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Ari Afilalo

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

*Ari Afilalo**

ABSTRACT

This project is the first empirical examination of 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 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 those trade filings under a model investment treaty applied in light of decided cases. This Article classifies the filings into “Positive,” “Potentially Positive,” and “Negative” categories. The findings show a near perfect correlation between trade and investment. These findings are highly significant not only because this is the first empirical study of its kind, but also because they suggest that private parties that relied on liberalized trade laws to invest across borders would have private causes of action for damages for protectionist measures that violate international economic law. Trade has traditionally been the domain of state-to-state dispute resolution, where states often operate based on rational choice, selective determinations of which matters to prosecute. Shifting trade litigation to the private party cause of action model would fundamentally alter sovereign immunity and the balance of power between private parties—in particular, large multinational corporations—and host jurisdictions.

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INTRODUCTION

In this Article, I report the outcome of my study of the cases filed by governments with the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) during the WTO's first 20 years of operation in the most controversial areas of trade law,¹ with a view to determine whether a private party could bring a complaint before an investment arbitral tribunal that arises from the same core operative facts as under trade law. My goal was to test if, in fact, as I had argued before,² the network of investment treaties regulating the cross-border flow of capital overlaps with trade law. The answer is an unqualified yes.

Trade filings are the domain of the WTO,³ which acts at the request of the contracting parties' governments and issues rulings invalidating national laws found to violate the General Agreement on Tariffs and Trade (GATT).⁴ The WTO hears a wide range of cases.⁵ It deals with controversies involving plainly protectionist measures such as import bans or domestic taxes.⁶ It also decides whether sensitive domestic laws that hinder trade pass muster under international economic law,⁷ such as restrictions on the use of asbestos,⁸ hormones,⁹ or genetically modified materials;¹⁰ packaging laws regulating the

¹ See *infra* notes 17–21.

² See, e.g., Ari Afilalo, *Meaning, Ambiguity, and Legitimacy, Judicial (Re-)Construction of NAFTA Chapter 11*, 25 NW. J. INT'L L. & BUS. 279, 281–82 (2005).

³ *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 25, 2018).

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.8, Apr. 15, 1994, 1869 U.N.T.S. 401, 403 [hereinafter DSU]; General Agreement on Tariffs and Trade, art. XXIII(2), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 268 [hereinafter GATT].

⁵ See, e.g., Raj Bhala et al., *WTO Case Review 2016*, 34 ARIZ. J. INT'L & COMP. L. 281, 281–84 (2017).

⁶ Ari Afilalo & Sheila Foster, *The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 GEO. INT'L ENVTL. L. REV. 633, 650–59 (2003).

⁷ See, e.g., Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (adopted Sept. 18, 2000).

⁸ Laurie Kazan-Allen, *The International Dimension of Asbestos in the 21st Century*, in ALI-ABA COURSE OF STUDY MATERIALS 1, 3 (2001).

⁹ See Suzanne Bermann, *EC-Hormones and the Case for an Express WTO Post-Retaliation Procedure*, 107 COLUM. L. REV. 131, 138 (2007).

¹⁰ Daniel Schramm, *The Race to Geneva: Resisting the Gravitational Pull of the WTO in the GMO Labeling Controversy*, 9 VT. J. ENVTL. L. 93, 96 (2007).

advertising and marketing of cigarettes;¹¹ or measures intended to preserve foreign currency reserves in a financial crisis.¹²

Investment law is the domain of arbitral tribunals¹³ awarding damages to private parties, rather than states, when their legitimate expectations are thwarted by government measures adopted by the host jurisdiction.¹⁴ The investment legal regime also handles a wide array of cases, including revoked permits; breached agreements; modifications to advance official rulings incorporating agreements concerning 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.¹⁵

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 governed by constitutional and institutional norms that sharply differ.¹⁶ 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 approximately 180 filings during the first two decades of operation of the WTO that were made under the national treatment,¹⁷ most favored nation,¹⁸ and quantitative restrictions provisions of the GATT,¹⁹ the Agreement on Technical Barriers to Trade (TBT),²⁰ and the Agreement on

¹¹ Suzy Frankel & Daniel Gervais, *Plain Packaging and the Interpretation of the TRIPS Agreement*, 46 VAND. J. TRANSNAT'L L. 1149, 1151 (2013).

¹² Robert W. Staiger, "Currency Manipulation" and World Trade, 9 WORLD TRADE REV. 583, 606–07 (2010).

¹³ *What is Investment Arbitration?*, INT'L ARB. L., <http://internationalarbitrationlaw.com/about-arbitration/international-disputes/investment-arbitration/> (last visited Mar. 25, 2018).

¹⁴ *Id.*

¹⁵ See, e.g., Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter*, 34 N.Y.U. J. INT'L L. & POL. 1, 3 (2001); Bryan W. Blades, *The Exhausting Question of Local Remedies: Expropriation Under NAFTA Chapter 11*, 8 OR. REV. INT'L L. 31, 64 (2006); Ernest A. Young, *Institutional Settlement in a Globalizing System*, 54 DUKE L.J. 1143, 1164 (2005).

¹⁶ Afilalo, *supra* note 15, at 9–31.

¹⁷ GATT, *supra* note 4, at 204 (barring measures giving less favorable treatment to foreign products compared to domestic products).

¹⁸ *Id.* at 196, 198 (barring taxation measures giving less favorable treatment to products of one country over another country).

¹⁹ *Id.* at 218, 220 (barring restrictions limiting the volume or value of goods imported into the country).

²⁰ The Agreement on Technical Barriers to Trade (TBT) was adopted as an ancillary to the GATT Agreement to "ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade." See Agreement on Technical Barriers to Trade pmbl. art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT Agreement].

the Application of Sanitary and Phytosanitary Measures (SPS).²¹ These cases are grouped in this Article because they implicate similar issues of trade and investment law and they cover most controversies dealing with the three “pillars” of trade.

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 have a substantial likelihood of success by the complainant—applying trade law to the facts as stated in the filings. Cases where the respondent prevailed or is reasonably likely to prevail belong in the Trade Negative category. I then classified the Trade Positives and Trade Negatives into three investment categories: Investment Positive, Potentially Positive, and Negative. These categories are 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.

The examination of the respective trade and investment outcomes shows a near-perfect correlation between Trade Positives, and Investment Positives or Potentially Positives. Approximately two-thirds of the Trade Positives 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 reasonable certainty to be an Investment Negative. Furthermore, 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.)

These findings demonstrate that states that introduce policies inconsistent with their obligations under the GATT expose themselves to possible investment arbitration claims. 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. States might escape liability for

²¹ As stated in the Recitals of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), it was adopted to “elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).” See Agreement on the Application of Sanitary and Phytosanitary Measures art. 5.1–5.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, https://www.wto.org/English/docs_e/legal_e/15-sps.pdf [hereinafter SPS Agreement].

breaches of the GATT in the WTO dispute system because states—on account of having limited legal resources and fear of retaliation for their own violations—are likely to bring legal challenges only in disputes involving high monetary, political, or precedential stakes.²² However, in the overlapping investment arbitration system, states will have virtually unlimited exposure to lawsuits brought by private parties arising from the very same measure and core operative facts.²³

In Part I, I describe the history of trade and investment and how two systems intended to operate in different realms of international economic law came to overlap. In Part II, I explore the doctrinal reasons for the trade/investment tension, using decided investment cases, standard investment treaty provisions, and familiar principles of trade law. 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 steps in this research project.

I. TRADE AND INVESTMENT

In Part I, I outline the historical, institutional, and constitutional features of the trade and investment systems that are relevant to their intersection.

A. Trade

Trade is the domain of the WTO and regional frameworks such as the North American Free Trade Agreement (NAFTA).²⁴ Their membership includes states that established a relatively transparent system to monitor international interference with their internal regulatory power.²⁵ Those states decided to

²² Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement* 1, 3–4 (UCLA Int'l Inst. Occasional Paper Series, 2002), <https://escholarship.org/uc/item/4t4952d7>; see also *infra* note 27 and accompanying text.

²³ See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 371 (2003).

²⁴ North American Free Trade Agreement arts. 1116, 1117, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

²⁵ In particular, many scholars emphasized the benefits of the open and transparent system of the Appellate Body's interpretative methods, which have given clear guidance to Members of the WTO and to panels. It has thus contributed to "providing security and predictability to the multilateral trading system." DSU, *supra* note 4, art. 3.2. See ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 614 (Oxford Univ. Press 2009); see also Claus-Dieter Ehlermann, *Experiences from the WTO Appellate Body*, 38 TEXAS INT'L L.J. 469, 469 (2003). 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 of "being one of the least transparent international organizations . . ." See, e.g., U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 120–21 (2002).

handle disputes without involving private parties or giving direct effect to trade law.²⁶ With few exceptions, only governments have the right to take enforcement action, and individuals do not have standing to sue.²⁷ Government officials carefully select which disputes sufficiently implicate weighty national interests before bringing them to dispute resolution.²⁸ In doing so, they weigh limited resources and the possibility of retaliation for their own violation before initiating legal proceedings. States will exercise their prudential choice in the marketplace of violations to determine which disputes to prosecute and which violations to refrain from challenging (or to let stand after an initial filing), in exchange for the other side giving up a claim of its own.²⁹ Likewise, “networks” of government officials forge bonds across borders to create a loose but effective network of lawmakers and enforcers.³⁰

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 protected state sovereignty and regulatory space.³¹ As John Maynard Keynes famously expressed, the lawyers as “poets of Bretton Woods” married after World War II a good economic idea

²⁶ Helene Ruiz Fabri, *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?*, 25 EUR. J. INT’L L. 151, 154 (2014).

²⁷ NAFTA, in addition to its Investment Chapter, gives individuals some access to its dispute resolution systems. The Side Agreement on Labor, for instance, includes a procedure pursuant to which private party complaints may be filed and trigger investigations, public hearings, non-binding recommendations, and other measures. If the parties fail to resolve the dispute between themselves, and if the dispute relates to certain labor rights (e.g., occupational health and safety), then an arbitration panel will have the power to prepare a report. If it finds 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. North American Agreement on Labor Cooperation arts. 27–29, 39(1), 41(2), Sept. 14, 1993, 32 I.L.M. 1499 (1993).

²⁸ Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law – A Response to the Case Against Reforming the WTO’s Enforcement Mechanism*, 2008 U. ILL. L. REV. 359, 366 (2008).

²⁹ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005); see also Robert Z. Lawrence, *The United States and WTO Dispute Settlement System*, in COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORTS NO. 25 at 1, 10–11 (Mar. 2007); Petersmann, *supra* note 28.

