Grain Regulations and Section 57 of the Canada Grain Act, imported wheat could not be mixed with Canadian domestic grain being received into or discharged out of grain elevators. Additionally, the Canadian law capped the maximum revenues that railroads may receive on the shipment of domestic grain but not revenues received on the shipment of imported grain. This scheme subjected imported grain to a higher shipping cost than domestic grain.[119] The Panel found that Sections 57(c) and 56(1) were inconsistent with Art. III:4, and were not justified under Art. XX(d) as measures necessary to secure

[118] DS/276//R *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, Panel report (6 April 2004); DS/276/AB/R *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, AB report (adopted 27 September 2004) (hereafter "***Canada – Imported Grain***").

[119] In addition, Canada allegedly provided a preference for domestic grain over imported grain when allocated government-owned railcars Pursuant to Section 87 of the CGA. This provision does not require use of Canadian grain in order to obtain a producer car and does not make any distinctions between domestic and imported products. However, the United States had failed to establish its claim that section 87 of the Canada Grain Act was inconsistent with Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement.

compliance with Canada's laws and regulations.[120] This case is therefore a Trade Positive. I classified it as an Investment Positive, after pausing to consider a possible securing compliance exception under IT Article VIII, because of the weak Article XX(d) defense and my conclusion that a comparable argument would also fall under our IT.

India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007.[121] The EC challenged restrictions on import maintained by India that affected a wide array of products, including agricultural products, matches, pharmaceutical products, technological goods, and other items. The EC claimed that the import restrictions violated Article III. I classified this case as a Food Case because it covered agricultural products, a common target of protective measures by India, and as a Trade Positive because it challenged measures that appeared to discriminate against imported products without any apparent domestic justification. The lack of a domestic purpose unrelated to protectionism, the discriminatory nature of the measure, and the use of administrative measures to burden foreign products, pointed to a likely violation of IT Article III and Article V, and I classified the case as an Investment Positive.

Australia — Quarantine Regime for Imports.[122] The EC requested consultations with Australia regarding the Australian quarantine regime for imports, both on its face and as applied. a Director of Quarantine taking discretionary action within administrative guidelines.

As regards the quarantine regime as such, the EC claims that the effect of this regime appears to be that the import of products is a priori prohibited, although there is no risk assessment. Risk assessments appear to be commenced, if at all, only once the import of a product has been specifically requested. The EC argued that this framework violates the SPS Agreement, and in particular, although not limited to, Articles 2.2, 2.3, 3.3, 4.1, 5.1, 5.6 and, if applicable, 5.7, 8 and Annex C. On 9 March 2007, Australia and the European Communities notified the DSB that they had reached a mutually agreed

[120] Canada –Imported Grain, at page 201.

[121] WT/DS279/1, *India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007*, Request for Consultations (23 December 2002).

[122] WT/DS287/1, *Australia — Quarantine Regime for Imports*, Request for Consultation (3 April 2003).

solution which includes enhances transparency of the quarantine regime of Australia, principles of treatment for market access applications from the EC, and continued expert discussions on scientific aspects associated with trade in pig meat and chicken meat. I classified this case as a Trade Positive because of the allegations of unjustified import bans and sanitary measures. I categorized it as an Investment Potentially Positive because the bans, and the possible lack of transparency in administrative procedures may violate IT Article V's minimum standard of treatment provisions.

Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua.[123] Nicaragua requested consultations with respect to import procedures that it claimed discriminated against its imports of black beans. Nicaragua asserted that Mexico violated its most favored nation treatment obligations because it gave importers from other jurisdictions more favorable treatment in navigating the licensing procedures. I included this case as Trade Positive because it raised claims that the Respondent breached its most favored nation provisions by giving regulatory advantages to certain importers, and there was no apparent justification for these violations.[124] For the same reason, I classified the case as an Investment Positive (violation of IT Article IV rules on most favored nation treatment).

Tax Measures on Soft Drinks and Other Beverages (Mexico).[125] This is the HFCS case discussed in Part II. Again it as a challenge to a Mexican tax on soft drinks and other beverages that use any sweetener other than cane sugar, such as high-fructose corn syrup. As discussed above, the United States prevailed, and this case is a Trade Positive and an Investment Positive.

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[123] WT/DS279/1, *Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua*, Request for Consultations (17 March 2003).

[124] According to the Request for Consultations "Nicaragua is particularly concerned about "The more favourable treatment that the competent Mexican authorities accord in the administration of the above procedures to like products originating in countries other than Nicaragua".

[125] WT/DS308/AB/R *Tax Measures on Soft Drinks and Other Beverages*, AB report (March 6, 2006) ('**Mexico– HFCS**'or '**Mexico – Taxes on soft drinks'**.)

Turkey -Measures Affecting the Importation of Rice (Turkey).[126] Turkey operated a tariff-rate quota for rice imports. The allegations focused on Turkey's requirement that US rice importers apply for a certificate for over-quota imports, with these applications being consistently denied. Turkey also operated a tariff-rate quota for rice imports requiring that, in order to import specified quantities of rice at reduced tariff levels, importers had to purchase specified quantities of domestic rice, including rice from the Turkish Grain Board, Turkish producers, or producer associations. The Panel found that Turkey's requirement that importers purchase domestic rice in order to be allowed to import rice under the tariff rate quotas was inconsistent with Article III:4 because it offered less favorable treatment to imported rice than to like domestic rice. The Panel found that purchase of domestic rice accorded an advantage to operators vis-à-vis that of imported rice solely through the option of being able to import rice at reduced tariff rates. Because this unequal treatment resulted in less favorable treatment of imported rice, the Panel held that Turkey had violated Article III:4.[127] The intentional targeting of foreign products and the mandatory purchase of domestic goods as a condition to access likely violates the performance requirements subsumed by the national treatment provisions of IT Article III, as well as the minimum standards of treatment provisions of IT Article V. I therefore classified this case as an Investment Positive.

United States – Ban on the Important of Poultry.[128] The European Communities requested consultations with the United States on account of a ban on the import of poultry that was ostensibly the result of health concerns. The EC claimed in its request for consultations that the United States did not provide a justification for its sudden ban on the import of certain poultry products. I classified this case as a Trade Positive because it alleged discriminatory treatment of the imported products and the health defense appeared pretextual or not based on sufficient scientific evidence. Nevertheless,

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[126] WT/DS3334/R, *Turkey -Measures Affecting the Importation of Rice,* Panel report (21 September 2007). ("**Turkey – Rice**").

[127] Turkey – Rice, para. 7.241.

[128] WT/DS100/1, *United States — Measures Affecting Imports of Poultry Products*, Request for Consultations (18 August, 1997).

because of the potential health concern, I downgraded the case to an Investment Potential Positive.

Philippines —Poultry.[129] This request challenged the same measures complained of by the US in WT/DS74, but also included Administrative Order No. 8, Series of 1997, which purported to amend the original measure complained of in WT/DS74. The U.S. contended that the Philippines' implementation of tariff-rate quotas, in particular the delays in permitting access to the in-quota quantities and the licensing system used to administer access to the in-quota quantities, were inconsistent with the obligations of the Philippines under Articles III, X, and XI of GATT, Article 4 of the Agreement on Agriculture, Articles 1 and 3 of the Agreement on Import Licensing Procedures, and Articles 2 and 5 of TRIMs. On March 12, 1998, the parties communicated a mutually agreed solution to their dispute. The allegations of discrimination made this case a Trade Positive as well as an Investment Positive.

European Communities – Restrictions on Certain Import Duties on Rice.[130] On May 27, 1998, India requested consultations with the European Communities with respect to an EC Regulation adopting the "cumulative recovery system" for determining certain import duties on rice. India claimed that the measure effectively limited the number of Indian importers allowed access to the European market. India claimed a violation, among other treaty obligations, of Article I and Article III. I classified the case as a Trade Positive and an Investment Positive because of the discrimination allegations made in the request for consultations, and the apparent absence of a defense.

United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada.[131] Canada challenged United States measures, in particular inspections and administrative measures adopted by the State of South Dakota, which it

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[129] WT/DS102/1, *Philippines — Measures Affecting Pork and Poultry*, Request for Consultations (9 October 1997); WT/DS74/R/1, *Philippines — Measures Affecting Pork and Poultry*, Request for Consultations (1 April 1997).

[130] WT/DS134/1, *European Communities – Restrictions on Certain Import Duties on Rice*, Request for Consultations (27 May 1998).

[131] WT/DS144/1, *United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, Request for Consultations (25 September, 1998).

claimed barred or substantially slowed down trucks carrying cattle, grain and swine into the United States. The blockade of trucks was justified as a health measure intended to insure that the Canadian products complied with safety regulation, but blatantly protectionist statements were often heard from United States officials and Canada demanded that the measure be suspended as a condition to entering talks with the United States. The measures followed protest in the United States against the cheap price of the grain and other agricultural products coming from Canada. I classified this case as a Trade Positive because of the overwhelming evidence of protectionism that was reported and the absence of a countervailing domestic purpose. For the same reasons, I classified it as an Investment Positive.

European Communities – Measures Affecting Imports of Wood and Conifers and Europe from Canada.[132] On June 17, 1998, Canada challenged a European measure restricting the import of conifers and other plant matters from Canada because of their potentially harmful effect on plant life in the EC. The measures included Council Directive 92/103/EEC, which stipulated protective measures against the introduction into the Member States of organisms that are deemed harmful to plants or plant products and protective measures against the spread of harmful organisms within Europe.[133] Canada alleged violations of the SPS and TBT Agreements, and made discrimination claims based on Article III. I classified this case as a Trade Positive because of the likelihood that the justifications advanced by the EC would either be found to be pretextual or insufficient. I classified the case as a Potentially Positive because of the possibility that, although Trade Positive because of inadequate science or a finding of disguised protectionism, the presence of a sufficient ecosystem health concern might sway the arbitrator against an award of damages.

[132] WT/DS137/1, *European Communities – Measures Affecting Imports of Wood and Conifers and Europe from Canada*, Request for Consultations (17 June 1998).

[133] Commission Directive 92/103/EEC of 1 December 1992 amending Annexes I to IV to Council Directive 77/93/EEC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community. Official Journal No. L 363, 11.12.1992, p. 1.

India — Import Restrictions.[134] The EC requested consultations with India concerning import restrictions allegedly maintained by India under its Export and Import Policy, 1997-2002, for reasons other than Article XVIII:B of GATT. India claimed that these restrictions are justified under Article XX and/or Article XXI of GATT. The EC contended that these import restrictions constitute an infringement of Articles III, X, XI, XIII and XVII of GATT 1994, Article 4.2 of the Agreement on Agriculture, and Articles 1, 2 and 3 of the Agreement on Import Licensing Procedures, and cannot be justified under Articles XX or XXI of GATT. This case is yet another challenge to import restrictions alleged to discriminate against foreign goods and/.or ban their import through administrative procedures that are not permitted by trade law. For the same reasons explained above in relation to several of the food filings, I classified it as a Trade Positive and an Investment Positive.

United States — Measures Affecting the Importation of Fresh Lemons.[135] Argentina requested consultations with the United States concerning certain measures affecting the importation of fresh lemons from the Northwest region of Argentina. The specific measures challenged by Argentina included:

(i) a series of US measures allegedly maintained for eleven years, which Argentina argued constituted an import prohibition on citrus fruits affecting fresh lemons originating in the Northwest region of Argentina;

(ii) the United States' failure to grant approval for the importation of fresh lemons from the Northwest region of Argentina; and

(iii) alleged undue delays in the approval procedures for the importation of fresh lemons from the Northwest region of Argentina.

Argentina claimed violations of Articles I:1, III:4, X:1, X:3 and XI:1 of the GATT. This case is a Trade Positive because of the allegations of discrimination against Argentinean citrus. I classified it as an Investment Positive because of the apparent lack of a health or other justification for the measure, or of a health justification that became

[134] WT/DS149/1 *India — Import Restrictions*, Request for Consultations (29 October, 1998).

[135] WT/DS448/1, United States — Measures Affecting the Importation of Fresh Lemons, Request for Consultations (3 September 2012).

obsolete, and the potential violation of IT Article V that may arise from the delays in approval procedures.

Pakistan, Export Measures Affecting Hides and Skins.[136] The European Communities on November 7, 1998 requested consultation with respect to a prohibition on the export of hides and skins and wet blue leather made from cow and cow calf hides. The EC contended that the measure deprived its undertakings of access to raw materials or piece goods that are instrumental to securing their competitiveness. I classified this case as a Trade Positive because, under established precedents dating back to GATT, a ban on the export of raw materials is unlikely to pass muster under the GATT Agreement. Export bans are likely to violate our IT Article III and its Article V. A foreign company established in Pakistan to source piece goods for the home factory will face competitive conditions less favorable than its domestic counterparts. The foreign company will not have the right to ship the component part to its mother factory, whereas the domestic competitor would. Indeed, this is principally why, as we will see in other cases such as China – Rare Earths, States adopt export bans. I therefore classified the case as an Investment Postiive.

India – Measures Affecting Export of Some Commodities.[137] The EC requested on March 11, 1998 consultations on a measure that established a negative list for the export of several commodities, including raw hides and skins. Exporters of these commodities had to apply for an export license. The EC claimed that India's Director General of Foreign Trade systematically refused application for the licenses. The EC further supported its claims with statistics from international agencies. It argued that there was no evidence that the embargo on export was temporary or that it had the objective of relieving a critical shortage of products essential to the exports of India. I classified this case as a Trade Positive because of the export ban and lack of a meaningful defense. I classified this case as a Trade Positive because, as explained in the preceding case, the export ban may violate IT Article III. In addition, the refusal to

[136] WT/DS107/1, Pakistan — Export Measures Affecting Hides and Skins, Request for Consultations (7 November 1997).
[137] WT/DS120/1, India — *Measures Affecting Export of Some Commodities*, Request for Consultations (11 march 1998).

issue licenses, if true, may amount to arbitrary administration action in violation of IT Article V.

Slovak Republic — Measures Concerning the Importation of Dairy Products and the Transit of Cattle.[138] Switzerland claimed that measures imposed by the Slovak Republic with respect to the importation of dairy products and the transit of cattle had a negative impact on Swiss exports of cheese and cattle. Switzerland alleged that some of these measures are inconsistent with Articles I, III, V, X and XI of GATT, Article 5 of the SPS Agreement, and Article 5 of the Import Licensing Agreement. The case involved sufficient allegations of discrimination and familiar patterns of protectionist measures related to the transportation of imported goods to warrant an Investment and Trade Positive classification.

European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States.[139] The United States requested consultations with the European Communities ("EC") regarding certain measures affecting poultry meat and poultry meat products ("poultry"). The measures prohibited the import of poultry treated with any substance other than water unless that substance has been approved by the EC. This ban resulted in the exclusion of poultry processed with chemical treatments ("pathogen reduction treatments" or "PRTs") designed to reduce the amount of microbes on the meat, effectively prohibiting the shipment of virtually all US poultry to the EC. In 2002, the United States had requested the Commission to approve the use of four PRTs in the production of poultry intended for export to the EC, and after a six-year delay the Commission rejected the request. The United States claimed that various EC agencies issued scientific reports regarding a number of different aspects related to the processing of poultry with these four PRTs, the cumulative conclusion of which is that the importation and consumption of poultry processed with them does not pose a risk to human health. The United States claimed a

[138] WT/DS133/1, *Slovak Republic — Measures Concerning the Importation of Dairy Products and the Transit of Cattle*, Request for Consultations (7 May 1998).