³⁰ Anne-Marie Slaughter frequently discussed the efficiencies provided by government networks, particularly the 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 resulting from the daily grind of international interactions. See, e.g., Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 200, 214, 217, 223–24 (Cambridge Univ. Press 2000).

³¹ See GATT, *supra* note 4, at 262, 264.

with a politically acceptable treaty system.³² The GATT established three “pillars” of trade: tariff reduction and most favored nation,³³ national treatment,³⁴ and prohibition of quotas and like measures. Those regimes were designed to open borders without dictating national policy.³⁵ The architecture of the GATT insulated national taxation and regulation from potential infringement by international norms.³⁶ Its constitutional architecture was designed to leave redistributive justice to the sovereign jurisdiction of the national political actors.³⁷

John Ruggie captured this bargain with his “embedded liberalism” shorthand.³⁸ The nations that emerged as victors from World War II featured highly evolved administrative states and regulatory systems spanning a wide array of economic and social issues.³⁹ 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.⁴⁰ 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 another prophylactic layer of sovereignty to the normative protections that was indispensable to the contracting parties. States have limited legal resources and tend to behave reactively in controversies that implicate national interests of sufficient political or economic magnitude.⁴¹ They may negotiate and resolve prudentially the

³² Robert Howse, *From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 95, 95–96 (2002).

³³ GATT, *supra* note 4, at 196, 198.

³⁴ *Id.* at 204.

³⁵ *Id.* at 226.

³⁶ *Id.* at 262.

³⁷ DENNIS PATTERSON & ARI AFILALO, *THE NEW GLOBAL TRADING ORDER: THE EVOLVING STATE AND THE FUTURE OF TRADE* 70 (2008).

³⁸ See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post War Economic Order*, 36 INT’L ORG. 379, 385–88 (1982). According to Professor John Gerard Ruggie, the GATT advanced “embedded liberalism” in each state, providing each participant, at least in theory, with the sovereign right to establish and operate a domestic system of its choice, and at the same time removed barriers to trade and created a more efficient trading system. *Id.* Each nation can maintain its identity and specific domestic programs ranging from universal education to the supply of subsidized metro tickets for large families, all the while participating in a liberalized system of trade that generates more global resources to share. *Id.*

³⁹ See, e.g., Mariano-Florentino Cuellar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1347–48 (2014).

⁴⁰ See, e.g., Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, § 3.19, WTO Doc. WT/DS135 (adopted Sept. 18, 2000) [hereinafter 2000 European Communities-Asbestos and Asbestos-Containing Products Panel Report].

⁴¹ See Garrett & Smith, *supra* note 22, at 10.

mutual violations that exist at any given time.⁴² In addition to these built-in limitations inherent in a state-to-state system, until the 1994 establishment of the WTO, the panel reports were not even adopted until all contracting parties, including the losing party in the dispute, gave their consent (called the “positive consensus rule” of the initial GATT of 1947).⁴³ Even though the WTO reversed this rule,⁴⁴ losing a case does not entail 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 comply with the ruling.⁴⁵ Although compensation and retaliation are technically available, the theoretical and practical preference is for voluntary compliance.⁴⁶

⁴² See *id.* at 8–12.

⁴³ See Julio Lacarte-Muró & Fernando Piérola Castro, *Comparing the WTO and GATT Dispute Settlement Mechanisms: What Was Accomplished in the Uruguay Round?*, in INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES 33, 51 (Julio Lacarte-Muró & Jaime Granados eds., 2004).

⁴⁴ 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 DSU, *supra* note 4, art. 16.4. See generally 6.4 *Adoption of Panel Reports*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s4p1_e.htm (last visited Mar. 25, 2018).

⁴⁵ See Timothy Webster, *How China Implements WTO Decisions*, 35 MICH. J. INT’L L. 525, 555 n.155 (2014) (“For example, the U.S. has chosen not to repeal Section 211 of the Omnibus Appropriations Act, which the DSB determined violated the national treatment obligation of the Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPS] Agreement in 2001. The United States told the DSB that it had ‘been working for more than ten years on the implementation of the DSB’s recommendations in this dispute,’ but has not amended the law. Countries—including China—have routinely urged the United States to comply with the ruling”) (citing World Trade Org. Dispute Settlement Body, Minutes of Meeting 22–33, WT/DSB/M/316 (July 20, 2012)).

⁴⁶ 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, GATT Doc. L/4907 (adopted Nov. 28, 1979), B.I.S.D. (26th Supp.) [hereinafter 1979 Understanding]. The GATT also recognized that it may take time to make the necessary changes to domestic law in implementing the recommendations. *Id.* 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.” Improvements to the GATT Dispute Settlement Rules and Procedures, ¶ 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 Settlement of 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 the non-complying Member under a WTO agreement). GATT, *supra* note 4. 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.” *Id.* According to Article 22, “compensation is voluntary and, if granted, shall be consistent with the covered agreements.” *Id.* Compensation is also referenced in the Reports Relating to the Review of the Agreement on Organization and Functional Questions and the Annex to the 1979 Understanding. Reports Relating 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.) (1955); 1979 Understanding, *supra*, annex. With respect to retaliation, under GATT practice, the contracting

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.⁴⁷ It has been widely recognized that domestic concerns routinely burden trade, and international trade tribunals define the boundaries of the domestic regulatory space upon which international law may not infringe.⁴⁸ By way of example, Indonesia filed a complaint against the United States to challenge the U.S. ban on clove cigarettes, requiring the WTO to determine whether the U.S. measure should be upheld as furthering a valid public health goal or invalidated as a protectionist scheme to favor domestic menthol cigarettes in competition with clove.⁴⁹ Argentina had to defend before investment arbitration panels measures designed to shift to its trading partners costs associated with shoring up domestic currency reserves, an essential domestic policy goal in a country beset by financial crises.⁵⁰ The WTO had to determine whether EU bans on asbestos and hormones furthered a valid domestic policy regarding health and occupational safety or

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. GATT, *supra* note 4. There was only one instance where retaliation was authorized under GATT. KIL WON LEE, *IMPROVING REMEDIES IN THE WTO DISPUTE SETTLEMENT SYSTEM* 17 (Proquest, Umi Dissertation Publ'g 2011) (“In Netherlands Measures of Suspension, the U.S. 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 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* Asim Imdad Ali, *Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System*, 14 J. PUB. & INT’L AFF. 5 (2003).

⁴⁷ Fair trade is a shorthand expression to capture goods that have been produced in accordance with principles of respect for labor rights, the environment, and other considerations. *See generally* Paulette L. Stanzer, *The Pursuit of Equilibrium as the Eagle Meets the Condor: Supporting Sustainable Development Through Fair Trade*, 49 AM. BUS. L.J. 557, 557 (2012) (“Fair Trade is a label for a movement, a process, and a set of principles. Fair Trade goods can be identified in one of two ways: (1) specific goods have been certified by a Fair Trade organization or (2) goods that are sold by a seller who is a member of a Fair Trade organization recognized by the Fair Trade community.”).

⁴⁸ *See* Ari Afilalo, *Rotating Checks and Balances in International Economic Law*, in *HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF TRADE* 414, 418 (David Deese ed., 2014); *see, e.g.*, Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CH. J. INT’L L. 403, 412 (2001); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1, 1 (2014).

⁴⁹ Afilalo, *supra* note 48; *see, e.g.*, Lucas Ballet, *Losing Flavor: Indonesia’s WTO Complaint Against the U.S. Ban on Clove Cigarettes*, 26 AM. U. INT’L L. REV. 515, 516–18 (2011).

⁵⁰ Afilalo, *supra* note 48; *see* Robert M. Ziff, *The Sovereign Debtors Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 RICH. J. GLOBAL L. & BUS. 345, 362 (2011).

amounted to an illegal protection of a competitive domestic product.⁵¹ “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.”⁵² The trade system is creating obstacles to challenges to sovereignty because when trade encroaches on the sovereign right to regulate, it should act within the confines of a system that has legitimacy.⁵³

Moreover, “the WTO has gradually supplemented the core GATT pillars with agreements that go beyond the negative injunctions and discriminatory rationale of the treaty.”⁵⁴ The SPS, for example, requires that states engage in a risk assessment and rely on credible scientific evidence before adopting sanitary measures, such as rules banning apples that may suffer from fire blight or beef with hormones.⁵⁵ The TBT 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.⁵⁶ The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) requires the Contracting Parties to conform their levels of intellectual protection to the international minimum mandate.⁵⁷ Going beyond discrimination and protectionism as the rationale for invalidating a national measure creates a

⁵¹ Afilalo, *supra* note 48; *see also* Afilalo & Foster, *supra* note 6, at 658; Bhala et al., *supra* note 5, at 362 n.157, 441.

⁵² Afilalo, *supra* note 48.

⁵³ This system resembled the classic international organizations of the time such as the United Nations and the European Union, whose basic laws were premised on the inviolability of the participating states’ rights to be free from interference by others. *See, e.g.*, Ari Afilalo & Dennis Patterson, *Statecraft and the Foundations of European Union Law*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 275, 287 (Julie Dickson & Pavlos Eleftheriadis eds., 2012) (describing how European Treaties, for example, although “more ambitious than any international treaty in force at 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 “black box” in which it enjoyed freedom to determine how best to support the welfare of its nations, free from interference by European law.” *Id.*

⁵⁴ Afilalo, *supra* note 48, at 419.

⁵⁵ *See* SPS Agreement, *supra* note 21, arts. 5.1–5.2.

⁵⁶ *See* TBT Agreement, *supra* note 20, art. 2.2.

⁵⁷ *See* TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. “The TRIPS Agreement is arguably one of the most controversial of the Uruguay Round Agreements and has been the subject of numerous articles and commentaries.” Uche Ewelukwa, *Patent Wars in the Valley of the Shadow of Death: The Pharmaceutical Industry, Ethics, and Global Trade*, 59 U. MIAMI L. REV. 203, 204 n.4 (2005) (citing ROBERT L. OSTERGARD, JR., *THE DEVELOPMENT DILEMMA: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS IN THE INTERNATIONAL SYSTEM* 110 (2003)); Haochen Sun, *A Wider Access to Patented Drugs Under the TRIPS Agreement*, 21 B.U. INT’L L.J. 101, 102 (2003).

potentially higher level of pressure on state sovereignty.⁵⁸ The international trade regime has often been under attack because of the pressure it imposes on state sovereignty.⁵⁹

B. Investment

Investment treaties embody a different rationale and arose from a different history than trade law.⁶⁰ At their core, they aim to give private investors a direct cause of action against the central government of the host state.⁶¹ 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.⁶² They rejected domestic courts as the venue for investor claims as unreliably biased and demanded an international neutral arbitral forum instead.⁶³ 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.⁶⁴ These tribunals, the West insisted, should have the power to award damages to make aggrieved investors whole and compensate them for treaty violations, with awards being enforceable in domestic courts under normal principles of arbitration law.⁶⁵

This stance was, originally, squarely aimed at protecting investments in emerging economies.⁶⁶ The international conversation about investment protection started after decolonization and quickly became a focal point of the ideological dispute between industrialized and less-developed nations.⁶⁷ 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

⁵⁸ Ari Afilalo, *Failed Boundaries: The Near-Perfect Correlation Between State-to-State WTO Claims and Private Party Investment Rights* 11 (Jean Monnet Working Paper No. 01, 2013).

⁵⁹ *Id.*; Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, <https://www.foreignaffairs.com/articles/1997-09-01/real-new-world-order>.

⁶⁰ Afilalo, *supra* note 58; Lauge N. Skovgaard Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality* (June 2011) (unpublished Ph.D. thesis, London School of Economics and Political Science), http://etheses.lse.ac.uk/141/1/Poulsen_Sacrificing_sovereignty_by_chance.pdf.

⁶¹ Afilalo, *supra* note 15, at 4; Afilalo, *supra* note 58.

⁶² Afilalo, *supra* note 15, at 4–5; Afilalo, *supra* note 58.

⁶³ Afilalo, *supra* note 15 at 17; Afilalo, *supra* note 58.

⁶⁴ Afilalo, *supra* note 15, at 4; Afilalo, *supra* note 58, at 11–12.

⁶⁵ Afilalo, *supra* note 15, at 31; Afilalo, *supra* note 58, at 12.

⁶⁶ Afilalo, *supra* note 15, at 18; Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 29 VAN. J. TRANSNAT'L L. 259, 261–62 (1994).

⁶⁷ Afilalo, *supra* note 58, at 12.

into international law their substantive and institutional needs.⁶⁸ Capital-exporting countries worried about the economic interests they left behind when their former colonies achieved political self-determination.⁶⁹ They wanted the framework investment treaty to include a clear requirement that the newly independent governments would not expropriate private property unless the government paid compensation at fair market value.⁷⁰

The capital-exporting countries also wanted protection against discriminatory treatment.⁷¹ The countries of the South sought to impose “performance requirements” on foreign investors to shore up the domestic economy, 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 those obtained in the normal course of business.⁷² In addition, the North demanded that the broad body of customary international law guaranteeing minimum standards of protection⁷³ be applied and guaranteed by the international arbitration tribunals.⁷⁴

For the South, these demands amounted to yet another manifestation of colonial arrogance.⁷⁵ The political self-determination that the former colonies had earned would not be complete without economic self-determination, and the framework advocated by their erstwhile colonizers would make this goal unattainable.⁷⁶ Property acquired by their former colonizers’ economic agents and left behind by their political echelons should be nationalized as necessary. The expropriation of the foreign economic interests would not, under the South’s view, necessitate a payment of full market value by the nationalizing government—rather, that the nationalizing state would only be required to pay

⁶⁸ Afilalo, *supra* note 15, at 18; Afilalo, *supra* note 58, at 12; *see also* PETER J. BURNELL, *ECONOMIC NATIONALISM IN THE THIRD WORLD* 243–44 (Westview Press 1996); Sandrino, *supra* note 66, at 259 (reviewing Mexico’s historic leadership role in the South and its subsequent acceptance of the positions espoused by the more developed countries with the adoption of NAFTA).

⁶⁹ Afilalo, *supra* note 15, at 14; Afilalo, *supra* note 58, at 12.

⁷⁰ Afilalo, *supra* note 58, at 12; *see* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT’L L. 121, 126 (1984).

⁷¹ Andrea Saldarriaga & Kendra Magraw, *UNCTAD’s Effort to Foster the Relationship Between International Investment Law and Sustainable Development*, in *INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP* 125, 131 (Stephan W. Schill, Christian J. Tams & Rainer Hofmann eds., 2015).

⁷² Afilalo, *supra* note 58, at 12; *see* BURNELL, *supra* note 68.

⁷³ Afilalo, *supra* note 58, at 12; *see* Charles N. Brower & John Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law*, 9 INT’L LAW. 295, 302 (1975).

⁷⁴ Afilalo, *supra* note 58 at 12; *see, e.g.*, David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT’L F. 289, 304 (1971).

⁷⁵ Afilalo, *supra* note 58, at 12.

⁷⁶ Afilalo, *supra* note 15, at 17–18; Afilalo, *supra* note 58, at 12.

whatever is “adequate in the circumstances” (i.e., not much in a post-colonization context).⁷⁷ 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 generates the opportunity to sustain long-term, meaningful development.⁷⁸ 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.⁷⁹

The parties also feuded as to the proper venue for bringing claims. The West demanded neutral, supra-national courts, whereas the “Calvo Doctrine” categorically rejected the grant of jurisdiction to international tribunals.⁸⁰ Under that doctrine, domestic courts of the newly independent countries would apply, as they saw fit, domestic standards adopted independently of the colonizer and its yoke.⁸¹ This, too, was an indispensable element of the self-determination package.⁸² In 1977, the United Nations adopted the “Charter of the Economic Rights and Duties of States,” with Southern and non-aligned votes approving the Charter over the objection of the industrialized states of the North.⁸³ This effectively ended the Northern hope for a multilateral investment treaty, and such an international agreement was never reached between the North and the South.⁸⁴

And yet, the North ultimately prevailed.⁸⁵ The victory of the North did not come with a formal capitulation or dramatic watershed event such as the

⁷⁷ Afilalo, *supra* note 58, at 12; *see, e.g.*, Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 168 (2005).

⁷⁸ Afilalo, *supra* note 58, at 12–13. *See generally* Theotonio Dos Santos, *The Structure of Dependence*, 60 AM. ECON. REV. 231, 235–36 (1970).

⁷⁹ Afilalo, *supra* note 58, at 13; Vandeveld, *supra* note 77, at 159–60.

⁸⁰ Afilalo, *supra* note 58, at 13; 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 JUL DISP. RESOL. J. 78, 80 (2004); *see also* Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil, Gas & Energy Disputes in Latin America*, 27 N. J. INT’L L. & BUS. 591, 592 (2007).

⁸¹ Afilalo, *supra* note 58, at 13.

⁸² *Id.*

⁸³ *Id.*; *see* Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth*, 75 AM. J. INT’L L. 437, 437 (1981).

⁸⁴ Afilalo, *supra* note 58, at 13. Attempts to create multilateral investment agreements can be traced back to the end of the 1950s. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 18 (2008). Among these attempts are the Organization for Economic Cooperation and Development’s (OECD) draft that was not accepted by non-member countries and the attempt to achieve a multilateral investment agreement as part of the unsuccessful negotiations over the proposed International Trade Organization (ITO). *See, e.g., id.*, at 18; ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 19–22 (2009).

⁸⁵ Afilalo, *supra* note 58, at 13.

adoption of a multilateral treaty or an international conference.⁸⁶ Instead, it came quietly and gradually.⁸⁷ Starting in the 1990s, the South stopped being the old South and began its transformation into a powerful bloc of emerging markets.⁸⁸ The financial world coalesced into intertwined markets competing for capital. Private investors and their foreign direct investment became a sought-after source of funds and, with technological advances, they acquired access to instant and plentiful information regarding the host jurisdiction.⁸⁹ “BRICS” countries emerged,⁹⁰ fueled by export manufacturing.⁹¹ A symbiotic relationship of interdependence (export countries reinvest the profits made in the import countries into the economies of such import markets, thereby stimulating more demand) became a mainstay of international commerce.⁹² In this new global culture, bilateral investment treaties proliferated with cross-border investment. This resulted in the commercial and financial worlds becoming regulated by thousands of investment treaties entered into bilaterally, trilaterally, or within the framework of regional agreements such as Chapter 11 of NAFTA.⁹³

The issues of the day from the post-decolonization time became much less sensitive.⁹⁴ Regardless of whether the “signal value”⁹⁵ 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.⁹⁶ Mexico’s story is a perfect example of this phenomenon.⁹⁷ 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 NAFTA, which is the poster

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ BRIC was a term coined in 2001 by James O’Neill, an economist and former Goldman & Sachs analyst, which became a shorthand for the alliances of Brazil, Russia, India, and China on various issues. Tamara Fisher, *China and the New Development Bank: The Future of Foreign Aid?*, 38 *LOY. L.A. INT’L & COMP. L. REV.* 141, 141 (2016). This group now includes South Africa. *See id.*

⁹¹ Afilalo, *supra* note 58, at 13.

⁹² *Id.* at 14; *see* Afilalo, *supra* note 15, at 17–19.

⁹³ Afilalo, *supra* note 58, at 14.

⁹⁴ *Id.*

⁹⁵ *See* Jeswal W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 *HARV. INT’L L.J.* 127, 164 (2017) (arguing that investment treaties influence capital flows through the signals they send to international capital markets as shown by empirical model-comparing countries that fit “Strong BIT Signal Country” as opposed to “Weak Signal BIT Countries.”).

⁹⁶ Afilalo, *supra* note 58, at 14.

⁹⁷ *Id.*

child for the Western investment treaty model.⁹⁸ 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.⁹⁹ The International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) became the forum for arbitration, under the United States' and World Bank's respective aegis, of investment disputes.¹⁰⁰ At the end of the day, instead of a single multilateral treaty, thousands of bilateral and regional investment alliances arose, giving the West the globalized rules of investment protection that it had advocated.¹⁰¹

C. *Investment and Trade Overlap. 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.¹⁰² Yet, as it currently stands, the doctrinal expression of the trade and investment fields leads to a virtually complete overlap of the two systems.¹⁰³ As the empirical analysis of this Article confirms, where a cause of action exists for a state in international trade, a parallel cause of action has a high likelihood of prevailing under a bilateral investment treaty.¹⁰⁴ “The upshot of collapsing investment into trade could be an explosion of high stakes litigation, overshadowing and taking over the delicately balanced system of trade integration of the WTO.”¹⁰⁵ As the European Union's history has shown, this is not an academic scenario.¹⁰⁶ 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.¹⁰⁷ Equating investment with trade would radically unsettle a WTO

⁹⁸ *Id.*; see Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA*, 25 ST. MARY'S L.J. 1147, 1149 (1994).