[139] WT/DS389/1, *European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, Request for Consultations (16 January 2009).

violation of national treatment as well as other trade provisions including the SPS Agreement. I classified this case as a Trade Positive because of the likelihood that the health basis would be found insufficient under SPS, or that the measure would be found to be a disguised restriction on trade. I downgraded the case to Investment Potential Positive because, although a violation of IT Article III may be found and the six-year delay in processing the United States request may indicate administrative failures that breach IT Article V, an investment tribunal may find that the health concerns justify the measure.

United States – Measures Affecting The Importation of Animals, Meat and Other Animal Products from Argentina. Argentina challenged a longstanding ban on the import of certain fresh meats imposed on health grounds by the United States. The request for consultation claimed that, although any risk of foot-and-mouth disease in Argentinean meat had subsided in several regions of the country and other regions were considered with vaccination," the United States still maintained the import restriction. Argentina argued that the ban lacked any scientific basis and was discriminatory. This case is a Trade Positive because of the claim of discrimination and pretextual use of a health justification.[140] I classified it as a Potentially Positive on the Investment side because, although it appears that the United States had maintained the measure long past the eradication of the foot-and-mouth concerns, an arbitrator might not award damages for a measure ostensibly intended to guard against the risk of a dreadful disease.

Turkey - Certain Import Procedures for Fresh Fruit.[141] Ecuador requested consultations with Turkey concerning certain import procedures for fresh fruits and, in particular, bananas. The procedure required, according to Ecuador, the issuance by the Turkish Ministry of Agriculture of a document, known as "Kontrol Belgesi." Ecuador alleged that this procedure, as applied by the Turkish authorities, is a barrier to trade which is inconsistent with the obligations of Turkey under, among other agreement,

[140] WT/DS447/1, United *States – Measures Affecting The Importation of Animals, Meat and Other Animal Products from Argentina*, Request for Consultations (30 August 2012).
[141] WT/DS237/1, *Turkey — Certain Import Procedures for Fresh Fruit*, Request for Consultations (31 August 2001).

Articles II, III, VIII, X and XI of the GATT Agreement, the SPS and TBT. The case, which was resolved by mutual agreement of the parties, raise claims of discrimination and arbitrary denial of market access and is classified as a Trade Positive. I classified it as an Investment Positive because it raises discrimination claim without any apparent domestic purpose that may legitimate them. In addition, the claims related to the application of the Kontrol Belgesi issuance procedure may also violate the minimum standards of treatment provisions of IT Article V.

United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US Tuna II).[142] This case involved a challenge to United States regulations aimed at protecting dolphins. The United States conditioned the access to the "dolphin-safe" label endorsed by its Department of Commerce on the fishing area, the fishing method, and the type of vessel used. In the relevant parts of its ruling, the Appellate Body found that the measure, which qualified as a technical barrier, violated Article 2.1 of the TBT by treating Mexican tuna less favorably than domestic tuna.[143] The Appellate Body found that the United States, while eliminating the risk to dolphins associated with the fishing method used in Mexico, did not remove the risks associated with other methods that complied with U.S. standards. This case qualifies as a Trade Positive because of the lack of even-handedness that the DSB found and the resulting distortion of competitive conditions. I classified it as an Investment Potentially Positive because, while the denial of access to foreign tuna may violate the national treatment provisions of IT Article III and the minimum standard of treatment provisions of IT Article V, an arbitrator may decline to find a measure ostensibly related to the protection of marine mammals of an often endangered kind to violate the investment framework.

[142] WT/DS381/AB/R *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, AB report (16 May 2012).

[143] The method involved "setting on" dolphins, meaning encircling dolphins with a net to catch the tuna associating with them.

United States – Certain Country of Origin Labeling (COOL) Requirements.[144] This case involved a challenge to United States regulations related to certain country of origin labeling. The AB found that the measures further a legitimate objective under the TBT Agreement, but that they had a detrimental impact on imported livestock and treated imports less favorably than domestic counterparts under Article 2.1 of the TBT. The crux of the findings related to recordkeeping verification requirements. The AB found that these measures created an incentive for meat processors to use domestic livestock. The AB found that the measures did not stem exclusively from a legitimate regulatory distinction. The law imposed a disproportionate burden imposed on upstream producers whereas only a small amount of the information obtained from those market actors was needed to comply with COOL. The case is a Trade Positive because the allegations of discrimination that were upheld create less favorable competitive conditions for foreign products. I classified it as an Investment Positive for the same reason. The burden on upstream, foreign producers may both violate IT Article III as depriving them of evenhanded treatment and constitute an impermissible administration action under IT Article V.

Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada.[145] This case involved a Korean ban on bovine meat and meat products. Korea claimed that the ban protected against risks associated with bovine spongiform encephalopathy (mad cow disease). Canada argued that the ban violated the SPS and Article III-4. The dispute was resolved after Korea reopened its market to Canadian beef, which had been shut off after the first case of BSE was identified in Canada in 2003.[146] This case is a Trade Positive because Canada essentially argued that the ban well outlasted the resumption of safe conditions for sale of Canadian beef. I classified it as an Investment Potentially Positive because a tribunal may well find that the Korean ban violated national treatment during the period in which it was imposed without a health justification. On the other hand, because of the seriousness of the initial concern

[144] WT/DS384/AB/R, WT/DS386/AB/R, *United States – Certain Country of Origin Labeling (COOL) Requirements*, AB Report (June 29, 2012).

[145] WT/DS391/R, *Korea — Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, Panel report (3 July 2012).

[146] Canadian Government News, *Harper Government Takes Steps to End WTO Challenge on South Korea's Ban on Canadian Beef Imports*, June 18, 2012. Available at *http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/06/18a.aspx?view=d* (last visited March 14, 2013).

that prompted its adoption, the arbitrator may be disinclined to award damages for the sales lost during the excessive maintenance period.

US – Poultry (China).[147] In this case, the measure at issue was a legislative provision (Section 727 of the Omnibus Appropriations Act of 2009), which effectively prohibited the establishment or implementation of any measures that would allow Chinese poultry to be imported into the U.S. because it denies the use of any funding by USDA for this purpose. China considers that the measures taken by the U.S. are in violation of Articles I:1 and XI:1 of GATT and Article 4.2 of the Agriculture Agreement. In addition, China also specifies that, although it does not believe that the US measure or any closely related measures at issue constitute sanitary and phytosanitary measures within the meaning of the SPS Agreement, if it were demonstrated that any such measure is a SPS measure, China would consider such measure also to be in violation of US obligations under various provisions of the SPS Agreement.

The panel found that Section 727 was inconsistent with Article I:1 of the GATT because the U.S. was not extending immediately or unconditionally to the like products originating from China an advantage that it has extended to all other WTO Members; The Panel also found violation of Article XI:1 because during the time it was in operation, Section 727 imposed a prohibition on the importation of poultry products from China. The panel found that Section 727 was not justified under Article XX(b) of the GATT because it had found that it was inconsistent with the SPS Agreement. This case is therefore a Trade Positive. It is also an Investment Positive because of an arbitral tribunal would likely find violations of IT's Article IV provisions on most favored national treatment without any countervailing domestic purpose.

Indonesia – Importation of Horticultural Products, Animal and Animal Products.[148] The United States challenged Indonesian measures inhibiting the import of horticultural products, animals and animal products. The measures consisted of a non-automatic import licensing programs requiring various certificates before the products

[147] WT/DS392/R, *United States – Certain Measures Affecting Imports of Poultry from China*, Panel Report (adopted 25 October 2010).
[148] WT/DS455/1, *Indonesia – Importation of Horticultural Products, Animal and Animal Products,* Request for Consultations (10 January 2013).

could enter the Indonesia market. The United States claimed that the Indonesian authorities used the system to distort competitive conditions and blocked imports, including by applying a provision to the effect that import of certain products would only be allowed if domestic supply did not meet public demand at a "reasonable price." This case is the most recent request for consultation received by the WTO. It is a Trade Positive because of the allegations of discrimination against foreign products and attempts to shut them out of the domestic market. I classified it as an Investment Positive because of these allegations of discrimination which, if true, would likely amount to a violation of IT Article III.

Import Prohibition of Certain Shrimp and Shrimp Products.[149] This is the first case in the famed Shrimp and Turtle saga. India, Malaysia, Pakistan, and Thailand claimed that the US import prohibition on shrimp and shrimp products from countries that did not require shrimping companies to use a turtle protective device of the type mandated by US law in catching shrimp violated Article XI and XIII of the GATT. The Panel and Appellate Body found that the US ban violated Article XI and constituted "arbitrary and unjustifiable" discrimination under Article XX. In reaching its conclusion, the Appellate Body found that in its application the measure was "unjustifiably" discriminatory because US regulation coerced policy similar to the United States without exploring potential less trade restrictive measures such as a company-specific evaluation or the negotiation of a treaty framework to address the resource conservation with the countries at issue. The failure to adopt this framework gave rise to an inference of protectionism.[150] The case is a Trade Positive and I classified it as an Investment Potentially Positive because, although an arbitrator may find a violation of IT Article III or Article V especially in relation to companies that

[149] WT/DS58/AB/R, *Import Prohibition of Certain Shrimp and Shrimp Products*, AB repoty (adopted 6 November 1998), ('**Shrimp I'**). See also WT/DS61/1, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Request for Consultations (25 October 1996)

[150] Following the ruling of the DSB, the United States adopted revised rules intended to comply with its obligations under trade law as defined by Shrimp I. See Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999. In Shrimp II, the DSB found that the United States had complied with its obligations and, as long as it maintained in place the revised guidelines that were adopted, it would be deemed in compliance. WT/DS58/AB/RW, United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, AB Report (Oct. 22, 2001) ("**Shrimp II**").

voluntarily complied with the United States standards but hailed from countries that did not mandate such compliance, the marine resource conservation and animal life protection purpose may persuade the arbitrator to rule in favor of the respondent.

In Shrimp I, the AB recognized that environmental protection for the purpose of sustainable development is permissible, but that the Contracting Parties may the environmental exception. It found that the United States overstepped the "line of equilibrium" between the right of one Member to invoke the exception and the substantive trade rights of other Members.[151] An arbitrator may, on the other hand, find that the United States did not cross the line and that investment law respects its regulatory space to legislate more stringent environmental protection measures.

European Communities — Measures Affecting Butter Products.[152] New Zealand challenged decisions by the EC and the U.K.'s Customs and Excise Department, to the effect that New Zealand butter manufactured by the ANMIX butter-making process and the spreadable butter-making process be classified so as to be excluded from eligibility for New Zealand's country-specific tariff quota established by the European Communities' WTO Schedule. New Zealand alleged violations of Articles II, X and XI of GATT, Article 2 of the TBT Agreement, and Article 3 of the Agreement on Import Licensing Procedures. On November 11, 1999, the parties notified a mutually agreed solution to this dispute and a brief panel report noting the settlement was circulated to Members on November 24. I classified this case as a Trade Positive because it involved a ban against a specific foreign product not supported by any readily apparent justification. For the same reasons, I classified it as an Investment Positive.

European Communities — Measures Prohibiting the Importation and Marketing of Seal Products.[153] Three separate requests for consultation were filed, by

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[151] Tomer Broude, Principles of normative integration and the allocation of international authority: the WTO, the Vienna Convention on the law of treaties, and the Rio Declaration**,** Volume 6, Issue 1 Loyola University Chicago International Law Review, at 203.

[152] WT/DS72/1, European Communities — Measures Affecting Butter Products, Report of the Panel (24 November 1999).

[153] WT/DS400/1, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Request for Consultations (complaint by Canada) (2 November 2009); WT/DS401/1,

Canada and Norway with various third parties reserving their rights, to challenge Belgian, Dutch and European-wide measures restricting the import and marketing of seal products. The measures severely restricted the ability of the Canadian and other commercial seal hunting industries to sell their products on the European market. By way of illustration, the EU-wide measure would not allow for the marketing of any seal product except those derived from hunts traditionally conducted by indigenous communities, small-scale hunting, hunting for medical research, and other narrowly defined activities falling short of the type of commercial hunting that industries like the Canadian seal fishing concerns conduct.[154] The requests for consultation raised claims of violation of national treatment and most favored nation rules. The case qualifies as a Trade Positive because of the breadth of the ban, its attempt to coerce other WTO Contracting Parties to adopt similar resource conservation policies and philosophies as Europe, and the allegations of discrimination among similarly situated countries.[155] I gave it a Potentially Positive Investment outcome because it may violate IT Article III, IV (most favored nation treatment on account of the allegations of discrimination between similarly situated countries), and V, for essentially the same reasons as in Shrimp I, giving special consideration to the controversial nature of commercial whale hunting even in Canada.

India —Certain Agricultural Products.[156] The U.S requested consultations with India with respect to certain prohibitions on the importation of various agricultural products to India purportedly because of concerns related to Avian Influenza. The U.S. claimed that the measures were inconsistent with the SPS Agreement and Articles I and

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European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Request for Consultations (complaint by Norway) (5 November 2009).

[154] Eckstein, A.,EU/Canada/Norway, EU Ban on Seal Products Goes Before WTO Panel, Euro politics, April 27, 2011.

[155] As is typical of international trade controversies, this case began to raise cross-border coalitions defined more by their approach to the particular issue than with national identity. A substantial majority of Canadian taxpayers, for example, reportedly oppose the Canadian government's decision to spend their tax dollars to help the commercial hunt industry and challenge the European measure. IFAW: MajorityofCanadiansDoNotWantTaxDollarstoSupporttheSealHunt, Market Wire, April 28, 2011.

[156] WT/DS430/1 India — Measures Concerning the Importation of Certain Agricultural Products from the United States, Request for Consultations (6 March, 2012).

XI of the GATT. On 15 March 2012, Colombia requested to join the consultations. At its meeting on 25 June 2012, the DSB established a panel. China, Colombia, Ecuador, the European Union, Guatemala, Japan, Vietnam, Argentina, Australia and Brazil reserved their third party rights. This case is a Trade Positive because of the allegations of discrimination and potentially pretextual health concerns. I classified it as a Potentially Positive Investment case because the health concerns might sway an arbitrator to rule in favor of the respondent country.