⁹⁹ Afilalo, *supra* note 58, at 14.

¹⁰⁰ Afilalo, *supra* note 48, at 421.

¹⁰¹ David Deese, *Introduction: Politics, Trade, and the International Political Economy*, in HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF TRADE 13 (David Deese ed., 2014).

¹⁰² Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 49–50 (2008).

¹⁰³ Afilalo, *supra* note 48, at 421.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ DiMascio & Pauwelyn, *supra* note 102, at 53 (“This spike in investment disputes produced something of a backlash against BITs, with numerous countries softening their BIT commitments or withdrawing from BITs altogether.”).

¹⁰⁷ *Id.*

system that never contemplated the award of damages to an unlimited class of plaintiffs.¹⁰⁸

The problem will be compounded in the United States where attorneys are permitted to work on contingency fees.¹⁰⁹ The business model of contingency fees lends itself very well to investment claims challenging government measures.¹¹⁰ 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.¹¹¹ The officials assessing the exposure will then, in most instances, have to factor into their calculations some likelihood of success on the complainants' part.¹¹² The magnitude of harm that they would face if defeated would more often than not reach very high levels.¹¹³ Discounting the possible damages with the 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.¹¹⁴

In Part II of this Article, I analyze the substantive provisions of the trade and investment regimes as well as their dispute resolution mechanisms, and expose how the overlap operates doctrinally.

¹⁰⁸ Afilalo, *supra* note 15, at 32–35; see also Bruce Carolan, *The Legislative Backlash to Advances in Rights for Same-Sex Couples: Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union*, 40 TULSA L. REV. 527, 530 n.18 (2005) (“In essence, this transforms every EU citizen into a private attorney general, and greatly enhances the effectiveness (effet utile) of EU law.”).

¹⁰⁹ W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” in How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. LAW 361, 372 (1999) (“The U.S. is unique in its wide use of contingent fees as a method of financing litigation.”).

¹¹⁰ Afilalo, *supra* note 58, at 15.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* “The contingent fee is an extremely common form of paying for the services of lawyers in the U.S.” Davis, *supra* note 109. “In fact, it is now the dominant means of financing cases in many important areas of legal practice, including the collection of overdue commercial accounts, stockholder’s suits, class actions, tax practice, condemnation proceedings, will contests, and—of course—personal injury litigation.” *Id.* The fact that arbitral panels have discretion to adjudicate claims for substantial damages in proceedings that are less transparent than courts increases the likelihood that a contingency lawyer would accept the case in the hope of securing a settlement that yields a sufficient contingent fee to justify the venture.

II. HOW INVESTMENT CAPTURES TRADE

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

There are nearly 3,000 bilateral investment treaties (BITs) in force.¹¹⁵ Commentators have debated the extent to which BITs are indispensable—or even relevant—legal means of attracting private foreign investments.¹¹⁶ Yet, the financial and commercial map of the world is littered with them.¹¹⁷ Not all BITs look alike.¹¹⁸ However, although their overall structure and semantics may vary, the global body of investment laws features converging doctrinal hallmarks. These treaties usually provide that foreign enterprises should not be treated less favorably than similarly situated domestic counterparts and should not make “performance requirements” unlawful.¹¹⁹ They require states that expropriate

¹¹⁵ See JONATHAN BONNITCHA, INT’L INST. SUSTAINABLE DEV., ASSESSING THE IMPACTS OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE 1 (2017). Lists of Bilateral Investment Treaties can be found on the website of the United Nations Conference on Trade and Development (UNCTAD). *International Investment Agreements Navigator*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited Mar. 25, 2018).

¹¹⁶ See, e.g., SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT 382 (Brian Pearce trans., Monthly Review Press 1974); IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM III: THE SECOND ERA OF GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY 1730–1840S (1989); Afilalo, *supra* note 15, at 13–19; Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement’s Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 304 (1997); Kevin Banks, *NAFTA’s Article 1110 - Can Regulation Be Expropriation?*, 5 L. & BUS. REV. AM. 499 (1999); Eduardo Jiménez de Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT’L L. & POL. 179 (1978); Sandrino, *supra* note 66, at 259.

¹¹⁷ See *IIA Mapping Project*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/mappedContent> (last visited Mar. 25, 2018).

¹¹⁸ See, e.g., Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT’L L. 303 (2009); Jeswald W. Salacuse, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67 (2005); Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT’L L. 496 (2009).

¹¹⁹ NAFTA, *supra* note 24. Several types of performance requirements are explicitly prohibited by Chapter 11 of NAFTA. See *id.* For instance, requirements for domestic equity are prohibited under NAFTA Article 1102(4). *Id.* art. 1102(4). Requirements for the mandatory transfer of intellectual property, as well as requirements for use of minimum levels of domestic content, are prohibited under Article 1106. *Id.* art. 1106. Requirements that specific managerial positions be 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. *Id.* art. 1107(1)–(2). Finally, restrictions on dividend transfers are prohibited under Article 1109(1)(a). *Id.* art. 1109(1)(a); see, e.g., Bilateral Investment Treaty, Bol.-U.S., art. VI–VII, Apr. 17, 1998, S. TREATY DOC. No. 106-25 (prohibiting many kinds of performance requirements); U.N. CONFERENCE ON TRADE AND DEV., FOREIGN DIRECT INVESTMENT AND PERFORMANCE REQUIREMENTS: NEW EVIDENCE FROM SELECTED COUNTRIES, U.N. Doc. UNCTAD/ITE/IIA/2003/7, U.N. Sales No. E.03.II.D.32 (2003) (explaining that performance requirements that are not prohibited by the WTO Agreement on Trade-Related Investment Measures may be addressed in various agreements at the bilateral or regional levels).

foreign assets—outright or through regulatory takings—to do so only for a public purpose and upon payment of compensation at fair market value.¹²⁰ They also typically include the international minimum standards of protection as a catch-all guardian of the security of foreigners' economic rights.¹²¹ On the dispute resolution front, BITs¹²² customarily grant foreign investors the right to bring a claim against the host state for violations of the treaty before ICSID,¹²³ ICSID's Additional Facility,¹²⁴ or UNCITRAL.¹²⁵

For the purposes of this Article, I use hypothetical provisions of an investment treaty inspired by the typical provision of BITs—in particular, Chapter 11 of NAFTA, which represents standard language for a BIT.¹²⁶ For national treatment, my treaty provisions state that “[e]ach 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

¹²⁰ Compare Bilateral Investment Treaty, Alb.-U.S., art. III(1), Jan. 11, 1995, S. TREATY DOC. No. 104-19 (prohibiting direct or indirect expropriation or nationalization of foreign investments without compensation), with U.S. CONST. amend. V (stating similarly that “nor shall private property be taken for public use, without just compensation.”).

¹²¹ See, e.g., Bilateral Investment Treaty, Croat.-U.S., art. II, July 13, 1996, S. TREATY DOC. No. 106-29 (establishing standards of protection for foreign investors' economic security rights in the other state).

¹²² See, e.g., Bilateral Investment Treaty, Ger.-India, July 10, 1995 (1998); Bilateral Investment Treaty, China-Japan, Aug. 27, 1988 (1989); Bilateral Investment Treaty, Arg.-U.S., Nov. 14, 1991, S. TREATY DOC. No. 103-2; U.S. Dep't of State, Model Bilateral Investment Treaty (2004).

¹²³ INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES (2006), <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>. The ICSID is an autonomous international institution, established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (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. *Id.* at 5.

¹²⁴ INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID ADDITIONAL FACILITY RULES (Sept. 27, 1978), <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx>. The ICSID Additional Facility is a branch of ICSID established to administer, inter alia, conciliation and arbitration proceedings between Member States and non-Member States. *Id.*

¹²⁵ The United Nations Commission on International Trade Law (UNCITRAL) is the United Nations' international trade division and is mostly concerned with collecting, organizing, and disseminating guidelines and conventions for international trade law. U.N. COMM'N ON INT'L TRADE LAW, A GUIDE TO UNCITRAL 5 (2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>. The Washington Convention broke with previous dogma that only states could bring claims against other states. INT'L CENT. SETTLEMENT INV. DISP., REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, art. 33 (Mar. 18, 1965), <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>. 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. *Id.* art. 24. However, in such cases the applicable law tends to be the local law as opposed to international law. *Id.* art. 42(1).

¹²⁶ This Article will use the term “IT” to encompass any possible FTAs, BITs, or MIAs.

sale or other disposition of investments.”¹²⁷ For most favored nation, this investment treaty (IT) provides that “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.”¹²⁸

For a minimum standard of treatment, I apply the following typical clause: “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.”¹²⁹ For expropriation, my IT will read: “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.”

And, of course, I assume that, like NAFTA and other BITs, international arbitral panels have jurisdiction to hear the case and award damages.

B. Brief Summary of the GATT Framework

Article III of the GATT incorporates the familiar national treatment provisions of trade law.¹³⁰ 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.¹³¹ Article I provides that imported

¹²⁷ NAFTA, *supra* note 24, art. 1102; *see also* Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, ASEAN-India, Nov. 12, 2014, <http://www.asean.org/storage/2016/04/ASEAN-India-Investment-Agreement-ASEAN-version.pdf>.

¹²⁸ NAFTA, *supra* note 24, art. 1103; *see also* Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment, Japan-Uru., art. 4, Jan. 26, 2015, <http://www.mofa.go.jp/files/000071951.pdf>.

¹²⁹ *See* Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Korea, China-S. Kor., Sept. 7, 2007, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

¹³⁰ GATT, *supra* note 4, art. III.

¹³¹ *See* PETER VAN DEN BOSCHÉ & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 350–403 (2013).

products must be afforded most favored nation treatment,¹³² meaning that the jurisdiction of import may not treat these products less favorably than like products from another contracting party.¹³³ Article XI of the GATT bans quotas and like measures,¹³⁴ including a broad array of regulations 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.¹³⁵

The SPS provides that sanitary and phytosanitary measures may not give imported products less favorable treatment than is afforded to like domestic products or like products of another contracting state.¹³⁶ In addition to this traditional discrimination rationale, the SPS provides that, “[m]ember 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”¹³⁷

The TBT 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.¹³⁸ In addition, it requires the Member States to make sure that no “unnecessary obstacles” to trade are created by way of technical regulations,¹³⁹ and it provides incentives for states to follow international standards when those exist.¹⁴⁰

¹³² GATT, *supra* note 4, art. I.

¹³³ See BOSSCHE & ZDOUC, *supra* note 131, at 315–35.

¹³⁴ GATT, *supra* note 4, art. XI.

¹³⁵ *Id.* Article XI of the GATT generally prohibits quantitative restrictions on the importation or exportation of any product, stating “[n]o prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any [Member]” *Id.* See generally, BOSSCHE & ZDOUC, *supra* note 131, at 481–98.

¹³⁶ SPS Agreement, *supra* note 21, art. 2.2.

¹³⁷ See Damien J. Neven & Joseph H.H. Weiler, *Japan – Measures Affecting the Importation of Apples (AB-2003-4): One Bad Apple? (DS245/AB/R): A Comment*, in THE WTO CASE LAW OF 2003: THE AMERICAN LAW INSTITUTE REPORTERS’ STUDIES 284 (Henrik Horn & Petros C. Mavroidis eds., 2004).

¹³⁸ TBT Agreement, *supra* note 20, art. 2.1.

¹³⁹ *Id.*

¹⁴⁰ *Id.* art. 2.4 (“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 basis for their technical regulations 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.”).

Article XX includes the customary exceptions to the trade disciplines, quoted in relevant parts below.

Provided that they do not violate its chapeau, Article XX protects measures that are:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; . . .
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, . . .
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption¹⁴¹

C. *Why the GATT and NAFTA Are Co-Extensive*

Causes of action arising under Articles I, III, XI of the GATT, or under SPS or TBT, may fall within the investment provisions of our 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.¹⁴² The minimum standards of treatment provisions may, based on the facts of the individual case, give the investors additional arguments.¹⁴³ 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.

I selected a few cases from investment law to illustrate its overlap with trade law. The first group of cases arose under NAFTA's Investment Chapter (Chapter 11) in connection with a challenge to Mexican measures that complainants alleged favored the Mexican sugar cane industry to the detriment of foreign high

¹⁴¹ GATT, *supra* note 4, art. xx. See BOSSCHE & ZDOUC, *supra* note 131, at 543–82.

¹⁴² Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 417–21 (2006).

¹⁴³ DiMascio & Pauwelyn, *supra* note 102, at 67.

fructose corn syrup (HFCS) producers.¹⁴⁴ 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,¹⁴⁵ challenged a Mexican twenty percent excise tax (the IEPS tax)¹⁴⁶ on soft drinks and syrups, and services used to transfer and distribute those products.¹⁴⁷ The tax applied only to drinks and syrups if they used sweeteners other than cane sugar, such as HFCS.¹⁴⁸ Not surprisingly, HFCS was associated with American producers, and cane sugar was associated with Mexican producers.¹⁴⁹ 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.¹⁵⁰

The second investment proceeding, brought by Cargill, another American company,¹⁵¹ arose out of the same regulatory framework.¹⁵² 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. The complainants challenged a decree adopted by Mexico in 2001,¹⁵³ pursuant to which HFCS importers from the United States would require a permit issued by the Mexican Secretary of the Economy.¹⁵⁴ If a given importer

¹⁴⁴ Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007).

¹⁴⁵ *Id.* ¶ 8.

¹⁴⁶ *Id.* ¶ 2. In Mexico, the IEPS Amendment (that incorporated IEPS tax) was temporarily suspended by Presidential Decree. *Id.* ¶ 46. On July 12, 2002, the Mexican Supreme Court declared this suspension unconstitutional and reinstated the IEPS Amendment. *Id.* ¶ 83. The IEPS Amendment was also the subject of an advisory ruling by the Mexican Commission Federal de Competencia. *Id.* The IEPS Amendment was also subject to a constitutional challenge in the Mexican courts by individual taxpayers, with the result that some soft drink bottlers, but not others, are exempt from the tax on the basis of successful amparo challenges. *Id.*

¹⁴⁷ *Id.* ¶ 2.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶¶ 6–8.

¹⁵⁰ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, 173, WTO Doc. WT/DS308/AB/R (Mar. 6, 2006) (addressing the legality under international trade law of tax measures on soft drinks and other beverages, further discussed in Part II). This case arose after Mexico continued to come up with measures to protect its sugarcane industry, following the invalidation of previous anti-dumping measures by the WTO and a NAFTA tribunal convened under Chapter 19. *Id.*

¹⁵¹ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Final Award (Sept. 18, 2009). There is also a third case brought by Corn Products International, Inc., but the award is not public. *Corn Products Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008).

¹⁵² *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Final Award, ¶ 1 (Sept. 18, 2009). Cargill, incorporated in the United States, sold HFCS through its subsidiary Cargill de Mexico, S.A. de C.V. *Id.*

¹⁵³ Cargill also brought a claim under the most-favored-nation provisions of Article 1103, which the Tribunal rejected. *Id.* ¶¶ 227–34.

¹⁵⁴ *Id.* ¶ 117.

did not have a permit, its products would be subject to a higher tariff than the NAFTA tariff.¹⁵⁵

The same measures were also challenged by states before the WTO, with the DSB finding against Mexico on this trade front.¹⁵⁶ The DSB Panel found that the IEPS tax violated the national treatment obligations of Mexico under Article III:4 of the GATT.¹⁵⁷ It 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) HFCS and sugar are directly competitive or substitutable products, and dissimilar taxation was applied in a way that offered protection to domestic products.¹⁵⁸ Mexico defended the IEPS tax under the Article XX(d) exception with an argument that the measures were necessary to secure compliance with NAFTA itself. Mexico claimed that the United States had violated NAFTA and retaliation was the only means of securing American compliance with the treaty.¹⁵⁹ The Panel rejected the Mexican argument and held that the term “laws or regulations” under Article 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 Article XX(d) and do not cover obligations of another WTO Member (here, the United States’ obligations under NAFTA).¹⁶⁰ The Appellate Body (AB) upheld the Panel’s conclusions.¹⁶¹

In the NAFTA investment cases, Mexico also argued that the case belonged to a trade—not an investment—dispute-resolution framework.¹⁶² Mexico argued that a claim related to the imposition of a permit requirement was beyond the jurisdiction of the tribunal because it involved the trade of goods and was

¹⁵⁵ *Id.*

¹⁵⁶ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 9.4, WTO Doc. WT/DS308/R (adopted Oct. 7, 2005).

¹⁵⁷ *Id.* ¶¶ 9.2(a)(iii) & 9.2(b).

¹⁵⁸ *Id.* ¶ 9.2.

¹⁵⁹ *Id.* ¶ 9.3.

¹⁶⁰ As explained in greater detail below, Cargill brought a broader challenge under NAFTA to a series of measures adopted by Mexico as part of its anti-HFCS campaign, including prominently import permit requirements. *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Final Award, ¶ 299 (Sept. 18, 2009) (“Reviewing closely the record of this case, the Tribunal finds ample support for the conclusion that the import permit was one of a 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.”).

¹⁶¹ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, *supra* note 156, ¶ 9.5.

¹⁶² *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Final Award, ¶ 136 (Sept. 18, 2009).

governed by NAFTA Chapter 3, not Chapter 11.¹⁶³ Chapter 3 was 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.¹⁶⁴ The NAFTA Tribunal found for the claimant and rejected the argument that the case belonged exclusively to a trade venue.¹⁶⁵

The Tribunal held that the existence of separate regimes applicable to trade in goods/services and investment does not *ipso facto* mean that there can be no overlap between the two.¹⁶⁶ It found that HFCS and cane sugar producers operated in “like circumstances” due to the competitive relationship between them.¹⁶⁷ In these circumstances, the Tribunal ruled, the IEPS tax was discriminatory and designed to afford protection to the domestic sugarcane industry.¹⁶⁸ These findings translated into a violation of the national treatment provisions of Article 1102.¹⁶⁹ The Tribunal also found a violation of the performance requirements of Article 1106(3) because the IEPS tax exempted soft drinks using cane sugar contingent upon the use of domestic products.¹⁷⁰ While the IEPS tax conferred advantages on sugar without discrimination between foreign and domestic investors, the reality was that the sugar industry in Mexico was essentially domestic and the disparate impact on the foreign producers warranted a finding of national treatment violation.¹⁷¹ 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 U.S. compliance with its NAFTA obligations, but rather to protect domestic industry.¹⁷²

In the second NAFTA proceeding, Cargill’s broader level challenge to the Mexican anti-HFCS campaign focused in particular on the import permit requirement that Mexico adopted in addition to the IEPS tax.¹⁷³ The Tribunal found that the “import permit was one of the series of measures expressly intended to injure U.S. HFCS producers and suppliers in Mexico in an effort to

¹⁶³ *Id.* ¶ 191.

¹⁶⁴ NAFTA, *supra* note 24, at ch. 23.

¹⁶⁵ Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Final Award, ¶ 193 (Sept. 18, 2009).

¹⁶⁶ *Id.* ¶ 148.

¹⁶⁷ *Id.* ¶ 211.

¹⁶⁸ *Id.* ¶¶ 219–20.

¹⁶⁹ *Id.* ¶ 223.

¹⁷⁰ *Id.* ¶¶ 313, 316, 319.

¹⁷¹ *Id.* ¶¶ 317–18.

¹⁷² *Id.* ¶ 412. The Tribunal did not find that Mexico had expropriated the claimants’ investment because the measure of interference was not substantial enough—the Claimants remained in control of their investment in Mexico throughout the entire relevant time period. *Id.* ¶¶ 317–18, 348, 363.

¹⁷³ *Id.* ¶¶ 224–25.

persuade the U.S. government to change its policy on sugar imports from Mexico.”¹⁷⁴ The Tribunal concluded that the introduction of the permit requirement was a manifestly unjust measure because its sole purpose was to persuade the United States to change its trade practices.¹⁷⁵ By imposing such an import requirement, Mexico targeted few suppliers of HFCS that originated in the United States and made them carry the burden of Mexico’s efforts to influence U.S. policy.¹⁷⁶ The Tribunal called such practice “willful 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).¹⁷⁷ Furthermore, the Tribunal found this measure to amount to gross misconduct because, when adopting the permit requirement, the Mexican government did not introduce objective criteria according to which the company could obtain an import permit.¹⁷⁸

These companion cases illustrate the doctrinal overlap between the treaties. This is by no means the only controversy that raises the issue. While it is beyond the scope of this Article to engage in a comprehensive review, I will review a few other cases to further exemplify the doctrinal construct that my empirical study confirms.

In *Ethyl v. Canada*,¹⁷⁹ 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 11.¹⁸⁰ Ethyl, the claimant, argued that Canada had violated national treatment (Article 1102), prohibition of expropriation (Article 1110), and the rules against performance requirements (Article 1106).¹⁸¹ Ethyl claimed \$251,000,000 in damages to cover the losses associated with its inability to sell MMT made in its production plant and the prejudice to its goodwill.¹⁸² In addition to asserting various procedural

¹⁷⁴ *Id.* ¶ 299.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* ¶ 300.