Australia-Measures Affecting the Importation of Apples from New Zealand.[157] New Zealand requested consultations with Australia concerning its measures on the importation of apples from New Zealand. Australia's policy for the importation of apples from New Zealand was as follows: "Importation of apples can be permitted subject to the Quarantine Act 1908, and the application of phytosanitary measures as specified in the final import risk analysis report for apples from New Zealand, November 2006." New Zealand prevailed both before the Panel and the Appellate Body.The Panel found that the 16 measures were not based on a proper risk assessment and, accordingly, were inconsistent with Article 5.1 and 5.2 of the SPS Agreement. The Panel also concluded that, by implication, those 16 measures were inconsistent with Article 2.2 of the SPS Agreement, which requires that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. The Panel also found that 13 measures were more trade-restrictive than necessary to achieve Australia's appropriate level of phytosanitary protection, and were therefore inconsistent with Article 5.6 of the SPS Agreement. The Panel noted that for Australia's eight fire blight and four European canker measures, there was an appropriate alternative in the form of importation of mature, symptomless apples. Additionally, the inspection of a six hundred-unit sample from each import lot was an appropriate alternative for another Australian measure ("against apple leafcurling midge" measure).

The Appellate Body upheld the Panel's finding that the 16 measures at issue, both as a whole and individually, constituted SPS measures within the meaning of Annex A(1)

[157] WT/DS367/AB/R, Australia-Measures Affecting the Importation of Apples from New Zealand, AB report (29 November 2010) ('**Australia – Apples**').

and were covered by the SPS Agreement. It further upheld the Panel's finding that the 16 measures were not based on a proper risk assessment and therefore were inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, and that by implication those measures were also inconsistent with Article 2.2 of the SPS Agreement. The Appellate Body reversed the Panel's finding that Australia's measures regarding fire blight and "against apple leafcurling midge" were inconsistent with Article 5.6 of the SPS Agreement. It declared itself unable to complete the legal analysis as to what level of protection would be achieved by New Zealand's proposed alternative measures for fire blight and "against apple leafcurling midge." The Appellate Body also reversed the Panel's finding that New Zealand's claims of undue delay pursuant to Annex C(1)(a) and Article 8 of the SPS Agreement were outside the panel's terms of reference. The Appellate Body found that New Zealand had not established that the 16 measures at issue were inconsistent with Australia's obligations under these provisions of the SPS Agreement. This case is a Trade Positive on account of the AB's findings under SPS. I classified it as an Investment Potentially Positive (after considering at length a potential Negative categorization) because the absence of a proper risk assessment might violate Article V of our IT and because an arbitrator may have had a sufficient record to consider the alternative measures suggested by New Zealand and conclude that Australia's failure to follow them justified a finding of violation of IT Article III.

EC Measures Concerning Meat and Meat Products (Beef with Hormones).[158] The United States and Canada requested consultations with the European Communities because the EC imposed measures[159] that restricted or prohibited imports of meat and meat products from the complainants in alleged violation of the SPS Agreement and of Article III. Since there was no international standard under which the EC could justify its actions, the analysis under the SPS Agreement focused on: 1) the existence of a valid scientific justification that meat containing hormones was dangerous for human health,

[158] WT/DS26/AB/R (Complaint by the United States), WT/DS48//AB/R (Complaint by the Canada), *EC: Measures Concerning Meat and Meat Products* (1/16/98), ('***EC – Hormones***').

[159] Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action.

and 2) that the EC complied with its risk assessment obligation before imposing a protective measure not based on a recognized international standard.[160]

The Panel found that the EC measure violated Article 5.1 (and thus Article 3.3) because the ban on hormones was not based on a risk assessment. The Panel further found that the EC also violated Article 5.5 of the SPS Agreement because the EC measure, through arbitrary or unjustifiable distinctions, resulted in "discrimination or a disguised restriction on international trade." While looking into the existence of international standards applicable to the case, the Panel commented that Article 3 of the SPS Agreement is designed "to harmonize sanitary and phytosanitary measures on as wide a basis as possible." In order to reach this objective, Article 3.1 provides that "Members shall base their sanitary or phytosanitary measures on international standards". Article 3.2 provides that when measures "conform to" international standards, the measures will be presumed consistent with the relevant provisions of the SPS Agreement and of GATT. The Panel found that Article 3.2 "equates measures *based on* international standards with measures which *conform to* such standards and concluded "that for a sanitary measure to be *based on* an international standard in accordance with Article 3.1, that measure needs to reflect the same level of sanitary protection as the standard."[161] In its appeal, the EC stressed that the prohibition of the use of hormones for growth promotion purposes applies equally to beef produced within the EC and to imports of such beef. It is also emphasized that the predominant motivation for both the prohibition of the domestic use of growth promotion hormones and the prohibition of importation of treated meat is the protection of the health and safety of its population.

The question of the appropriate international standard was not raised further on appeal, because the EC did not argue that it relied on such a standard while introducing the ban. Still, the Appellate Body reversed the Panel's holding on the correlation of 'based on' and 'conformed to' phrases, ruling that the latter was narrower. While upholding the Panel's ultimate conclusion, i.e., that the EC measure violated Art. 5.1

[160] WT/DS26/R/USA, EC*: Measures Concerning Meat and Meat Products* (Complaint by the United States), Panel Report (adopted 8/18/97), page 13, para. 3.6.
[161] EC – Hormones , Panel Report, page 179, para. 8.73.

(and thus Article 3.3 – scientific justification) because it was not based on a risk assessment, the Appellate Body reversed the Panel's interpretation, considering that Article 5.1 requires that there be a "rational relationship" between the measure at issue and the risk assessment. Risk assessment involves, as the Appellate Body clarified, identifying the adverse effects and then providing an evaluation of the probability of such effects. Overall, the Appellate Body held that the EC had not conducted a risk assessment, that no adverse effects of consumption of meat treated with hormones was found, and that scientific data was not 'reasonably sufficient' to support the EC measure.

The Appellate Body also reversed the Panel's finding that the EC measure, through arbitrary or unjustifiable distinctions, resulted in "discrimination or a disguised restriction of international trade" in violation of Article 5.5, noting that: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones; (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel's finding was not supported by the "architecture and structure" of the measures[162].

This case falls in the "Trade Negative/Investment Potentially Positive" category because an arbitrator may take the same approach as the Panel and find that the measure is not sufficiently based on scientific analysis and risk assessment, and is in fact a way to shut foreign meat out of a local market. The scientific evidence available at the time when such a case arises might tend to dispel the legitimate health fears that the Appellate Body cited. An arbitrator may find the disparate impact on foreign meat to violate national treatment and shut out competitive products from a market, and hold that public health may be protected by labeling, education and other measures short of barring hormones. In the Hormones case, the EC claimed that the Panel erred when it systematically considered the scientific views of the panel-appointed experts of higher probative value than the scientific evidence presented by the EC scientists. Specifically, the EC claimed the Panel inappropriately assigned a high probative value to the scientific views presented by some of the five scientific experts chosen by the Panel and to the views of the technical expert appointed by Codex Alimentarius, and disregarded

[162] EC – Hormones , AB Report, pages 95, 96. Para.245, 246.

the scientific evidence presented by the EC and its scientific advisors. The EC further claimed that the Panel based its legal interpretations and findings on a number of critical issues on the majority of scientific views presented by its own appointed experts, instead of limiting itself to examining whether the scientific evidence presented by the EC was based on "scientific principles" as required by Article 2:2 of the SPS Agreement.[163] In an arbitration proceeding, the decision-maker's assessment of the evidence of risk will tip the balance in favor or against the claimant's argument. For obvious reasons, on the other hand, the arbitrator may conclude that the "genuine anxieties" as to the health concerns raised by hormones in meat products brings this case out of the investment realm altogether.

Korea —Agricultural Products.[164] The US requested consultations with Korea concerning testing, inspection and other measures required for the importation of agricultural products into Korea. The U.S. claimed that these measures restrict imports and violate GATT Articles III and XI, SPS Articles 2, 5 and 8, TBT Articles 2, 5 and 6, and Article 4 of the Agreement on Agriculture. The available record did not include sufficient facts to explore the nature of the testing and inspection measures that the United States challenged, and I classified this case as Trade and Investment Negative.

Japan - Measures Affecting Agricultural Products.[165] The United States requested consultations regarding Japan's prohibition under quarantine measures on the import of certain agricultural products because of the possibility of their becoming potential hosts to codling moth. The Panel and the Appellate Body both concluded that Japan's testing requirement was maintained without sufficient scientific evidence, in violation of SPS Article 2.2, and that it was not justified under Article 5.7 because Japan did not meet all the requirements for the adoption and maintenance of a provisional SPS measure. The Appellate Body found that the Panel improperly applied judicial economy to the United States' claims under SPS Article 5.1 in relation to apricots, pears,

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[163] EC – Hormones , Panel Report, pages 5,6 para.12, 14.

[164] WT/DS41/1 *Korea — Measures concerning Inspection of Agricultural Products*, Request for Consultations (24 May, 1996).

[165] WT/DS76/AB/R, *Japan - Measures Affecting Agricultural Products*, AB report (22 February 1999) ('**Japan – Agricultural Products II'**).

plums and quince – four products that were not examined by the Panel. The Appellate Body completed the legal analysis as to these products and found that Japan's measure violated Article 5.1 for these four products because it was not based on a proper risk assessment. This case is a Trade Positive because of the finding of SPS violations. However, the Appellate Bound specifically reversed the Panel's findings that Japan's measures were more trade restrictive than required. It is possible that an arbitration tribunal will rule in favor of the complainant on the grounds that it should have a legitimate expectation that the scientific evidence supporting an import ban be sufficient, and that a violation of the SPS in these circumstances violates IT Article V. However, because the case ultimately revolved more on the sufficiency of the scientific evidence than on the presence of discrimination, and it implicated genuine issues of scientific validity, I classified it as an Investment Potential Positive, borderline Negative.

Japan — Measures Affecting the Importation of Apples.[166] In this case the United States requested consultations with Japan regarding restrictions that it claimed was imposed by Japan on the importation of apples from the US. The United States' complaint arose from Japan's quarantine restrictions on apples imported, which Japan argued were necessary to protect against the introduction of fire blight. Among the measures the US complained of were the prohibition of imported apples from orchards in which any fire blight was detected, the requirement that export orchards be inspected three times yearly for the presence of fire blight, and the disqualification of any orchard from exporting to Japan should fire blight be detected within a 500 meter buffer zone surrounding such orchard. The key factual question before the Panel was whether the fire blight could be transmitted to Japan through the exportation of apple fruits rather than infected plants, and whether there was sufficient scientific evidence to prove it, as is required by Article2.2 of the SPS Agreement. The Panel found, and the Appellate Body upheld, that the measure was maintained "without sufficient scientific evidence" in violation of Article 2.2 of the SPS Agreement, as there was no "rational or objective relationship between the measure and the relevant scientific evidence." The Appellate Body referenced back to its *Hormones* decision (reviewed below) and reasoned that

[166] WT/DS245/AB/R, *Measures Affecting the Importation of Apples*, AB report (November26, 2003).

even though the complaining party (the US) had the initial burden of establishing a prima facie case of inconsistency under the SPS Agreement, the responding party had nevertheless to prove facts on which it relied in response. Japan could only prove that mature, symptomless apples were exported by the US into Japan, but it did not prove that those apples could spread the infection.

Japan was also found to have violated Article 5.1 of the SPS Agreement because the measure was not based on a risk assessment. The AB found that the analysis relied on by Japan failed to evaluate: (i) the likelihood of entry, establishment or spread of fire blight specifically through apple fruit, and (ii) the likelihood of entry "according to the SPS measures that might be applied." In this regard, the Appellate Body noted that the obligation to conduct an assessment of "risk is not satisfied merely by a general discussion of the disease, but rather by an evaluation of the risk. It must connect the possibility of adverse effects with an antecedent or cause (i.e. in this case, transmission of fire blight "through apple fruit"). I classified this case as a Trade Positive/Investment Potentially Positive for essentially the same reasons as I classified other cases where the AB found a trade violation without relying on a discrimination rationale: an investment tribunal might find a BIT provision akin to IT Article V to apply on the grounds that an investor has legitimate expectations of compliance with the SPS and its requirements that import bans have sufficient scientific evidence, but it may also stop short of finding an investment violation in the absence of a denial of national treatment (no discrimination), especially because of the health and resource conservation flavors that infuse the case.

Egypt – Import Prohibition on Canned Tuna with Soybean Oil.[167] Thailand challenged an Egyptian ban on tuna canned in soybean oil. The Egyptian ban arose ostensibly out of health concerns related to the genetically modified organisms that Egypt presumed were used to make soybean oil. Thailand's claim was premised on its challenge to Egypt's proof that its soybean oil contained any genetically modified organisms (GMOs),

[167] WT/DS205/1 *Egypt — Import Prohibition on Canned Tuna*, Request for Consultation (22 September, 2000).

which Thailand asserted was not existent.[168] Thailand claimed a violation of Article XI. I classified this case as a Trade Positive because of the possibility that, if the proof of GMO use did not exist there would be an unjustified violation of Article XI and Article III, and even if the proof was found to exist the measure might violate SPS. I classified it as an Investment Potentially Positive because of the claim that a health risk may arise from the use of GMOs the controversy in the scientific community over the dangers and problems associated with GMOs. The use of GMOs is considered controversial in light of the potential health risks, the environmental concerns regarding potential loss of biological diversity, ethical and moral concerns and the potential for adverse economic consequences to local farmers and industries in favor of large global biotech corporations. [169]

Automobile and Gasoline Cases

I grouped all cases involving the automobile industry in one category. I included also cases like Reformulated Gasoline because of their connection to the car industry. These cases fall in the Trade Positive – Investment Positive category with the exception of the Brazil – Retreaded Tires and the Gasoline case. This outcome is not surprising given the traditional incentives to protect the automobile industry. That industry has a relatively high rate of unionization in industrialized countries. Skilled and semi-skilled jobs tend to be numerous, and outsourcing of component parts or assembly is common. Component parts may be subject to a separate duty thereby creating gaming opportunities. At the same time, the industry involves obvious environmental and resource conservation concerns. They may be more eco-friendly if built with gasoline and other environmentally relevant considerations in mind. Or they may be more "ego-friendly," including by way of example luxury cars with a high rate of gasoline consumption, and may be subjected to stricter regulation or higher levels of taxation. This might create an incentive for governments to regulate in the name of environmental or resource conservation concerns, which will either amount to a

[168] Xinhua News Agency, Thailand Wants Talks with Egypton Tuna Import Ban, October 2, 2000, World News, Economics).

[169] See Samuel Blaustein , Splitting Genes: The Future of Genetically Modified Organisms in the Wake of the WTO/Cartagena Standoff, 16 Penn St. Envtl. L. Rev. at 371-372; See also Peter Pringle, Food, Inc.: Mendel to Monsanto - The Promises and Perils of the Biotech Harvest 54 (Simon & Schuster 2005).

disguised restriction or be insufficiently strong to justify the restriction on trade. (The Reformulated Gasoline case exemplifies this possibility; yet, I downgraded it to Potentially Positive on the investment side because of the domestic sensitivities associated with the resource conservation aspects of the measure discussed below.) These issues will be discussed in details in the application of investment law section.