¹⁷⁷ *Id.* ¶¶ 2, 300, 550.

¹⁷⁸ *Id.* ¶ 301. The Tribunal rejected the most-favored nation claim made by Cargill on technical grounds. *Id.* ¶¶ 284, 286, 298, 301.

¹⁷⁹ *Ethyl Corp. v. The Government of Canada*, UNCITRAL, Award On Jurisdiction (June 24, 1998), 38 I.L.M. 708, 722, ¶¶ 3–4 (1999).

¹⁸⁰ The statute prohibited international trade of or import of MMT for commercial purposes except under authorization under Section 5. Section 5 precluded any authorizations for additions to unleaded gasoline. Meanwhile, production and sale of MMT in Canada were not prohibited. *Id.* ¶¶ 5–6.

¹⁸¹ *Id.* ¶¶ 7, 18.

¹⁸² *Id.* ¶¶ 71–73. See Patricia Isela Hansen, *The Interplay Between Trade and the Environment Within the NAFTA Framework*, in ENVIRONMENT, HUMAN RIGHTS, AND INTERNATIONAL TRADE 326 (Francesco Francioni,

defenses,¹⁸³ Canada also argued that the ban was justified by concerns about the environmental and health risks associated with MMT.¹⁸⁴ Canada and Ethyl settled the Chapter 11 claim in 1998 before proceeding to the merits.¹⁸⁵ Under the settlement, the Canadian government agreed to withdraw the legislation and to pay Ethyl \$13 million in compensation.¹⁸⁶ 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 of the claim.¹⁸⁷

In *Pope & Talbot, Inc. v. Canada*,¹⁸⁸ 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 its national treatment and minimum standard of treatment.¹⁸⁹ Under the

ed., Hart Publishing 2001). Ethyl's claim for \$251,000,000 was the first significant claim involving a challenge to an environmental regulation brought following adoption of the NAFTA. *Id.*

¹⁸³ *Id.* ¶¶ 12–14. Canada argued that the Tribunal had no jurisdiction over the dispute as it is out of the scope of Chapter 11 of NAFTA and that the claimant failed to fulfill requirements of Section B of Chapter 11. *Id.* ¶ 12. Ethyl defended jurisdiction of the Tribunal by arguing that all the requirements of Chapter 11 for arbitration procedure were met by the time of hearing. *Id.* ¶ 46. As for the scope of Chapter 11, the claimant argued that it challenged measures against it within the territory of Canada for which it is entitled to compensation, including for damages resulting from the act outside of Canada. *Id.* ¶ 27. The Tribunal agreed with Ethyl that this argument was not critical enough to be decided on the procedural stage, and it did not reject Ethyl's claim on that ground. *Id.* ¶ 64. The Tribunal noted that the MMT Act was the realization of the governmental program that had been sustained over a long period of time, and, in any event, by the time of commencement of arbitration, the government had a "measure" adopted or maintained within the meaning of Article 1101. *Id.* ¶ 69. Part of Ethyl's claim was that the damages it had suffered included losses outside the territory of Canada. *Id.* ¶ 72. The Tribunal joined Canada's objections related to damages suffered outside of Canada and to the trade nature of the dispute to the merits phase and rejected other objections. *Id.* ¶ 96.

¹⁸⁴ *See id.* ¶ 21.

¹⁸⁵ *Ethyl Corporation v. The Government of Canada*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng> (last visited Mar. 25, 2018).

¹⁸⁶ Alan C. Swan, *Ethyl Corporation v. Canada, Award on Jurisdiction (under NAFTA/UNCITRAL)*, 94 AM. J. INT'L L. 159, 161 (2000).

¹⁸⁷ *See Ethyl Corp. v. The Government of Canada*, UNCITRAL, Award On Jurisdiction (June 24, 1998), 38 I.L.M. 708, 722, ¶¶ 3–4 (1999).

¹⁸⁸ *Pope & Talbot, Inc. v. The Government of Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001), 40 ILM 258 (2001); *Pope & Talbot, Inc. v. Canada*, Interim Award (June 26, 2000), 40 I.L.M. 258 (2001).

¹⁸⁹ *Pope & Talbot, Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶¶ 105–06 (Apr. 10, 2001), 40 ILM 258. The claimant also argued for violations of Article 1106 ("Performance Requirements") and Article 1110 ("Expropriation"). *Pope & Talbot, Inc. v. Canada*, Interim Award, ¶¶ 45, 47, 81 (June 26, 2000), 40 I.L.M. 258 (2001). The Tribunal rejected both claims. *Id.* ¶¶ 70–72, 76, 79. 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 not substantial enough to be qualified as expropriation. *Id.* ¶¶ 96, 99, 102, 104. It should be noted that Pope & Talbot also originally alleged violation of MFN treatment,

SLA, Canada agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet.¹⁹⁰ According to Pope & Talbot, Canada's allocation of a fee-free quota was unfair and inequitable.¹⁹¹ It argued that its investment was subjected to threats, its reasonable requests for information were denied, it incurred unreasonable expenses, and it suffered loss of reputation in government circles.¹⁹² It also claimed that discriminatory treatment arose out of transitional adjustment provisions, unfair allocation of quota related to wholesale exports, inequitable reallocation of quota for British Columbia companies, and Canada's breach of administrative fairness.¹⁹³

The Tribunal found a violation of the minimum standards of protection but not of national treatment.¹⁹⁴ 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.¹⁹⁵ 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 fees did not discriminate against the foreign investors.¹⁹⁶ Pope & Talbot had claimed damages totaling over \$507 million (USD) and the Tribunal awarded it with \$461,566 (USD) in damages with interest on the findings of violation.¹⁹⁷ It is likely that, had the claimant prevailed in its national treatment claim, the damages would have been higher.

One of Canada's main defenses was that the Tribunal lacked jurisdiction because there was no "investment dispute" within the meaning of Article 1115 due to the fact that the dispute was related to trade in goods.¹⁹⁸ Drawing on interpretive practices for Article XX of the GATT, Canada claimed that its measures did not relate to investment because "relate to" should be construed to

but this claim was dropped by the time the interim award was issued. Pope & Talbot, Inc. v. The Government of Canada, Award on the Merits of Phase 2, ¶ 39 (Apr. 10, 2001), 40 ILM 258.

¹⁹⁰ Pope & Talbot, Inc. v. Canada, Interim Award, ¶ 22 (June 26, 2000), 40 I.L.M. 258 (2001).

¹⁹¹ *Id.* ¶ 150.

¹⁹² *Id.* ¶ 181.

¹⁹³ *Id.* ¶¶ 122, 124, 126, 182.

¹⁹⁴ *Id.* ¶¶ 88, 94–95, 118.

¹⁹⁵ 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. *Id.* ¶¶ 160, 165, 171.

¹⁹⁶ *Id.* ¶¶ 126–28.

¹⁹⁷ U.S. DEP'T OF STATE, *Diplomacy in Action: Pope & Talbot, Inc. v. Government of Canada*, <https://www.state.gov/s/l/c3747.htm> (last visited Mar. 25, 2018).

¹⁹⁸ Pope & Talbot, Inc. v. Government of Canada, Award by Arbitration Tribunal with Relation to Preliminary Motion by Government of Canada (Jan. 26, 2000), ¶ 12(1), 40 I.L.M. 258 (2001).

mean “primarily aimed at.”¹⁹⁹ 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.²⁰⁰ The Tribunal, however, concluded that all elements of a proper investment dispute were met; 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.”²⁰¹ This is exactly the point: investment and trade law deal with the same activities. The WTO speaks to states about trade in goods and services,²⁰² and BITs speak to the private economic actors carrying on trade.²⁰³

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 under open-ended provisions of an IT.²⁰⁴ In *Methanex v. United States*,²⁰⁵ for instance, a Canadian maker of methanol, which is occasionally used as 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.²⁰⁶ In *Loewen v. United States*,²⁰⁷ the claimant argued that a Mississippi trial resulting in an enormous amount of punitive damages violated due process norms, amounting to a taking of property.²⁰⁸ In both cases, the complainant sought hundreds of millions of dollars in damages,²⁰⁹ and in both cases the

¹⁹⁹ *Id.* ¶ 28.

²⁰⁰ *Id.* ¶ 28.

²⁰¹ *Id.* ¶ 26.

²⁰² See Marrakesh Agreement, Apr. 15, 1994, 1867 U.N.T.S. 154 (establishing the WTO).

²⁰³ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *Bilateral Investment Treaties*, <https://ustr.gov/trade-agreements/bilateral-investment-treaties#> (last visited Mar. 25, 2018).

²⁰⁴ See *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005); *The Loewen Group, Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

²⁰⁵ *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005).

²⁰⁶ *Id.* ¶ 24.

²⁰⁷ *The Loewen Group, Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Notice of Claim, ¶ 16 (Oct. 30, 1998).

²⁰⁸ *Id.* ¶¶ 7-8.

²⁰⁹ *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, ¶ 2 (NAFTA Ch. 11 Arb. Trib. 2005); *The Loewen Group, Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Notice of Claim, ¶ 187 (Oct. 30, 1998).

complainants did not even come close to having a domestic cause of action.²¹⁰ While the arbitrators ultimately rejected those claims, all of the cases proceeded to the awards stage, and a different panel may well have ruled in their favor.²¹¹

Even when the complainants are ultimately unsuccessful on the merits, the overlap between trade and investment creates massive exposure of the defending states to protracted litigation. The “plain packaging litigation” against Australia illustrates this claim. On the investment front, Philip Morris Asia (PM Asia) challenged Australia’s “plain packaging” laws²¹² under the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments of 1993.²¹³ The plain packaging laws severely restricted the ability of a cigarette manufacturer to use its brand, logos, or designs on a cigarette pack.²¹⁴ They required that all cigarettes be sold under plain, drab brown, unattractive packaging.²¹⁵ They also prohibited the use of graphics and logos on the package.²¹⁶ In addition to the investment rules, Australia’s plain packaging laws were challenged before the WTO by several states, including the European Union, Brazil, Egypt, the Ukraine, Honduras, the Dominican Republic, and New Zealand, among others.²¹⁷

²¹⁰ Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, Part IV, ch. F, ¶ 2 (NAFTA Ch. 11 Arb. Trib. 2005); The Loewen Group, Inc. & Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Notice of Claim, ¶ 240 (Oct. 30, 1998).

²¹¹ See generally Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (NAFTA Ch. 11 Arb. Trib. 2005); The Loewen Group, Inc. & Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003).

²¹² Tobacco Plain Packaging Bill 2011 (Cth) and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth). See *Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging*, WEB WIRE (June 27, 2011), <https://www.webwire.com/ViewPressRel.asp?aId=140252>.

²¹³ Agreement for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, 1748 U.N.T.S. 385; 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 (July 15, 2011) [hereinafter Written Notification of Claim].

²¹⁴ *Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

²¹⁵ *Id.* § 19.

²¹⁶ *Id.* ch. 1, § 4; *id.* ch. 2, § 20.

²¹⁷ Request for Consultations by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/1 (Mar. 15, 2012) [hereinafter *Australia—Trademarks and Other Plain Packaging Requirements, Request by Ukraine*]; Request for Consultations by Honduras, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/1 (Apr. 10, 2012) [hereinafter *Australia—Trademarks and Other Plain Packaging Requirements, Request by Honduras*]; Request for Consultations by the Dominican Republic, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/1 (July 23, 2012) [hereinafter *Australia—Trademarks and Other Plain Packaging Requirements, Request by Dominican Republic*].

The main arguments of the complaining states before the DSB were brought under the TBT and TRIPS. As to the TBT, the states claimed that the measures amounted to a technical barrier to trade because they severely hindered sales of branded cigarettes in Australia, and that they were more restrictive than necessary to achieve Australia's health objective.²¹⁸ Depriving cigarette brand owners of their normal packaging, logos, and branding, they claimed, will hurt their sales but will not decrease smoking significantly.²¹⁹ Instead of distinguishing the products by branding habits, smokers would do so through product pricing.²²⁰ In turn, this would favor cheaper, domestic cigarettes, using lesser quality tobacco.²²¹ As to TRIPS, the complainants argued 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.²²²

The investment filings by PM Asia followed a similar structure and, additionally, raised investment-specific causes of action.²²³ PM Asia was incorporated in Hong Kong with the goal of benefitting from the Hong Kong–Australia treaty, and it owned shares in Philip Morris Australia Limited (PM Australia) as its “investment” in Australia.²²⁴ PM Asia argued that Australia expropriated its valuable intellectual property by banning the normal use of a trademark to brand intellectual property on tobacco products and packaging.²²⁵ It also claimed a violation of the minimum standards of treatment of international investment law on the grounds that Australia violated international treaties such as the TBT and the Paris Convention for the Protection of Industrial Property.²²⁶ PM Asia translated its trade claims into investment language by arguing that, when it chose to do business in Australia, it had a legitimate expectation that Australia would abide by its obligations under international economic law.²²⁷ By rejecting and failing to abide by those obligations, PM Asia claimed that Australia deprived it of basic assumptions upon which its

²¹⁸ See Australia–Trademarks and Other Plain Packaging Requirements, Request by Dominican Republic, *supra* note 217.

²¹⁹ See Written Notification of Claim, *supra* note 213.

²²⁰ See *id.*

²²¹ See Request for Consultations by the Dominican Republic, *supra* note 217.

²²² Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Notice of Arbitration, UNCITRAL, ¶ 39 (Nov. 21, 2011).

²²³ *Id.* ¶ 1.2.

²²⁴ *Id.* ¶ 1.3.

²²⁵ *Id.* ¶¶ 7.3–7.5.

²²⁶ *Id.* ¶¶ 7.6–7.8.

²²⁷ *Id.* ¶ 6.5.

investment in that country relied.²²⁸ As a result of the violations, PM Asia alleged it was entitled to compensation “in an amount to be quantified but of the order of billions of Australian dollars.”²²⁹

In both the arbitral claim and the WTO proceeding, the tribunal sided with Australia and held that Philip Morris treaty-shopped to bring a baseless complaint about the exercise of legitimate regulatory power that had been in the works for a substantial amount of time.²³⁰ Australia’s massive legal efforts to defend the case, the length of years it lasted, and the staggering exposure in the event of a loss (\$15 billion AUS) illustrate the sensitivity of allowing challenges of this type to proceed to arbitration.²³¹ Treaty-shopping, a longstanding participation of PM in regulatory preparations for harsher tobacco measures, and the sensitive health concerns at issue, made it a case where the investor had a low likelihood of success. More sympathetic plaintiffs may be able to prove legitimate expectations and an actionable breach of international law in cases where a state has changed its domestic policies or law.

In another case, the investment tribunal may strike a different balance between investor expectations and the state’s regulatory space to change course. Line drawing is a delicate exercise, and the location of the boundary will depend on the factual circumstances, individual philosophies, and predilections of the arbitrators.²³² There will be plenty of instances where the investor, in a case that overlaps trade and the applicable investment treaty, will be able to prove a

²²⁸ *Id.* ¶¶ 6.2–6.12, 45.

²²⁹ *Id.* ¶ 8.3.

²³⁰ Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, 25, 47–50, Australia’s Response to the Notice of Arbitration, UNCITRAL, ¶ 48 (Dec. 21, 2011).

²³¹ See Valentina S. Vadi, *Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law*, 48 STAN. J. INT’L L. 93, 128 (2012) (discussing the chilling effect of investment treaties and reporting case studies to the effect that, unless properly limited by jurisprudence, “investment treaty guarantees may negatively affect tobacco control policies as investors may claim that tobacco control measures infringe their rights”); see also Wagner, *supra* note 48.

²³² See, e.g., William T. Waren, *Paying to Regulate: A Guide to Methanex v. United States and NAFTA Investor Rights*, 31 E.L.R. 10986. Methanex illustrates the “risk to States” because, “[g]iven the largely undefined standards of NAFTA’s investment chapter, the arbitrators have room to read its language broadly or narrowly.” *Id.* *International Thunderbird*, which involved a ruling granted by a Mexican government agency allowing Thunderbird to operate its gaming machines in Mexico as “games of skill” rather than prohibited games of “chance,” provides an excellent illustration of the risk faced by states. *International Thunderbird Gaming Corp. v. United Mexican States, Arbitral Award, UNCITRAL/NAFTA*, ¶ 102 (Dec. 2005). When its ruling was canceled, Thunderbird challenged the adverse government action under NAFTA. *Id.* The majority took the view that Thunderbird had assumed the risk of a reversal of government policy, whereas the dissent argued that Mexico had provided sufficiently strong assurances to the investor to create legitimate expectations, and it would allocate the risk to the State. *Id.* The different outcomes are direct results of the arbitrators’ exercise of their discretion to evaluate how much regulatory space the defending State has to change policy course. *Id.*

breach.²³³ 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.²³⁴

This arbitrator strongly held that the balancing in that case favored the complainants, while his colleagues sheltered the regulatory space that he described.²³⁵

In Part III, I show, applying my hypothetical investment treaty provisions, how the overlap between trade and investment results in the “capture” by the investment treaty of most WTO cases.

III. CASE ANALYSIS

A. *A Few More Introductory Comments on Classification*

I have reviewed both decided trade cases and cases that were settled before reaching the Panel or AB stage. I grouped cases either by industry or by subject matter. Food, liquor, automotive, clean energies, textiles, tobacco, and other industries have been the focus of multiple WTO filings. Patent, trademark, and like cases are better categorized by subject matter (intellectual property). Some cases did not fall readily into one category or another and are included in a “General Market Access” catch-all category. My categorization judgments, I believe, fulfill 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 action is available.

²³³ As this Article demonstrates, there is a near-perfect correlation between national treatment for trade and for investment. See generally Afilalo, *supra* note 15 (setting forth the theoretical argument that this Article proves empirically).

²³⁴ *International Thunderbird Gaming Corp. v. United Mexican States, Arbitral Award, UNCITRAL/NAFTA*, ¶ 102 (Dec. 2005) (separate opinion of Thomas Wälde).

²³⁵ *Id.* ¶ 5 (“[The arbitrators in the majority] see the glass of the investor half empty, I rather see it as half full. They imply a very high level of due diligence, of knowledge of local conditions and of government risk to be taken by the investor. I rather see the government as responsible for providing a clear message and of sticking to the message once given and as reasonably understood by the investor.”).

In determining whether to classify a case as Trade Positive, Investment Positive, or Potentially Positive, I kept 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 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 *International Thunderbird* dissent shows, different panels of arbitrators may reach different results based on their general understanding of the purpose of investment law.²³⁶ Also, many trade cases did not go beyond the request for consultations stage and did not include a fully developed record.²³⁷ This made it difficult to predict with accuracy how a panel would rule on either the trade or investment side.

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 also whether the ultimate decision maker may find a legal violation depending on his or her conclusions as to a legal standard that is in a state of flux and is, thus, uncertain. In making judgments as to individual cases, I tried to strike a 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 more.

To avoid those tendencies, I adhered to the following principles and guidelines. First, to be 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, stood a good chance 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. Second, 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 assumed 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. Third, and conversely, I have not hesitated to classify cases as Investment Positive where the allegations of protectionism are not counterbalanced by any legitimate state interest that appears on the available

²³⁶ *Id.* ¶ 8.

²³⁷ *See, e.g.*, cases cited *infra* at notes 242–49. The tables setting forth the cases reviewed for purposes of this project will illustrate the extent to which a substantial number of filings do not go beyond the Request for Consultations stage.

record, or when the case appears to raise familiar allegations of economic protectionism unrelated to any trade-legitimate state interest.

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 that 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.

B. The Liquor Cases

Most students of trade will read at least a few liquor cases. A highly lucrative industry, it is also home to cultural biases and stereotypes. For example, the French drink wine while 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, nor the Koreans from soju. Yet, all liquor cases are easy to classify as 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.²³⁸

These cases resulted or would result if adjudicated in a violation of international trade rules principally because they tend to share the following hallmarks. First, 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. Second, 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 that, when the tax is applied to domestic and foreign categories of products, the foreign product is discriminated against *de facto*. Third, consumer preferences fall squarely on the side of the domestic liquor. However, the taxation or regulation providing it with more favorable competitive conditions

²³⁸ See, e.g., Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DSS/AB/R, WT/DS10/AB/R, WT/DS11/R (Oct. 4, 1996) [hereinafter *1996 Japan-Alcoholic Beverages AB Report*].

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. Fourth, the likeness analysis under the WTO/GATT 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, because of the cultural biases, the consumer preferences analysis may show definitive results as to the tastes of the consumer at a given point in time. However, 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.