Automobile and Gasoline Cases

DS 4: Standards for Reformulated and Conventional Gasoline	TP	IPP
DS 54, 55, 59, 64: Indonesia - Certain Measures Affecting the Automotive/Automobile Industry	TP	IP
DS 139, 142: Canada - Certain Measures Affecting the Automotive Industry	TP	IP
DS 146, 175: India - Measures Affecting the Automotive Sector	TP	IP
DS 195: Philippines - Measures Affecting Trade and Investment in the Motor Vehicle Sector – MVDP	TP	IP
DS 332, 339, 340, 342: Brazil - Measures Affecting Imports of Retreaded Tyres - MERCOSUR	TP	IPP

Indonesia; Certain Measures Affecting the Automotive Industry.[170] The EC, US and Japan requested consultations with Indonesia concerning two measures that they claimed protected the domestic automobile industry. The first measure granted duty reductions or exemptions on automotive parts with sufficient local content. The second extended various benefits, including luxury tax and import duty exemptions, to cars of

[170] WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, *Indonesia – Certain Measures Affecting the Automobile Industry* (Complaints by the EC (WT/DS54), Japan (WT/DS55 and WT/DS64), and the U.S. (WT/DS59), Panel report (7 December 1998).

Indonesian make or qualifying as having sufficient local content. The Panel found the measures to violate Article III:2 of the GATT. It found that the first measure resulted in the taxation of an imported motor vehicle at a higher rate than a like domestic vehicle, and the second program in the higher taxation of imported cars as compared to directly competitive or substitutable domestic cars.[171] The national treatment findings and performance requirements claims make this case an Investment Positive.

Canada — Certain Measures Affecting the Automotive Industry.[172] In this case, Japan and the European Communities challenged a Canadian import duty exemption adopted pursuant to an automotive products agreement with the United States. The agreement provided that only a limited number of vehicle manufacturers were eligible to import vehicles into Canada duty free and to distribute the motor vehicles in Canada at the wholesale and retail distribution levels. The complainants argued that this measure favored American cars and violated the most-favored-nation provisions of Article I-1. The complainants further challenged a Canadian value added requirement, on the grounds that it essentially required imported products to have local content in order to reach the minimum level of local value added required by Canada.

The Panel and the AB rejected the Canadian argument that the measures were origin-neutral. It held that Article I:1 applies to *de facto* discrimination as well as d*e jure*, and covers measures that limit the benefit of the import duty exemption to certain importers only. The Panel and the AB found that the duty exemption at issue, although origin-neutral in its form, benefited only imports from a small number of countries in which an exporter was affiliated with eligible Canadian manufacturers/importers. The DSB further rejected Canada's defense that Art. XXIV allowed the duty exemption for NAFTA members, because the Panel and the AB found that the exemption was provided to countries other than the United States and Mexico. Regarding the value added claim, the DSB found that, while a value added requirement does not necessarily translate into

[171] Additionally, the Panel found the second program violated Article 2.1 of TRIMs because the measure was a "trade-related investment" measure; and it, as a local content requirement, fell within paragraph 1 of the Illustrative List of TRIMs in the Annex to the TRIMs Agreement, which sets out trade-related investment measures that are inconsistent with national treatment obligation under GATT ArticleIII:4.

[172] WT/DS139/AB/R, WT/DS142/AB/R *Canada — Certain Measures Affecting the Automotive Industry,* AB report (adopted 19 June 2000).

a domestic content requirement, the Canadian value added requirement was so high as to raise the inference that the use of domestic goods was a condition to meeting it.[173] This case is a Trade Positive because of the clear finding of discriminatory treatment without any countervailing domestic purpose and because the extension of the trade benefits to non-NAFTA parties negate possible defenses grounded in regional integration arguments. I did not hesitate to classify as an Investment Positive as well because of the findings of most-favored nation-treatment violations, which would violate IT Article IV, the national treatment breaches, and the absence of any valid domestic purpose.

India - Measures Affecting the Automotive Sector.[174] In this case, the United States and the EC challenged India's "indigenization" program and its requirement that exports value be equal imports value in the autos industry. The indigenization programs involved features akin to performance requirements. The imports/export equivalency rule further denied market access and created unfavorable competitive conditions for car manufacturers. The AB found that the indigenization requirement modified the competitive conditions in the Indian market to the detriment of the imported products and violated Article III-4. It also found that the balance of payment provisions amounted to a quota in violation of article XI, and that India had not made a prima facie case for any justification under the balance-of-payment defense of Article XVIII-B. This case qualifies as a Trade Positive. I also classified as an Investment Positive because the national treatment violations had no legitimate purpose and the balance of payment defense fell far short of justifying the protective effect of the Indian measures.

Philippines — Measures Affecting Trade and Investment in the Motor Vehicle Sector.[175] The United States requested consultations with the Philippines with respect to various measures included in Philippines' Motor Vehicle Development Program

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[173] See Kenina, L., NOTE: An Inherent Conflict Between WTO Law and a Sustainable Future? Evaluating the Consistency of Canadian and Chinese Renewable Energy Policies with WTO Trade Law, 24 Geo. Int'l Envtl. L. Rev. 57, 80 (2011); Bhala, R., and Gantz, D., CASE REVIEW 2000, 18 Ariz. J. Int'l & Comp. Law 1, 30 (2001).

[174] WT/DS146/AB/R , WT/DS175/AB/R , India — Measures Affecting the Automotive Sector, AB report (19 March 2002).

[175] WT/DS195/1, *Philippines — Measures Affecting Trade and Investment in the Motor Vehicle Sector*, Request for Consultation (23 May, 2000).

("MVDP"). The United States argued that car makers located in the Philippines could avail themselves of preferential tariff rates if they met certain performance requirements including domestic content and a mandate to earn enough foreign exchange gains from exports to generate a part of the import prices. The United States asserted a violation of Article III and Article XI. This case qualifies as a Trade Positive for essentially the same reasons as the India – Autos decisions described above, and as an Investment Positive as well because of the performance requirements and other violations of national treatment.

Brazil--Measures Affecting Imports of Retreaded Tyres.[176] This case involved a challenge to a Brazilian import ban on retreaded tires. Brazil justified its measures on Article XX(b) grounds. It claimed that retreaded tires raised risks associated with mosquito infestations, the spread of malaria and dengue fever, as well as wild fires and associated fumes and health hazards. A separate proceeding brought under MERCOSUR found the measure illegal, thereby requiring Brazil to exempt imports from its MERCOSUR partners from the scope of the ban. Another judicial decision, by the Brazilian Supreme Court, prohibited the application of the ban to used tires. This meant that Brazilian manufacturers of retreaded tires could use imported casings. The case had strong trade significance because it required the WTO to confront recurring issues of trade and sustainable development.[177]

The Appellate Body and the Panel both found that the import prohibition on retreaded tires was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b) of the GATT. The Appellate Body made clear that a health risk might require a combination of domestic measures and import bans, and rejected the argument that Brazil should use only measures like incineration, stockpiling, or landfills, that do not involve an import ban. The ban, the AB found, was

[176] WT/DS332/R, *Brazil--Measures Affecting Imports of Retreaded Tyre*s, Panel report , (12 June 2007) as modified by WT/DS332/AB/R, *Brazil--Measures Affecting Imports of Retreaded Tyres*, AB report (adopted Dec. 17, 2007) ("**Brazil-Retreaded Tyres**").

[177] Bederman, J. and Gray, K., INTERNATIONAL DECISIONS: BRAZIL--MEASURES AFFECTING IMPORTS OF RETREADED TYRES:WorldTradeOrganizationAppellateBodyopinionon GATT Article XX exceptionforhumanhealth, 102 A.J.I.L.610 (2008).

necessary to limit the generation of retreaded tires, rather than its management, and to enable Brazil to achieve its desired level of protection.

However, the AB both found the measure to violate the chapeau of Article XX. The Appellate Body reversed the Panel's findings with respect to the analysis under the Article XX *chapeau*, and instead held that the MERCOSUR exemption resulted in the import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapter of Article XX of the GATT. The AB also reversed the Panel's analysis on the significance of the import of tires authorized pursuant to the Brazilian judicial rulings. The Appellate Body held that the court orders resulted in the application of the import ban in a manner constituting arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX. The case is of course a Trade Positive and I classified it as an Investment Potentially Positive. An arbitrator would have no problem finding a violation of IT Article III and Article IV on account of the discrimination against foreign tires and the preferences given to regional partners pursuant to the Brazilian court decision. The health analysis would give him or her more pause. The dangers associated with retreaded tires raise legitimate domestic concerns, and the arbitrator may refuse to award damages for a measure intended to protect against the spread of disease or urban fires. The arbitrator may also, because of the fire dangers, invoke the public order exception of the IT. On the other hand, the arbitrator might rule in favor of the complainant because domestic and preferred trading partners' companies may sell the tires on the Brazilian market. While the volume of imports bears on the level of risk in that the more tires the more exposure, the classification chosen by Brazil entails a fair degree of arbitrary discrimination among similarly situated concerns and may violate the arbitrator's sensitivities.

China - measures affecting imports of automobile parts.[178] The United States, EU and Canada brought proceedings against China, challenging a 25% charge on imported auto parts used in the manufacture or assembly of certain models of motor

[178] WT/DS/339/AB/R, WT/DS/340/R, WT/DS/342/AB/R, *China – Measures Affecting Importsof Automobile Parts*, AB report (Dec. 15, 2008) ('**China – Auto Parts**').

vehicles assembled and sold in China. The extra charge applied to imported parts having the essential character of a completed vehicle, determined based on criteria prescribed in the challenged measure. In addition, the charge was levied only after the parts were imported and assembled in China into a finished vehicle. China argued that, insofar as the measures were found to be inconsistent with either Article II or Article III, they were justified under Article XX(d) of the GATT. China contended that the measures were necessary to address circumvention of the obligation to pay 25% duties on complete vehicles through the shipment of auto parts at 10% when those parts were later assembled into a complete vehicle.

The Panel rejected the Article XX(d) defense. The Panel noted that the language and circumstances leading to the adoption of the measure cast doubt on the legitimacy of the Chinese claim that were 'designed' to address the evasion or circumvention of higher tariff rates, and otherwise rejected the defenses asserted by China.[179] This is a Trade Positive and I also classified it as an Investment Positive because, even though the case raises the possibility of a securing compliance exception within IT Article VIII, the case has enough of the look-and-feel of unjustified protectionism to fall within that category without too much hesitation.

Indonesia -Certain Measures Affecting the Automobile Industry.[180] The EU, US and Japan challenged two Indonesian measures affecting the import of cars. The first imposed import duty reductions or exemptions on automotive parts based on the amount of local content they contained. The second regulatory structure provided various benefits, such as luxury tax exemption or import duty exemption, to automobiles and car makers using a sufficient amount of local content. The Panel found that the measures violated national treatment. It held that under the first program, an imported motor vehicle would be taxed at a higher rate than a like domestic vehicle, and under the second program any imported vehicle would be taxed dissimilarly to a directly

[179] GATT Panel Report, European Economic Community – Regulation on Imports of Parts and Components, L/6657, adopted 16 May 1990, BISD 37S/132 GATT Panel Report, para. 5.18.

[180] WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, *Indonesia – Measures Affecting the Automobile Industry*, Panel report (2 July 1998).

competitive or substitutable domestic car. Additionally, the Panel found that the second program violated Article 2.1 of TRIMs because the measure was a "trade-related investment" measure; and it, as a local content requirement, fell within paragraph 1 of the Illustrative List of TRIMs in the Annex to the TRIMs Agreement, which sets out trade-related investment measures that are inconsistent with national treatment obligation under GATT Article III:4. This case is a Trade Positive and an Investment Positive because of the performance requirements and other violations of national treatment that were imposed without an apparent domestic justification.

United States - Standards for Reformulated and Conventional Gasoline[181]. Brazil and Venezuela challenged the "Gasoline Rule" of the US Clean Air Act in one of the first challenges to a measure involving environment protection. The Gasoline Rule allowed domestic refiners, blenders, and importers to measure compliance factors related to gasoline contents by choosing between a statutory baseline intended to reflect average industry conditions as to cleanliness factors, and an individual baseline measuring actual company-specific measurement. Foreign refiners were forced to use the statutory baseline. The foreign undertakings were not allowed to use their individual baseline. The Panel found that the measure treated imported gasoline less favorably than domestic gasoline in violation of Article III:4, because the imported gasoline experienced less favorable sales conditions than those afforded to domestic gasoline. The Gasoline Rule deprived the foreign entity of the ability to use an individual baseline that, potentially, would be more favorable than the statutory baseline. By requiring importers to meet an average standard (statutory baseline) that had no connection to the particular gasoline imported, the Rule had the potential to create less competitive conditions for foreign undertakings.

The Panel and the Appellate Body rejected the Article XX defense asserted by the United States. Both the Panel and the Appellate Body found the measure was "related to" the "conservation of exhaustible natural resources," and falling within the scope of Article XX(g). However, even though it sought to regulate the composition and emission

[181] WT/DS2/R, *Standards for Reformulated and Conventional Gasoline*, Panel report (29 January 1996); WT/DS2/AB/R, *Standards for Reformulated and Conventional Gasoline*, AB report (20 May, 1996).

effect of gasoline to prevent air pollution, the Rule could not be upheld under Article XX shelter because its discriminatory features amounted to "unjustifiable discrimination" and a "disguised restriction on international trade" under the chapeau of Art. XX. The United States had failed to seek a less trade restrictive measure, such as negotiating a treaty with the export jurisdictions. Under this record, the environmental concerns asserted by the United States would not justify the trade embargo that it imposed on foreign gasoline.

This case was unique and controversial in two respects. First, the case was initiated by two emerging economies that filed a complaint against a more industrialized country in contrast to the prevailing practices under the former GATT. Second, the case involved environment-related issues, drawing attention from environmentalists as well as government officials handling environmental policies. The case was brought in the mid-1990s, when the world was still more sharply divided between more developed countries with higher levels of regulation and emerging economies that the West feared would trade on their lower wages and costs of production associated with laxer regulation. While these concerns still pervade the trade discourse, the strength of economies like those of the BRICS, their support of the debt habits and often of the currency strength of countries like the United States, and the global recessionary forces that have been experienced, have pushed the environmental, labor, resource conservation and other concerns apparent in Gasoline to lower rungs of priority. At the time, though, the decision of the WTO was viewed by some as a wholesale attack against the Clean Air Act and the United States' sovereign right to protect its environment. My own view (with many others) is that the WTO recognized squarely the validity of environmental and resource conservation defenses, but that the obvious presence of less trade restrictive alternatives raises a sufficient inference of unjustified protectionism to find a trade violation. I would apply the same rationale in an investment context. I nonetheless classified the case as an Investment Potentially Positive because the domestic concerns for the environment and resource conservation might, despite the evidence of protectionism, sway him or her in favor of a finding for the respondent.

General Market Access

I have grouped in this catch-all category cases involving familiar forms of protectionism, such as minimum import pricing, as well as cases that did not readily fit into an industry-specific grouping.

General Market Access

DS 44: Japan - Measures Affecting Consumer Photographic Film and Paper	TN	IPP
DS 431, 432 and 433 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Request for Consultations	TP	IPP
DS 116: Brazil - Measures Affecting Payment Terms for Imports	TP	IP
DS 137: EC - Measures Affecting Imports of Wood of Conifers from Canada	TP	IPP
DS 149: India - Import Restrictions	TP	IP
DS 188: Nicaragua - Measures Affecting Imports from Columbia and Honduras	TP	IP
DS 197: Brazil - Measures on Minimum Import Prices	TP	IP
DS 198: Romania - Measures on Minimum Import Prices	TP	IP
DS 201: Nicaragua - Measures Affecting Imports from Columbia and Honduras	TP	IP
DS 233: Argentina - Measures Affecting the Import of Pharmaceutical Products	TP	IP
DS 246: EC - Tariff Preferences	TP	IP

DS 358, 359: China - Measures Concerning Refunds, Reductions or Exemptions from Certain Taxes and Other Payments	TP	IP
DS 421: Moldova - Measures Affecting the Importation and Internal Sale of Goods	TP	IP
DS 438, 444, 445, 446: Argentina - Measures Affecting the Importation of Goods	TP	IP

Measures Affecting Consumer Photographic Film and Paper (Japan).[182] The United States challenged Japanese measures affecting the distribution and internal sale of imported consumer photographic film and paper. The US alleged that Japan treated imported film and paper less favorably through distribution measures, restrictions on large retail stores, and promotion measures in violation of Article III of the GATT. Underlying the trade dispute was the commercial rivalry between Kodak and Fuji. Kodak claimed that substantial swaths of the Japanese market were shut off to its products as a result of a combination of government policies and widespread discrimination by Japanese retailers and distributors against United States products.[183] The Panel found that none of the Japanese measures were improper. It held that distribution measures were generally origin-neutral and did not have a disparate impact on imported film or paper, and that the US had not proven that the measures were inconsistent with Article III: 4. This is a Trade Negative.

An arbitral tribunal, however, may take a more aggressive view of market access in emerging economies. The Japan – Film case was the first loss for the United States in a major WTO dispute, and it reflected a deep trade tension between Japan, whose economy had been export-oriented since after World War II, and the United States, which sought to gain greater access to the Japanese market after its remarkable

[182] WT/DS44/R, *Measures Affecting Consumer Photo graphic Film and Paper*, Panel report (31 March, 1998) ("**Japan – Film**").

[183] See D. Daniels, Issues of Fairness in the Kodak – Fuji Case, available at http://www.internationalecon.com/fairtrade/fairpapers/ddaniels.html (last visited on March 2, 2013).

solidification. Kodak and Fuji were like ships passing each other by night. Fuji argued that its access to the United States market was substantially similar to the market share of Kodak in Japan, indicating the absence of discrimination. Kodak argued that its large investment in Japan, which in other export markets would have led to a greater share of the market than it had in Japan, showed that it was disfavored structurally by Japanese law and practice.[184]

These arguments raise classical issues that arise between export and import countries. The most applicable example in today's trading world is China. For example, in the field of clean energy, China's trade laws have been gearing up to block American battery-powered cars and have applied "Buy China" rules excluding foreign imports, especially of higher technology solar cells and wind turbines. At the same time, the U.S. and the EU's trade laws are blocking the export of Chinese-made solar cells and wind towers. Around September 2012, the EU launched a probe into alleged "dumping" of solar panels by Chinese manufacturers. Two months later, in November 2012, China filed a complaint with the WTO against subsidies provided by some European governments to solar panel makers. The conversation that the trading partners and warriors hold at the international level mirrors the domestic pressures that their industry in the competitive fields of the day place on their governments, and the rational choice dance that they engage in to give the most protection to their economic interests all the while maintaining the global equilibrium of commerce. An arbitrator may cut through the traditionally protective market access structure of Japan and rule in favor of a Kodak in a case under IT, most likely under Article III. I have therefore classified this case as a Potentially Positive Investment filing.

China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum.[185] This case is another example of a recent dispute concerning China's exports practices. I included it in this Section with a longer discussion than I normally ascribed to each filing, and discuss it again more briefly with the raw materials cases as

[184] Id.

[185] WT/DS431/6 (complaint by the U.S.), WT/DS432/6 (complaint by the E.U.) and WT/DS433/6 (complaint by the Japan), *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, Request for Consultations (13 March 2012).

well, because it evoked a (post-)modern day Kodak-Fuji battle for market access in light of shifting manufacturing and industrial/technological patterns of commerce.

The Panel in this case was established by the Dispute Settlement Body on July 23, 2012 following a request by the U.S., E.U. and Japan to probe China's export, quotas, duties and other restrictions on rare earths, as well as minor metals molybdenum and tungsten. Requesting the panel, the U.S. claimed that the export restraints at issue include export quotas, export duties, various restrictions on the right to export and administrative requirements that limit China's exports of these materials by increasing the burden and costs for exporting. According to the EU's filing, the export restrictions significantly distort the market and create competitive advantages in favor of China's manufacturing industry to the detriment of foreign competition. The complainant's basic claim is that by increasing the burden and costs for exporting, China is coercing foreign companies to set up shop in China in order to have access to essential manufacturing resources, a claim that is a common thread in export restraint cases. The complainants further claim that the export restrictions significantly distort the market and create competitive advantages in favor of China's manufacturing industry to the detriment of foreign competition. China responded that its policies aimed at protecting natural resources and achieving sustainable economic development and that it has no intention of protecting domestic industry through means that would distort trade.

In order to understand this case, one should first understand the background and the importance of rare earths. The complaining countries, especially the U.S. are currently engaged in a race to develop practical, non-Chinese sources of the rare earth elements that are so critical to modern technologies. Everything from smartphones to missile systems requires rare earths. Almost every piece of high tech gadgetry contains some combination of rare earths to make volumes louder, E-mails vibrate, and bombs able to hit their targets. Therefore, nations that control rare earth production own one of the most capable economic and national security levers in the modern world. Over the last quarter century, that lever has been controlled overwhelmingly by China. China today has almost half the world's reserves rare earth. The claim is that it has also worked to eliminate the competition; starting in the 1990s, China dumped huge quantities of rare earths onto the world market, resulting in plunging prices that forced U.S.

companies out of the business. With U.S. and foreign competitors out of the way, China began to use rare earths as an economic development lever. Companies that produce their high tech products in China can get the benefit of lower prices as well as a guaranteed supply. China's intent all along was not just to develop rare earth production, but also the downstream high tech industries that depend on rare earths. This supply chain brings with it thousand of jobs — and tremendous dependency on China. The country currently has a stranglehold on the rare earth supply, amounting to more than 95% of worldwide production. However, many companies are increasingly loathed to move their production to mainland China. Most are afraid of the potential of intellectual property infringement and industrial espionage. But the need to gain a cost effective, guaranteed supply of rare earths means that many have been forced to make a compromise. If viable, non-Chinese sources are developed soon, however, companies will have an alternative that will allow them a way out of the China relocation trap.

This race is also important for defense reasons: a reliable domestic source of rare earths for weapons production is a critical national security goal for modern nations. As China proved in 2010 when it placed a rare earth embargo on Japan because of a territorial dispute, it is not afraid to use access to rare earths as a lever to get its way in the international arena. Because of concerns over China's dominance of the rare earths market, the U.S. Department of Defense was directed by Congress in 2011 to study the problem. The Department of Defense's analysis resulted in an April 2012 report entitled Rare Earth Materials in Defense Applications, which determined that we are at risk for interruption of some critical rare earth elements because of Chinese production hegemony.

The U.S., with approximately 13% of the world's total reserves, has one of the most economically-viable concentrations of rare earths in California. Production in California is rapidly developing, and will be able to supply the raw rare earth ore for much of America's needs within a year or two. The problem is that mining for rare earths is just the start. The industrial capacity that takes raw rare earth elements and makes them into components that can be used in high tech products largely does not exist in the United States—and may not be developed for another 10 to 15 years. So the production of rare earth metals, alloys, and magnets have to rely on factories located

outside the United States, and some even in China. An astounding 80% of the worldwide rare earth magnet production is from China. So the problem is not just about access; countries like the United States will have to develop their capabilities to refine and make rare earths into useable components to compete effectively. Otherwise, it would simply be shipping our raw materials to China, or other countries, for processing.

I have spent more space discussing this case than others because it is a highly visible dispute on the current trade scene that involves key concerns, including national security and basic ability to compete in the industries where the United States, Europe, and Japan, the original "senior partners" of trade, are most invested. I have classified the case as a Trade Positive because, putting aside the nature of the industry and the stakes involved, it is a run-of-the mill export restriction case. China's defense will rest on the preservation of natural resources, and among other burdens it will have to prove that its measure is applied in conjunction with domestic efforts and of course that it is not a disguised restriction on trade. Based on past experience, the defense is likely to fail if the case proceeds to a decision. In addition, the case is an important development in the conversation among today's trading actors for market access, and it raises key concerns such as the consequence of concentrating manufacturing power in China or other emerging powerhouses.

The case, if our hypothetical IT applied, would be a Potentially Positive. The analysis, as with trade, does not involve any strikingly new doctrinal move. It is unique because of the context for the case, and it should catch the reader's attention not because of the legal reasoning at work but because it shows that even disputes like Rare Earths could wind up on an arbitrator's desk. If a violation of IT Article III or IT Article V were found applying the rationale that I have applied to the other export restriction cases discussed here, the damages would be staggering. They would include, potentially, the lost profits arising as a failure to be excluded from the raw materials. The investor would form a sourcing subsidiary intended to buy and ship rare earths to its parent company for use in manufacturing at home. The legislation would not allow for the shipment, whereas a similarly situated company manufacturing in China would have the right to make its final product using the raw materials. The denial of national treatment would likely violate IT Article III, and the claim of violation of GATT law

would add an Article V cause of action under IT, and the lost market share resulting from these actions.

A*rgentina — Measures Affecting the Importation of Goods*.[186] The EU requested consultations with Argentina concerning certain measures imposed by Argentina on the importation of goods. The EU challenged: (i) declarations required as a condition for the approval of imports; (ii) various types of licenses required for the importation of certain goods; and (iii) the alleged systematic delay in granting import approval or failure to grant such approval, or the grant of import approval subject to importers undertaking to comply with certain allegedly trade restrictive commitments. The EU claimed that the challenged measures appear to be inconsistent with Articles III:4, VIII, X:1, X:3 and XI:1 of the GATT, Article 2 of the TRIMs Agreement, and certain articles of the Agreement on Import Licensing Procedures, the Agreement on Agriculture, and the Safeguards Agreement. This case involves sufficient claims of protectionism to warrant a Trade Positive and Investment Positive classification.

Brazil – Measures on Minimum Import Prices.[187] The United States challenged Brazilian measures establishing a system ostensibly designed to verify the values of imported goods for purposes of applying customs duty. The United States claimed that Brazil established minimum import prices disproportionate to the value of the goods imported. It argued that Brazil used this verification and implementation system together with a non-automatic licensing procedure to curtail the flow of imported goods. The United States claimed that the Brazilian measures violated Article XI. This is a Trade Positive because the claims implicate discrimination against foreign goods inherent in the use of licensing to impose additional burdens and abuse of administrative procedures to achieve protection of the domestic market. The likelihood

[186] WT/DS438/R/1 (complaint by the E.U.), *Argentina — Measures Affecting the Importation of Goods*, Request for Consultations (25 May 2012). See also WT/DS444/R/1 (complaint by the U.S.) *Argentina — Measures Affecting the Importation of Goods*, Request for Consultations (21 August 2012); WT/DS445/R/1 *Argentina — Measures Affecting the Importation of Goods* (complaint by Japan), Request for Consultations (21 August 2012); WT/DS445/R/1 (complaint by Mexico) — *Measures Affecting the Importation of Goods*, Request for Consultations (24 August 2012).

[187] WT/DS197/R/1, *Brazil — Measures on Minimum Import Prices*, Request for Consultations (30 May 2000).

that these claims may result in a finding of violation of IT Article III and Article V make this case an Investment Positive.

Romania – Measures on Minimum Import Prices.[188] The United States requested consultations with Romania in relation to the asserted use of minimum import prices for customs valuation purposes. The United States claimed a violation, among other provisions, of Article XI. The parties notified a resolution of the matter that included an undertaking by Romania to eliminate the minimum import prices and instead receive assistance from the United States to assess the risk of customs frauds. This is a typical minimum imports price and I classified it as a Trade and Investment Positive.

EC – Tariff Preferences.[189] This case involved a challenge to the EC's generalized tariff preferences scheme for developing countries and economies in transition. India claimed that it received less favorable treatment than twelve countries that benefited from special concessions on account of their membership in an arrangement aimed at preventing drug trafficking. India claimed violations of Article I of GATT and of the "Enabling Clause" allowing the extension of more favorable treatment to developing countries. The Panel and the Appellate Body, albeit with different reasoning, both found a violation of Article I that was not justified by the Enabling Clause. The Appellate Body found that, because the countries benefiting from more favorable treatment did not demonstrate that they had different trade, financial or economic needs than India, they could not be favored under the arrangements to combat drug trafficking that were used to justify the discrimination. This case qualifies as a Trade Positive because of the discrimination between countries that the WTO finds to be similarly situated. I classified it as an Investment Positive because of the likelihood that this would translate into a violation of IT Article IV most-favored-nation provisions.

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[188] WT/DS198/R/1, *Romania – Measures on Minimum Import Prices*, Request for Consultations (30 May 2000).

[189] DS246/R, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel report (1 December 2003); WT/DS246/AB/R, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, AB report (adopted 7 April 2004).

China — Grants, Loans and Other Incentives.[190] This case involved a challenge to a Chinese program of grants, loans and other incentives extended to enterprises on the condition that they meet performance requirements. The relevant portions of the case included an alleged violation of national treatment that the measures benefit Chinese-origin products but not imported products. While the controversy centers primarily on subsidies and the Agriculture Agreement, the claim falls within the Trade Positive – Investment Positive because the Article III claim pertains to performance requirements and the grant of more favorable treatment to domestic products.

China – Measures Related to the Exportation of Raw Materials.[191] U.S., EC and Mexico claimed that China's restrictions on the export from China of various forms of raw materials violated Articles VIII, X, and XI of the GATT, and certain sections of the Protocol on the Accession of the People's Republic of China. The complainants argued that the use of export restraints creates scarcity and causes higher prices of the raw materials in global markets. The distortion on export trading conditions favored domestic manufacturers by giving domestic manufacturers access to necessary intermediate materials at a stable and lower price, while creating scarcity and higher prices for foreign manufacturers. China argued in its defense that some of its export duties and quotas were justified because they related to the conservation of exhaustible natural resources for some of the raw materials. As for other of the raw materials, China had claimed that its export quotas and duties were necessary for the protection of the health of its citizens.

The complainants were successful on most counts before the WTO. I classified the case, therefore, as a Trade Positive. Because of the finding that China's defense does not justify the measures at issue, I also classified it as an Investment Positive.

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[190] WT/DS387/1 (complaint by U.S.), WT/DS388/1 (complaint by Mexico) *China — Grants, Loans and Other Incentives,* Request for Consultations (19 December 2008); See also WT/DS388/1 (complaint by Mexico) *China — Grants, Loans and Other Incentives,* Request for Consultations (19 January 2009).

[191] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, *China – Measures Related to the Exportation of Various Raw Materials*, AB report (30 January 2012). See also WT/DS394/R (the US Panel Report); WT/DS395/R (the EU Panel Report) and WT/DS398/R (the Mexico Panel Report), *China — Measures Related to the Exportation of Various Raw Materials* (5 July 2011).

Argentina – Measures Relating to Trade in Goods and Services.[192] This case involved a challenge by Panama to a wide array of financial regulation designed to discourage business with certain countries and to retain capital within Argentina. The measures included:

- Discriminatory assessment of profits tax -- Argentina presumed net profits of 100% for transactions from the targeted countries, thereby increasing tax rates from 15.05% to 35% for those countries.
- Discriminatory imposition of "unjustified increase in wealth" -- Argentina presumed that funds received from the targeted countries, including payment for exports, was an unjustified increase in wealth taxable in its entirety (with an "add-on" income of 10% of the receipt tacked on to the taxable base).
- Discriminatory valuation of transactions from the targeted countries, in particular by presuming that the transactions are not arm's length thereby requiring the services of independent public accountants to rebut the presumption.
- Market access restriction for reinsurance services originating from the targeted countries.
- Additional, discriminatory requirements to register companies from the targeted countries, or their branches and subsidiaries.
- Discriminatory measures regarding the repatriation of investments to those countries.
- Ban on trade in certain financial instruments by their nationals.
- Discriminatory treatment on the deduction of cost of goods or services furnished or rendered by companies incorporating in those countries.

This is yet another case brought against the current government of Argentina. After the 2001 economic crisis, the Argentinean economy recovered but it continued to suffer from chronic problems, including an over-bloated and inefficient government. Argentina's international reserves recently decreased, thereby giving rise to payment

[192] WT/DS453/1 *Argentina — Measures Relating to Trade in Goods and Services*, Request for Consultation (12 December 2012).

risks. In response, Argentina adopted measures intended to boost its trade balance. In November 2012, these measures started to yield results, with Argentina showing a larger than expected surplus. The capital-preserving measures, however, entailed overtly protectionist regulation that led Argentina's regional and other trading partners to take the country to task with the WTO.[193]

Over 40 countries have described Argentina's trade restrictions as protectionist and contradicting free trade practices. Argentina's practice of holding exports at the border for 60 days is especially contentious. Other complaints involve Argentina's "balanced trade" policy, which only extends import licenses to businesses that ship goods overseas for similar values or invest locally. This case counts as Trade Positive and an Investment Positive because of the discriminatory treatment alleged, and the low likelihood that Argentina would prevail on any potential defense, including balance of payment, administration of tax measures intended to prevent fraud, or other legitimate grounds.

Nicaragua – Measures Affecting Imports from Columbia and Honduras.[194] In this case, Columbia and Honduras requested consultations with Nicaragua with respect to a tax that the complainants said was imposed on their products. Columbia and Honduras asserted a violation of most-favored nation treatment. The claims that the complainants were singled out for discriminatory treatment while other states were not make this case a Trade Positive and an Investment Positive.

China – Measures Concerning Refunds, Reductions or Exemptions from Certain Taxes and Other Payments.[195] The United States and Mexico challenged measures by China extending tax benefits to companies on the condition that those enterprises purchase domestic over imported goods, and/or on the condition that those enterprises meet certain export performance criteria. The performance requirements and export performance conditions would make this a Trade Positive and an Investment Positive.

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[193] D&B Country Riskline Reports, Argentina, February 2013 (on file with author).

[194] WT/DS188/1, *Nicaragua — Measures Affecting Imports from Honduras and Colombia*, Request for Consultation (17 January, 2000).

[195] WT/DS358/1, (complaint by the U.S.); WT/DS359/1 (complaint by Mexico), *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments,* Request for Consultation (2 February 2007).

Argentina — Measures Affecting the Import of Pharmaceutical Products.[196] India requested consultations with respect to Argentinean measures regarding the import of pharmaceutical products. The measures included lists of approved foreign manufacturing facilities and inspection requirements. India claimed that its manufacturing facilities did not appear on the list and that it therefore did not have the opportunity to access the Argentinean market. India claimed a violation of Article III and Article XI. The filing raises an inference that Argentina discriminated against Indian pharmaceuticals, and I classified it as a Trade Positive and an Investment Positive.

Textiles

I have grouped under this heading all textiles cases raising a substantial Article III or Article XI concern and will discuss in the sequel to this piece cases that raised issues related to the specific WTO rules on textiles, which did not raise a sufficiently material Article III or Article XI set of issues. The cases discussed here reflect by and large domestic efforts to protect growing textiles industry or, in some cases, to resist the outsourcing of production of textiles to more cost-effective jurisdictions that has characterized the industry. Not surprisingly, they are all Trade Positive/Investment Positive filings.

Textile Cases

DS 29, 34, 47: Turkey - Restriction on the Import of Textiles and Clothing Product	TP	IP
DS 90, 91, 92, 93, 94, 96: India: Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products	TP	IP
DS 151: US - Measures Affecting Textiles and Apparel Products (II)	TP	IP

[196] WT/DS233/1, Argentina — Measures Affecting the Import of Pharmaceutical Products, Request for Consultation (25 May 2001).

DS 183: Brazil - Measures on Import Licensing and Minimum Import Prices	TP	IP
DS451: China – Measures Related to the Production and Exportation of Apparel and Textiles	TP	IP
DS 366: Columbia - Ports of Entry - Panama Colon Free Zone	TP	IP

China – Measures Related to the Production and Exportation of Apparel and Textiles Products.[197] Mexico requested consultation with respect to a number of Chinese measures that supported Chinese producers and exporters of textiles products. Mexico argued that the measures displaced its imports into the United States, and caused a substantial amount of lost sales on the American market. While the majority of the measures were challenged under the SCM Agreement, the request for consultations also alleged violations of national treatment with respect to three regulatory areas: income tax benefits, benefits extended in connection with the purchase of equipment (including import duties and VAT reductions), measures enabling textiles manufacturers to obtain cotton and chemical fiber at preferential prices, all of which were conditioned on the use of Chinese goods. This case is a Trade Positive because of the allegations of discrimination against foreign products made by Mexico. For the same reasons, I classified it as an Investment Positive.

Brazil — Measures on Import Licensing and Minimum Import Prices.[198] The EC requested consultations with Brazil with respect to import licensing and minimum import pricing schemes that affected the import of textiles into Brazil. The EC complained that non-automatic licensing schemes were applied in a discriminatory fashion to curtail the flow of European goods into Brazil. The EC noted that the minimum prices were fixed after consultation with the affected national industry and

[197] WT/DS451/1 *China – Measures Related to the Production and Exportation of Apparel and Textiles Product*, Request for Consultation (15 October 2012).
[198] WT/DS183/1, *Brazil — Measures on Import Licensing and Minimum Import Prices*, Request for Consultations (14 October 1999).

used, among other things, to calculate customs value. The case whiffed of protectionism. In an investigation preceding the request for consultations, the European Commission had found that "as a consequence of these obstacles to trade, exports to Brazil of certain textile products have come to an almost complete halt. After three years of growth, in 1996 exports of carpets from Belgium to Brazil fell by 16% in quantity and by 25 % in value (from BEF 386 million in 1995 to BEF 279 million in 1996) as a result of a minimum pricing scheme.[199] For these reasons, I classified it as a Trade Positive/Investment Positive.

India: Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.[200] The United States requested consultations with India regarding quantitative restrictions maintained by India on imports of a large number of agricultural, textile and industrial products. These restrictions included an import licensing system, imports canalization through government agencies, and actual user requirement for import licenses. India claimed that the measures were taken to protect its balance-of-payments (BOP) under GATT Article XVIII. The Panel and the Appellate Body found that the measures violated Article XI and rejected India's justification. The case would most likely violate IT Articles III and V, the domestic justification is highly unlikely to prevail, and I therefore classified the case as an Investment Positive as well.

Columbia – Ports of Entry.[201] Panama challenged Columbian measures that, among other things, imposed port of entry restrictions on goods originating from Panama and the Colon Free Zone ("CFZ"), including textiles, apparel and footwear. Columbia required an advance import declaration for these goods. This resulted in the

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[199] Commission of the European Communities, Press Release IP 98/204, Commission Investigates Brazilian Restrictions on EU Textiles Exports.

[200] WT/DS90/AB/R, WT/DS91/AB/R, WT/DS92/AB/R, WT/DS93/AB/R, WT/DS94/AB/R, WT/DS96/AB/R *India: Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, AB report (23 August 1999).

[201] WT/DS366/AB/R, *Colombia - Indicative Prices and Restrictions on Ports of Entry* Panel report (27 April 2009). On 7 July 2009, Panama requested binding arbitration under Article 21.3(c) of the DSU. The Arbitrator determined that the reasonable period of time for Colombia to implement the recommendations and rulings of the DSB is eight months and 15 days from the date of the adoption of the panel report. The reasonable period of time will thus end on 4 February 2010. On 23 February 2010, Panama and Colombia notified the DSB of Agreed Procedures under Articles 21 and 22 of the DSU.

need to pay customs duties and sales tax in advance, and deprived importers of the opportunity to check the accuracy of the declaration on site. The Panel found that the measure Colombia conferred advantages to like products from all other WTO Members that were not extended immediately and unconditionally to textile, apparel and footwear imports from Panama and the CFZ in violation of Art. I.1. The Panel's conclusion makes this a clear Trade Positive. The most-favored-nation violations also make this case a clear IT Article V candidate, and I classified it as an Investment Positive.

Turkey – Restriction on the Import of Textiles and Clothing Product.[202] The Complainants challenged quantitative restrictions imposed by Turkey as a result of its entry of a Customs Union agreement with the European Communities. Turkey argued that it had followed the lead of the EC and that the products at issue would have been excluded from its new Customs Union framework if it had not adopted quantitative restrictions of the type in place in the EC. The AB rejected the Turkish argument and found Turkey in violation of its obligations under Article XI.[203] The parties reached agreement on the implementation of a resolution to this dispute, which included in part the elimination of the quantitative restrictions at issue.

This is a straightforward quota case, complicated by the existence of a sensitive relationship between Turkey and the EC and the presence of a Customs Union agreement that marked a milestone in the integration of Turkey into Europe. The WTO reasoned that new quantitative restrictions in violation of Article XI may not be justified by the entry of a new multilateral agreement. It essentially crafted a test akin to the "least trade restrictive" inquiry onto the WTO provisions applicable to regional agreements, and concluded that certificates of origin or like administrative measures could alleviate the concerns raised by Turkey and the EC without the necessity of

[202] WT/DS34/AB/R, *Turkey – Restriction on the Import of Textiles and Clothing Product,* (complaint by India), AB report (22 October 1999). The filings and requests for consultation involved also WT/DS47/1, *Turkey – Restriction on the Import of Textiles and Clothing Product*, Request for Consultations (complaint by Thailand) (20 June 1996), and WT/DS29/1, *Turkey – Restriction on the Import of Textiles and Clothing Product*, Request for Consultations (complaint by Hong Kong and China) (2 February 1996).

[203] See AB Report 1999-5. For a good discussion of the decision, see S. Cho, *Breaking the Barriers between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 Harv. Int'l L.J. 419, 445-447 (2001).

imposing a wholesale quantitative restriction.[204] In so doing, the WTO relied on the existence of specific treaty clauses addressing the extent to which Contracting Parties may derogate from its provisions in connection with the establishment of a regional integrated area. It is doubtful that an arbitrator would accept the defenses advanced by Turkey and I therefore classified the case as an Investment Positive as well.

Intellectual Property

I have grouped under this heading the cases involving a national treatment, Article XI, or SPS or TBT claims that are related to intellectual property protection of foreign products, or an Article.[205]

Intellectual Property Cases

DS 174: EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs	TP	IP
DS 199: Brazil - Measures Affecting Patent Protection	TP	IPP
DS 224: United States — US Patents Code	TP	IP
DS434, 435 441 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products[206]	TP	IPP
DS 290: EC - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs	TP	IP

[204] S. Cho, at pages 448-450 analyzes the implications of the decision in the debate between regionalism and multilateralism.

[205] I have not included the "pure" TRIPS case, i.e. those that arise only in connection with a claimed failure to adhere to a State's intellectual property obligations but do not implicate the trade provisions discussed in this article. I will address those in the sequel to this article. Also, I have classified the plain packaging case as a Cigarettes Case even though it could just as easily qualify as an Intellectual Property Case.

[206] Please refer to part II for a detailed discussion of these cases.

DS 186: US - Section 337 of the Tariff Act of 1930 and Amendments thereto	TP	IP

European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs.[207] The United States and Australia requested consultations with the EC alleging that a Regulation concerning the use of trademarks and geographical indications (GIs) for agricultural products and foodstuffs discriminated against foreign products. The complainants challenged in particular the reciprocity conditions of Article 12(1) of the Regulation which on their face denied the trademark and GI legal protection to applicants from States that do not have similar industrial property laws.[208]The Panel agreed that the Regulation does not provide national treatment to other WTO Members' right holders and products, because: (i) registration of a GI from a country outside the European Union is contingent upon the government of that country adopting a system of GI protection equivalent to the EC's system and offering reciprocal protection to EC GIs; and (ii) the EC Regulation's procedures require applications and objections from other WTO Members to be examined and transmitted by the governments of those Members, and require those governments to operate systems of product inspection similar to those of EC Member States. Therefore, foreign nationals do not have guaranteed access to the EC's system for their GIs, unlike EC nationals.[209] This case is a Trade Positive. I classified it as an Investment Positive as well because of the likelihood that an arbitrator will not accept a reciprocity defense as justifying the denial of national treatment.

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[207] WT/DS290/R, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Food stuffs*, Panel report (15 March 2005).

[208] Article 12(1) provides as follows:
"1. Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provided that:
- the third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this Regulation,
- the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products or food stuffs coming from the Community."

[209] DS174/R, *European Communities (US) – Protection of Trademarks and Geographical Indications for Agricultural Products and Food stuffs- Complaint by the Unite States*, Panel report (adopted April 20, 2005).

Brazil – Measures Affecting Patent Protection.[210] The United States requested consultations with Brazil regarding its "local working requirement" for patents. The case had particular significance for the pharmaceutical industry and raised sensitive issues concerning drugs like HIV medication. The United States claimed that the local working requirement would force US manufacturers to make their products in Brazil or face the possibility of a compulsory license, thereby making the local competitive conditions less favorable to United States companies. Organizations like Doctors without Borders complained that the United States' action would deter humanitarian measures, such as Brazil's distribution of free medication to HIV patients. The United States claimed a violation of TRIPS and of the national treatment provisions of Article III. The parties resolved the controversy through an agreement that provided, among other things, that Brazil would notify the United States before issuing a compulsory license. (Interestingly, the United States' acceptance of this agreement included a statement to the effect that "the United States' concerns were never directed at your government's bold and effective program to combat HIV/AIDS. Our ability to find a mutually satisfactory solution to this WTO dispute will allow our conversation regarding this scourge to turn to our shared goal of defeating the HIV/AIDS.")[211]

I classified this case as a Trade Positive because of the possibility that, under TRIPS and national treatment, a trade tribunal might require Brazil to find a less trade restrictive measure and take more financial responsibility for its AIDS programs, rather than target foreign patents. Although the magnitude of the health interests involved may deter a tribunal from reaching that result, the DSB might decide that the discrimination in favor of the domestic generic pharmaceutical industry violates essential norms of trade law. The business model of generic drugs companies relies on the ability to manufacture "off-patent" to create cheaper drugs that use the same active

[210] WT/DS199/1, *Brazil – Measures Affecting Patent Protection*, Request for Consultation (30 May, 2000).

[211] See Zarocostas, J., UPI Science News, February 2, 2001, *U.S., Brazil differ on aids drug patentat WTO*. Available at http://lists.essential.org/pipermail/pharm-policy/2001-February/000645.html (last visited March 16, 2012).

ingredients as the patented products without using the brand's name.[212] If a country like Brazil (or India) has a strong generic industry, its government's denial of patent benefits to foreign drugs companies will not only allow the generic company to sell in the domestic market at much cheaper prices but to also export to countries that do not have the capacity to copy and make the drugs. This arguably amounts to a blatant distortion of competitive conditions, and an arbitrator may choose to intervene to protect the foreign undertaking's expectations.

An investment arbitrator may find for a pharmaceutical company applying the same rationale and find a violation of IT Article III. However, the AIDS crisis, or whatever other health concern may be at stake in a similar case, may prompt the arbitrator to find a justification under the health exception of IT Article VIII. For these reasons, I classified the case as a Potential Positive.

United States — US Patents Code.[213] Brazil claimed that the US Patents Code contains several discriminatory elements in violation with the U.S.'s obligations under the TRIPS Agreement, especially Articles 27 and 28, the TRIMs Agreement, Article 2 in particular, and Articles III and XI of GATT. These provisions include the stipulation that no small business firm or non-profit organization which receives title to any subject invention shall grant to any person the exclusive right to use or sell any subject invention in the US unless such person agrees that any products embodying the subject invention or produced through the use of the invention will be manufactured substantially in the US. Brazil also referred to a requirement that each funding agreement with a small business firm or non-profit organization shall contain appropriate provisions to effectuate the above-mentioned requirement, and to the statutory restrictions limiting the right to use or sell any federally owned invention in the US only to a licensee that agrees that products will be manufactured substantially in the U.S. The allegations of discrimination and of imposition of performance requirements make this case a Trade Positive and Investment Positive.

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[212] See,e .g., Mullin, R., Beyond the Patent Cliff, Chemical and Engineering News. Available at http://cen.acs.org/articles/90/i50/Beyond-Patent-Cliff.html (last visited March 16, 2012).

[213] WT/DS224/1, *United States — US Patents Code*, Request for Consultation (31 January 2001).

United States — Section 337 of the Tariff Act of 1930 and Amendments thereto.[214] This filing followed two decisions rendered by a GATT Panel before the establishment of the WTO regarding the legality under international trade law of Section 337 of the United States Tariff Act of 1930. Section 337 provided for countermeasures, including exclusion and cease and desist orders, if (among other potential scenarios) the United States authorities made a finding of infringement of United States intellectual property rights. Canada initiated the first dispute pursuant to which the Panel found that Section 337 violated national treatment but the statute was found to be justified under Article XX(d) as "necessary" to secure compliance with laws or regulations relating to the protection of patents.[215] In 1988 the EC brought the second GATT challenge to Section 337 on behalf of Akzo, a Dutch chemical firm that was subject to a limited exclusion order for infringing upon a DuPont patent.[216] The Panel held that Section 337 violated national treatment principles because imported products alleged to have infringed upon a U.S.-granted patent were given less favorable treatment under Section 337 in the following respects:

(i) The availability to complainants of a choice of forum in which to challenge imported products, whereas no corresponding choice is available to challenge products of United States origin;

(ii) The potential disadvantage to producers or importers of challenged products of foreign origin resulting from the tight and fixed time-limits in proceedings under Section 337, when no comparable time-limits apply to producers of challenged products of United States origin;

(iii) The absence of opportunities in Section 337 proceedings to raise counterclaims, as is possible in proceedings in federal district court;

(iv) The possibility that general exclusion orders may result from proceedings brought before the US International Trade Commission

[214] WT/DS186/l, United States-Section 337 of the Tariff Act of 1930, Request for Consultations by the European Communities (Jan 18, 2000) .

[215] BISD 30S/10, United States-Imports of Certain Automotive Spring Assemblies.GATT Panel Report (May 26, 1983).

[216] BISD 36S/345, United States-Section 337 of theTariff Act of 1930, GATT Panel Report, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345-54 (1990).

under Section 337, whereas no comparable remedy is available against infringing products of United States origin;

(v) The automatic enforcement of exclusion orders by the United States Customs Service, when injunctive relief obtainable in federal court in respect of infringing products of United States origin requires for its enforcement individual proceedings brought by the successful plaintiff; and

(vi) The possibility that producers or importers of challenged products of foreign origin may have to defend their products both before the USITC and in federal district court, whereas no corresponding exposure exists with respect to products of United States origin.

The Panel found that none of these elements were justified under Article XX(d) as measures "necessary" to secure compliance with U.S. laws or regulations relating to patent protection. The Panel also articulated the principle that a facially discriminatory statute, like Section 337, was inconsistent with GATT obligations so long as its effects were *potentially* capable of discriminating against a single foreign producer. **As a result of this ruling, Section 337 was partially amended in 1994. In this case, the EC filed a new challenge** to the Section 337 procedures and remedies claiming they are still substantially different from internal procedures concerning domestic goods and discriminate against European industries and goods. This case is a Trade Positive and an Investment Positive because of the allegations of continued discriminatory treatment of foreign patented products.

Additional Comments on Infringement Damages and Other IP Issues

These cases are all Investment Positives or Potentially Positives principally because they involve claims of discrimination with respect to regulatory rights, which rights may be essential to the establishment or operation of a business. Many enterprises obviously derive a substantial portion of their value from trademarks, copyrights or patents. Investment law has traditionally banned performance requirements mandating the transfer of intellectual property to domestic interests. If a car manufacturer owned a patent on an engine component, for example, investment law

would prohibit a host jurisdiction from conditioning the establishment of a plant on the grant to local manufacturers of licenses to practice the patent. A case like Brazil – Patents falls squarely within that category, except that it involves a sensitive health issue. The arbitral tribunal would have to decide if the health purpose justifies the performance requirement under an exception like the health exception of IT Article VIII. The question will become whether a less trade restrictive alternative exists. An arbitrator may conclude that the host jurisdiction must subsidize medications or otherwise finance their purchase rather than placing the entire onus for the health measures on the foreign pharmaceutical company. The presence of a domestic generic industry may influence the decision by raising an inference of protectionism, especially in cases where the domestic pharmaceutical companies reverse engineer and resell drugs to other markets (i.e. a Brazilian company selling in, say, Africa). There is a sufficient possibility that the tribunal will rule that the measure qualifies as a performance requirement and that the health objective should be reached by different means to count this case as a Trade Potentially Positive.

The other cases have a distinctively protectionist flavor and do not raise any countervailing domestic purpose. The denial of intellectual property protection to foreign companies, or the erection of additional burdens in achieving intellectual property protection, negatively impacts the operation or establishment of an enterprise. If a company cannot use a trademark because it comes from a country that does not reciprocate rights, it will face a competitive disadvantage vis-à-vis its domestic counterparts. If a company cannot challenge the patent rights of competitors in a venue that is available to similarly situated domestic enterprises, its ability to operate will also be impeded.

In most cases, the measure of damages should be lost profits, a calculation that is familiar to intellectual property lawyers suing for infringement.[217] Whether those damages are calculated as lost profits or lost royalties, the complainant will likely have the possibility of obtaining compensation for the State's failure to protect its rights. In

[217] See, e.g., Lemley, M., *Distinguishing Lost Profits from Reasonable Royalties*, 51 Wm. & Mary L. Rev. 655 (2009).

Brazil – Patents, for example, the tribunal would likely award to the complainant the net profits lost as a result of the loss of intellectual property protection. In the cases involving a compulsory transfer of rights, the domestic competitors' sales may provide a measure to approximate lost profits. In cases where a right is granted to a domestic company but not the competition, the arbitrator will make a judgment, aided by expert evidence, as to the market share that the foreign entity lost as a result of the lack of intellectual property.

Periodicals, Films and Other Cultural Products

I loosely labeled and categorized these cases under the "Cultural Cases" label. I discussed in Part II the special provisions that may be negotiated in connection with BITs to protect local industries with a cultural flavor. I have, as an operational rule, assumed that my IT will be interpreted with special deference to cultural industries. Therefore all cases in this Section that would otherwise be Investment Positives have been downgraded to Potentially Positive.

Periodicals, Films and Other Cultural Products

DS 31: Canada - Measures Concerning Periodicals	TP	IPP
DS 43: Turkey - Taxation of Foreign Film Revenues	TP	IPP
DS 363: China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products	TP	IPP

Canada - Certain Measures Concerning Periodicals.[218] This case involved a challenge to Canadian measures banning the import of "split-run" magazines. In this context, split-run magazines mean periodicals that include contents that are essentially

[218] WT/DS31/R, Certain Measures Concerning Periodicals, Panel report (14 March 1997); AB - WT/DS31/AB/R, Certain Measures Concerning Periodicals (adopted 30 July 1997), ('**Canada – Periodicals**').

similar across jurisdictions but advertisements targeted at the local market. Since 1965, Canada had prohibited the importation of magazines containing advertising not found in the country of origin. This had the obvious effect of limiting the import of foreign magazines, because advertisements are often targeted at local audiences and products. In 1993, Time Warner attempted to circumvent this policy by electronically transferring the content of Sports Illustrated to printers in Ontario and selling the advertising space to Canadian advertisers. A Canadian reader of a split-run Sports Illustrated could follow the United States National Hockey and Basketball Leagues, which include Canadian teams, alongside advertisements for local Canadian beer and sports bars. Canada reacted by imposing measures targeted at split-run magazines like Sports Illustrated. The measure at issue involved (i) a ban on the importation of split-run magazines and (ii) a tax on advertising revenues on magazines containing less than 80% content.

The United States challenged both the tax and the 1965 import ban and prevailed. The Appellate Body found that the import ban violated Article XI. It concluded that domestic and foreign periodicals were substitutable within Article III-2, and that the tax on advertising revenues discriminated against foreign periodicals. The Appellate Body rejected the Canadian argument that the measure was intended to "secure compliance" with Canadian tax laws under Article XX(d), because the tax at issue did not comply with the WTO Agreement and compliance must secure a WTO-consistent measure. Following the WTO ruling, Canada adopted new legislation prohibiting foreign publishers from selling advertising space to Canadian advertisers. The United States threatened to execute the trade retaliation measures provided under the NAFTA if Canada was to use the cultural exemption clause. Following pressure from Canadian industries that would have borne the brunt of these retaliation measures, a compromise was negotiated, which provided that 18% of advertising revenue of US magazines sold in Canada could come from Canadian advertisers. This case is a Trade Positive. It would be an Investment Positive but for the potential for a cultural exception being applied by the arbitrator.

China – Measures Affecting Publications and Audiovisual Entertainment Products.[219] The U.S. challenged various Chinese measures(1) that restrict trading rights with respect to imported films for theatrical release, audiovisual home entertainment products (e.g. video cassettes and DVDs), sound recordings and publications (e.g. books, magazines, newspapers and electronic publications); and (2) that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment products. The panel and the AB concluded that a number of Chinese measures were inconsistent with China's obligation to grant "trading rights" under China's Accession Protocol, because such measures restricted the right of enterprises in China. The Panel and AB also found that China has not demonstrated that the relevant provisions are "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT because there was at least one other reasonably available alternative, and as a result, China has not established that these provisions are justified under Article XX(a). The panel found and the AB upheld that Chinese measures were inconsistent with China's national treatment commitments. The Panel also found that Chinese measures limit the distribution of certain imported reading materials to wholly Chinese-owned enterprises, while the distribution of like domestic reading materials can be effected by other types of enterprises, including foreign-invested ones. Accordingly, the panel concluded and AB upheld that these measures were inconsistent with China's obligations under Article III:4 of the GATT. With regard to the U.S. claim that Chinese measures discriminate against imported hard-copy sound recordings by subjecting them to more burdensome content review regimes than like domestic products, the panel concluded that the U.S. had not demonstrated that that the measures were inconsistent with Article III:4. The Panel and the AB also concluded that the provisions of China's measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with Article XVII of the GATS. Here again, this is a Trade Positive downgraded for cultural reasons to an Investment Potentially Positive.

[219] WT/DS363/AB/R, *China — Measures Affecting Publications and Audio visual Entertainment Products*, AB report (21 December 2009).

Turkey – Taxation of Foreign Film Revenues.[220] On June 12, 1996, the United States notified its request for consultation with Turkey in relation to a Turkish tax measure taxing box office receipts of foreign films at a higher rate than domestic movies. The United States claimed a violation of national treatment. On July 24, 1997, the parties notified a mutually agreed solution of the matter which entailed an equalization of the tax rate by Turkey.

The DSB would likely have ruled in favor of the United States and rejected the cultural defense much like it did in the Canada – Periodicals case. An arbitral panel may have followed the lead of the DSB and ruled that the overt discrimination against the foreign movie industry created less favorable competitive conditions in Turkey. On the other hand, the arbitrator may have been swayed by the cultural arguments, and hence I classified this case as a Potential Positive.

Embargoes

This category includes a single case: the filing challenging the United States' secondary embargo targeting companies engaged in certain commercial activities with Cuba. The case is interesting because, in an era where international strategic considerations include a strong emphasis on economic sanctions (as the Iran nuclear issue demonstrates), and when allies do not necessarily see eye to eye on tactics, the issues that it present may well recur.

Embargoes Cases

DS 38: United States – The Cuban Democracy and Solidarity Act	TP	IPP

[220] WT/DS43/1, *Turkey – Taxation of Foreign Film Revenues*, Request for Consultations (12 June, 1996).

United States – The Cuban Democracy and Solidarity Act.[221] The European Communities challenged measures adopted by the United States that imposed trade sanctions on goods of Cuban origin and certain third parties doing business with Cuba. The measures arose from an aggressive United States' "secondary embargo" of Cuba aimed at vindicating Cuban emigres to the United States. The taking of Cubans' private property by the Castro regime raised political outcry and pressure on the United States government to cast a wide net over not only Cuban and its Communist regime but European and other undertakings trading in Cuban goods. The secondary embargo affected foreign companies trading in goods of Cuban origin, threatened their major stockholders and senior management with potential exclusion from the United States and visa denials, and raised the possibility of excluding foreign vessels from United States ports. The measures raised strong political and legal objections over the extra-territorial assertion of United States jurisdiction, including even "blocking measures" aimed at retaliating and neutralizing the effect of the United States measure. In this case, the European Communities took the legal fight to the WTO.[222] A Panel was established and ultimately suspended its work.

This case qualifies as a Trade Positive and a Potentially Positive Investment filing because the United States measure will likely violate Article XI as well as potentially breach principles of customary international law. A complainant will not likely prevail on a claim of national treatment, because the secondary embargo does not impose burdens on foreign companies higher than those imposed on United States competitors. Customary international law, however, may not tolerate the broad assertion of jurisdiction necessary to support a secondary embargo such as that imposed against Cuba. Customary international law provides for territorial and nationality based grounds for jurisdictions, and the "effects doctrine" may reach conduct occurring

[221] WT/DS38, United States — The Cuban Liberty and Democratic Solidarity Act, Request for Consultations (3 May 1996).

[222] Davidson, Nicholas. "U.S. Secondary Sanctions:The U.K. and E.U. Response." Stetson Law Review 27 (1998).

outside of a state's territory that has an effect on its territory or citizens.[223] The nexus between the conduct regulated by a secondary embargo, however – foreign business with a country that in the course of a revolution expropriated assets of individuals who were not at the time US nationals – may not suffice to find a valid basis for jurisdiction. This was the crux of the European complaints, and those lodged by other States such as Mexico, and their justification for blocking measures. The WTO may find a ban on imports not justified by any valid domestic purpose. An arbitral tribunal may lend a sympathetic ear, and award damages for sales lost as a result of the secondary embargo and other causally related damages.[224] However, the national security potential justification for the measure may qualify under the catch-all clause of IT Article VIII, and for this reason this case is a Potentially Positive Investment.

Asbestos

I included in this category the famed Asbestos case.

DS 135: Canada - Measures Affecting Asbestos and Asbestos Containing Products (EC)	TN	IN

[223] The effects doctrine was developed by the U.S. courts in the application of the U.S. anti-trust regulations. It refers to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory of a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.Based on the effects doctrine, the US courts justified the exercise of jurisdiction over cartel arrangements and collusions which had not physically taken place within the United States at all. According to the formulation of these courts, the US anti-trust law "applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States." Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993).
The connection between the alleged offences and jurisdiction that the US courts relied on in these cases was pure effects felt within the United States. The introduction of the effects doctrine led to significant confrontation, particularly when certain acts in question were not illegal in the territorial States. Some States protested, enacted blocking legislation, and ordered the private actors involved in their territory not to comply with US court orders. The concern behind this opposition was that the effects doctrine seemed to eliminate altogether the limits imposed upon the exercise of extraterritorial jurisdiction: the justification based on effects alone could justify extraterritorial jurisdiction infinitely. See more Mika Hayashi, "Objective Territorial Principle or Effects Doctrine? -Jurisdiction and Cyberspace", In.Law, 2006/No.6, pp. 284-302 (2006).

[224] Davidson, Nicholas. "U.S. Secondary Sanctions: The U.K. and E.U. Response." Stetson Law Review 27 (1998).

Measures Affecting Asbestos and Asbestos Containing Products.[225] Canada requested consultations with the EC regarding the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods. The principal rationale asserted for the EC's actions was the protection of workers handling asbestos products and consumers. Canada claimed that the EC violated the national treatment standard because its ban was discriminatory between 'like products' because the ban allowed use of domestic alternative fibers. The EC defended under Article XX (b) of the GATT. The Appellate Body reversed the Panel's decision and instead found that asbestos and PCG fibers (asbestos fibers) and, consequently, cement-based products containing asbestos and those containing PCG fibers, should not be considered as 'like products.' The Appellate Body's analysis focused on the meaning of 'like products' under Article III.4, with the main factor being the 'competitive (not substitutable) relationship.' The Appellate Body also upheld the Panel's finding that the ban was justified as an exception under Article XX(b) of the GATT, and that the measure satisfied the conditions of the Article XX chapter, as the measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.

This is a Trade Negative. It is highly unlikely that, on these facts, an investment panel will find for the complainant. There is neither a violation of national treatment nor a violation of the trade treaty that might trigger IT Article V. I have therefore classified this case as an Investment Negative.

Technology Products

I have included cases involving high-tech products in this category. They raise issues of competition and market access similar to those discussed in the General Market Access, and Commodities, Energy and Raw Materials categories:

Technology Products Cases

[225] WT/DS135/AB/R, *Measures Affecting Asbestos and Asbestos Containing Products,* AB report (adopted 5 April 2001) ('**EC- Asbestos**').

DS 15: Japan - Measures Affecting the Purchase of Telecommunications Equipment	TP	IP
DS 291, 292, 293: European Communities - Measures Affecting the Approval and Marketing of Biotech Products	TP	IPP
DS 309: China - Value-Added Tax on Integrated Circuits	TP	IP

Japan – Measures Affecting the Purchase of Telecommunications Equipment.[226] The European Communities challenged Japanese measures that had the effect of requiring that Motorola, Inc. be the preferred supplier of equipment for the Japanese mobile phone market. The Japanese Government, the request for consultations claimed, had a wide range of legal measures available to insure compliance with its international obligations to the United States to insure preferred access, and also offered certain incentives to private Japanese market actors to make sure they would comply. The European Communities claimed a violation of national treatment and most favored nation principles, because of the preference given to an American company. These allegations make the case a Trade Positive and, coupled with the lack of a countervailing domestic measure, shift it as well to the Investment Positive category.

European Communities —Biotech Products.[227] The United States, Canada and Argentina claimed that measures taken by the EC and its Member States affecting imports of agricultural and food imports from the United States were inconsistent with the EC's obligations under the SPS Agreement, Articles I, III, X and XI of the GATT, Article 4 of the Agriculture Agreement, and Articles 2 and 5 of the TBT Agreement. The Panel found that the EC applied a general *de facto* moratorium on the approval of biotech products between June 1999 and August 2003, which is when the panel was established. The Panel further found that, when it applied this moratorium, the EC had

226 WT/DS15, *Japan – Measures Affecting the Purchase of Telecommunications Equipment*, Request for Consultations (18 August 1995).

227 WT/DS291/R, WT/DS292/R, WT/DS293/R, European Communities — Measures Affecting the Approval and Marketing of Biotech Products, Panel report, 29 September 2006.

acted inconsistently with its obligations under the SPS Agreement because the moratorium led to undue delays in the completion of EC approval procedures. The Panel further found , however, that the EC had not acted inconsistently with its obligations under other provisions raised by the complaining parties. I classified this case as an Investment Potential Positive because of the possibility that the moratorium and associated administrative irregularities might violate IT Article V's minimum standards of protection provisions.

China — Value-Added Tax on Integrated Circuits.[228] The United States challenged China's value added tax scheme, claiming violations of national treatment and most favored nation. The VAT system, which applied to integrated circuits, gave manufacturers of domestically produced or designed goods the right to obtain a partial refund. It also extended exemptions for foreign goods that are not produced domestically, but not for foreign goods for which a domestic substitute existed. The United States claimed that its products were given less favorable tax treatment than domestic goods and goods from nations benefiting from an exemption. The dispute was resolved when China eliminated the exemption system. The allegations of discrimination make this case a Trade and Investment Positive.

[228] WT/DS309, *China — Value-Added Tax on Integrated Circuits*, Request for Consultations (6 October, 2005).

Commodities; Energy; Raw Materials.

The history of trade and the WTO mirrors that of the trading nation's economies and their interaction. One of the stories told by the cases in this subject matter category is that of the expansion of manufacturing to China, India, and other new economic powerhouses, the relationship of interdependence between these states and the traditional players in global trade, and the live application of rational choice theory. Take, for example, the rare earths case pitting China against Western states, discussed in the General Market Access section above. Rare earths are necessary to a wide array of key products. Restricting its exports has the obvious effect of forcing foreign manufacturers to set up shop in China so as to have access to their raw materials. At the same time as they seek to limit their losses to China's manufacturing strength (and to penetrate its thickly protected markets), the United States and Europe are engaged in violations of their own, and being taken to task by China. Their consumer hungry societies are also being fed by China-bought credit and their currency by China-held reserves. Much like from the vantage point of this generation we can look back at traditional protectionism in Liquor and Food Cases and see a WTO-led charge against protectionism, the next generation will likely look at cases dealing with renewable energies, raw materials and other issues of the current day, and find that the WTO did not permit exclusion of foreign manufactures or other distortions of competitive conditions. I have not hesitated, based on my understanding of the history of trade and the constant drives that propel it forward, to classify cases in these areas that involve protectionism or other unjustified measures as Trade Positives. The absence of domestic countervailing purposes has, by and large, prompted me to also predict Investment Positive outcomes.

Commodities; Energy; Raw Materials Cases

DS 1: Malaysia - Prohibition of Imports of Polyethylene and Polypropylene	TP	IP
DS 387, 388, 390, 394, 395, 398: China - Measures Related to the Exportation of Raw Materials	TP	IP
DS 426: Canada - Measures Related to the Feed-in Tariff Program	TP	IP
DS 431, 432, 433: China - Export, Quotas, Duties and Other Restrictions on Rare Earths	TP	IP
DS 452: China - Measures Affecting the Renewable Energy Generation Sector	TP	IP
DS 456: India - Certain Measures Relating to Solar Cells and Solar Modules	TP	IPP

Malaysia — Prohibition of Imports of Polyethylene and Polypropylene.[229] Singapore requested consultations with Malaysia regarding the prohibition of imports of polyethylene and polypropylene instituted and maintained by the Malaysian Government in violation of Article XI, X of the GATT, Article 3 of Agreement on Import Licensing Procedures. On 19 July 1995, Singapore announced that it had decided to withdraw its complaint completely. I classified this case as a Trade and Investment Positives because it included the wholesale ban of imports of a particular category of products without any apparent domestic justification.

India – Certain Measures Relating to Solar Cells and Solar Modules.[230] The United States requested consultations with India concerning measures including

[229] WT/DS1/1, *Malaysia — Prohibition of Imports of Polyethylene and Polypropylene*, Request for Consultations (10 January 1995).

[230] WT/DS456/1, *India — Certain Measures Relating to Solar Cells and Solar Modules*, Request for Consultations (6 February 2013).

domestic content requirements that were adopted in connection with the Jawaharial Nehru National Solar Mission ("NSM") for solar cells and solar modules. The United States claimed that the measures violated Article III-4. According to the United States, governmental benefits for solar power developers such as electrical subsidies were contingent on their purchase and use of domestic solar cells and solar modules. India defended by arguing that the measures are procurement measures exempt from national treatment requirements, that they only affect a few projects, and that they have not impacted import levels. This case is a Trade Positive and Investment Potentially Positive because it raises claims of performance requirements, which may or may not exempted from a BIT under procurement exemptions.

European Union and Certain Member States.[231] China requested consultations with the European Union, Greece and Italy regarding certain measures, including domestic content requirements, related to renewable energy generation sector. The measures made access to feed-in tariff programs of EU member States, including but not limited to Italy and Greece, contingent upon domestic content requirements. (Feed-in tariffs are long term contracts offered to producers of renewable energies to encourage investment and development of clean power.) China claimed a violation of national treatment, in addition to SCM and TRIMS claims. This is a Trade Positive and an Investment Positive case on account of the discrimination and performance requirements claims.

Malaysia — Prohibition of Imports of Polyethylene and Polypropylene.[232] Singapore complained about restrictions on the import of plastic resins imposed by Malaysia. Singapore claimed that, before the measures came became effective, its producers were exporting a significant volume of resins to Malaysia. Resins are routinely used in industrial applications and, even if they raise health or other domestic concerns, they are common enough products that the filing has a sufficient likelihood of

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[231] WT/DS452/1, *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation*, Request for Consultation (5 November, 2012).

[232] WT/DS1/1, *Malaysia — Prohibition of Imports of Polyethylene and Polypropylene*, Request for Consultations (10 January, 1995).

success to be a Trade Positive. I classified the case as an Investment Positive because the filing raised the inference that foreign products were targeted for discriminatory treatment without sufficient domestic justification.

Canada-Measures Related to the Feed-in Tariff Program.[233] This case involved a claim by the EU that Canada's Feed-in Tariff (FIT) program is inconsistent with Article III. The FIT program is the result of a policy that is designed to accelerate investment in renewable energy technology. Overall, the EU alleges that Canada is illegally restricting trade by giving a subsidy to local producers of renewable energy equipment and services. It allows for above-market energy prices for renewable power that uses a certain amount of Canadian-made equipment/services. The EU claims that the FIT program consists of a series of laws and regulations that affect the sale and use of equipment for renewable energy generation facilities. The EU contends that the program affords less favorable treatment to imported equipment than like products made in Ontario, in violation of Article III.4 and Article III.5 of the GATT. Additionally, the EU argues that the regulations, which require a specific mixture, processing, or use of certain equipment for renewable energy generation facilities, require that the equipment for renewable energy generation facilities be supplied from Ontario sources. This, the EU contends, results in protection being afforded to Ontario production of the equipment, in violation of Article III.1. I classified this case as a Trade Positive and an Investment Positive because of the performance requirements and other violations of national treatment that were alleged. This type of case is also characteristic of the kind of protectionist measures that are increasingly being complained of. As the review of WTO cases that I engaged in in this Article should make clear, the subject matter of WTO filings mirrors the economic landscape of the day. Today, the competition for renewable energy markets is fierce, and it pits the traditionally industrialized economies against one another as well as the new powerhouses of international commerce such as China. It is no surprise, then, that governments are tempted to protect their own industries through measures that will wind up before the WTO.

[233] WT/DS412/R, WT/DS426/R, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector/ Canada-Measures Related to the Feed-in Tariff Program*, Panel Report (19 December, 2012).

Conclusion

My review of all WTO filings gave me a new flavor of the historical evolution of trade. I was struck by how many cases came down as Trade Positive without much of an analytical controversy. This was perhaps my biggest surprise on the trade side. I expected to find a strong trade-investment correlation, but not that it would translate into a wholesale capture of trade filings on account of overwhelming number of Trade Positives. The same results obtain in the sequel to this piece, including as relates to anti-dumping and other measures that I have not reviewed here but that have a profound impact on trade law. This firmed up my view that the problem lies not in trade law, which I believe has by and large fulfilled its objective of liberalizing commerce with deference to State sovereignty.

The problem is investment law. As Part III of this project will argue, it is meaningless to attempt to define a boundary distinguishing between goods and investment. A baker sells bread through a bakery. Any regulation affecting the bread will obviously impact the baker and the bakery. The real doctrinal work must be crafted in the light of the historical evolution of trade and investment, and the treatment of sovereign regulatory space by international economic systems at this stage of history. While the WTO's self-contained system may have legitimacy because of its limits, the investment system may lose its legitimacy if it achieves, as it is currently at risk of doing, outcomes that although logical doctrinally exceed the legitimate reach of international economic law in relation to sovereign regulatory space. In the final leg of my project, I will present a comprehensive theory of investment law that achieves this result, and test it by (again) applying it to all WTO filings. Stay tuned.

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