For these reasons, it is not surprising that the cases are all Trade Positive and Investment Positive:

Japan—Taxes on Alcoholic Beverage—Shochu ²³⁹	TP	IP
Korea—Taxes on Alcoholic Beverages—Soju ²⁴⁰	TP	IP
DS 87 & DS 110: Chile—Taxes on Alcoholic Beverages—Pisco ²⁴¹	TP	IP
DS 261: Uruguay—Tax Treatment on Certain Products ²⁴²	TP	IP
DS 263: European Communities—Measures Affecting the Import of Wine ²⁴³	TP	IP

²³⁹ Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/D11/R (October 4, 1996).

²⁴⁰ Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, (October 18, 1999).

²⁴¹ Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13, 1999); Request for Consultations by the United States, *Chile—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS109/1 (Dec. 16, 1997).

²⁴² Request for Consultations by Chile, *Uruguay—Tax Treatment on Certain Products*, WTO Doc. WT/DS261/1 (June 2, 2002).

²⁴³ Request for Consultations by Argentina, *European Communities—Measures Affecting Imports of Wine*, WTO Doc. WT/DS263/1 (Sept. 12, 2002).

DS 352: India—Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities ²⁴⁴	TP	IP
DS 354: Canada—Tax Exemptions and Reductions for Wine and Beer ²⁴⁵	TP	IP
Thailand—Customs Valuation of Certain Products from the European Communities	TP	IP
DS 380: India—Certain Taxes and Other Measures on Imported Wines and Spirits ²⁴⁶	TP	IP
DS 396 & DS 403: Philippines—Taxes on Distilled Spirits ²⁴⁷	TP	IP
DS 411: Armenia—Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages ²⁴⁸	TP	IP
DS 423: Ukraine—Taxes on Distilled Spirits ²⁴⁹	TP	IP

One compelling reason for these outcomes 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.²⁵⁰ The removal of the disadvantageous competitive conditions will

²⁴⁴ Request for Consultations by the European Community, *India—Measures Affecting the Importation and Sale of Wines and Spirits from the European Communities*, WTO Doc. WT/DS352/1 (Nov. 23, 2006).

²⁴⁵ Request for Consultations by the European Communities, *Canada—Tax Exemptions and Reductions for Wine and Beer*, WTO Doc. WT/DS354/1 (Dec. 4, 2006).

²⁴⁶ Request for Consultations by the European Communities, *India—Certain Taxes and Other Measures on Imported Wines and Spirits*, WT/DS380/1 (Nov. 18, 2009).

²⁴⁷ Appellate Body Report, *Philippines—Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R (Dec. 21, 2011).

²⁴⁸ Request for Consultations by Ukraine, *Armenia—Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages*, WT/DS411/1 (July 22, 2010).

²⁴⁹ Request for Consultations by Moldova, *Ukraine—Taxes on Distilled Spirits*, WT/DS423/1 (Mar. 7, 2011).

²⁵⁰ See, e.g., Joshua Aizenmann & Eileen L. Brooks, *Globalization and Taste Convergence: The Case of Wine and Beer*, (Nat'l Bureau of Econ. Research, Working Paper No. 11228, 2005) (finding a high degree of convergence of consumption of wine relative to beer within groups of countries that have a higher degree of

in turn enable foreign liquor to gradually gain access to domestic markets and transform national preferences.²⁵¹

Similarly, all liquor cases examined are also Investment Positive, creating a perfect correlation between investment and trade possible outcomes. All cases involved differential taxation on liquors, which could be contested by the model IT under several grounds. First, measures that were in violation with National Treatment provisions under trade law would also be in violation with National Treatment provisions in ITs.²⁵² In addition, investors could argue that the measures carried out by the state constitute manifest injustice and arbitrary treatment. Finally, investors could also rely on the minimum standards of treatment provisions to argue they had a legitimate expectation that the host state would comply with its obligations under international law.

C. Cigarettes and Related Products

The outcomes of these cases are summarized in the table below:

DS 227: Peru—Taxes on Cigarettes ²⁵³	TP	IPP
DS 232: Mexico—Measures Affecting the Import of Matches ²⁵⁴	TP	IP
DS 302: Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes ²⁵⁵	TP	IPP

integration and that a “key prediction of international trade is confirmed in the data: greater trade integration weakens the association between production and consumption patterns”).

²⁵¹ *Id.*

²⁵² This is because, as has been noted ever since the early days of the WTO, in a typical liquor case, the challenged taxes are “offensive because the tax distinctions [a]re unsupported by any objective basis . . . no aim other than protectionism explain[s] the tax distinctions.” James H. Snelson, *Can GATT Article III Recover from its Head-On Collision with United States – Taxes on Automobiles*, 5 MINN. J. GLOBAL TRADE 467, 472 n. 37 (1996). As explained above, the absence of a colorable domestic purpose will doom a measure under both trade and investment laws.

²⁵³ Request for Consultations by Chile, *Peru—Taxes on Cigarettes*, WTO Doc. WT/DS227/1 (Mar. 6, 2001) [hereinafter Peru—Taxes on Cigarettes].

²⁵⁴ Request for Consultations by Chile, *Mexico—Measures Affecting the Import of Matches*, WTO Doc. WT/DS232/1 (May 28, 2001).

²⁵⁵ Request for Consultations by Honduras, *Dominican Republic—Measures Affecting the Importation of Cigarettes*, WTO Doc. WT/DS300/1 (Sept. 3, 2003); Appellate Body Report, *Dominican Republic Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (Apr. 25, 2005) [hereinafter Dominican Republic—Importation and Internal Sale of Cigarettes].

DS 371: Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines ²⁵⁶	TP	IP
DS 406: United States—Measures Affecting the Production and Sale of Clove Cigarettes ²⁵⁷	TP	IPP
DS 434; DS 435; DS 441 Australia—Plain Packaging ²⁵⁸	TN	IN

This category of cases borrows some of the features of the Liquor Cases and the Food Cases described below. Some of the Cigarette Cases reflect a straightforward desire to protect a profitable domestic cigarette industry, much like the domestic liquor industry tended to elicit protectionism from government.²⁵⁹ Other proceedings implicate legitimate health concerns, and yet, the science or the effectiveness of the measure taken by each State may be sufficiently contested to allow room for a strong argument that the measure should not outweigh the trade system's interest in free movement of goods applying familiar principles of trade law. 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.²⁶⁰ The Peru case presented vastly different concerns than the plain packaging law proceedings where, after years of debate, Australia decided to adopt an extreme ban on attractive cigarette advertisements.²⁶¹ Standing in the middle of these two poles, we find cases like the Clove Cigarette proceedings where the United States selectively targeted flavored cigarettes by banning clove cigarettes but not menthols.²⁶² The Peru and United States cases fell in the Trade Positive side of the divides. I found sufficient evidence of protectionism, evaluated by the absence of a rational,

²⁵⁶ Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/AB/R (June 17, 2011) [hereinafter *Thailand—Cigarettes from the Philippines*].

²⁵⁷ Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/R (Sept. 2, 2011) [hereinafter *United States—Clove Cigarettes*]; Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (Apr. 4, 2017).

²⁵⁸ Australia—Trademarks and Other Plain Packaging Requirements, Request by Ukraine, *supra* note 217; Australia—Trademarks and Other Plain Packaging Requirements, Request by Honduras, *supra* note 217; Australia—Trademarks, Geographical Indications, and Other Plain Packaging Requirements, Request by Dominican Republic, *supra* note 217.

²⁵⁹ See, e.g., Dominican Republic—Importation and Internal Sale of Cigarettes, *supra* note 255; Thailand—Cigarettes from the Philippines, *supra* note 256.

²⁶⁰ Peru—Taxes on Cigarettes, *supra* note 253.

²⁶¹ *Tobacco Plain Packaging Act 2011*, *supra* note 214; Australia—Trademarks and Other Plain Packaging Requirements, *supra* note 217.

²⁶² United States—Clove Cigarettes, *supra* note 257.

health-based justification for the measure at issue, 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.

Except for the Australia plain packaging case, discussed above, none of the cases examined are Investment Negative or Trade Negative.²⁶³ They all present a reasonable basis for investment arbitration claims and trade disputes, though to different extents. While some cases involved clear protectionist measures and were labeled both Investment Positive and Trade Positive,²⁶⁴ a couple cases involving cigarettes and related products present compelling health considerations and were therefore labeled as Investment Potentially Positive—though they were all Trade Positive.²⁶⁵

D. Food Cases

I grouped all food-centered cases, including agricultural products such as bovine hides and soft drinks, in one category. Food Cases have abounded in the WTO,²⁶⁶ and the narrative of the filings shows a clear trend towards unjustified discrimination.²⁶⁷ 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.²⁶⁸ Governments barred the import of food products

²⁶³ Australia—Trademarks and Other Plain Packaging Requirements, *supra* note 217; Australia—Trademarks and Other Plain Packaging Requirements, *supra* note 217; Australia—Trademarks, Geographical Indications, and Other Plain Packaging Requirements, *supra* note 217.

²⁶⁴ *See* Peru—Taxes on Cigarettes, *supra* note 253; Mexico - Measures Affecting the Import of Matches, *supra* note 254; Thailand—Cigarettes from the Philippines, *supra* note 256.

²⁶⁵ *See* Dominican Republic—Importation and Internal Sale of Cigarettes, *supra* note 255; United States—Clove Cigarettes, *supra* note 257; Australia—Trademarks and Other Plain Packaging Requirements, Request by Ukraine, *supra* note 217; Australia—Trademarks and Other Plain Packaging Requirements, Request by Honduras, *supra* note 217; Australia—Trademarks, Geographical Indications, and Other Plain Packaging Requirements, *supra* note 217.

²⁶⁶ *Dispute Settlement – Index of Disputed Issues*, WORLD TRADE ORG., https://www.wto.org/English/tratop_e/dispu_e/dispu_subjects_index_e.htm (last visited Mar. 25, 2018).

²⁶⁷ *See, e.g.*, Request for Consultations by the United States, *Australia—Measures Affecting the Importation of Salmonids*, WTO Doc. WT/DS21/1 (Nov. 23, 1995) [hereinafter *Australia—Measures Affecting the Importation of Salmonids*]; Request for Consultations by the United States, *Korea—Measures Concerning Inspection of Agricultural Products*, WTO Doc. WT/DS41/1 (May 31, 1996) [hereinafter *Korea—Measures Concerning Inspection of Agricultural Products*]; Request for Consultations from Canada, *United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WTO Doc. WT/DS144/1 (Sept. 29, 1998) [hereinafter *United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*].

²⁶⁸ *See, e.g.*, Panel Report, *European Communities—Trade Description of Scallops*, WTO Doc. WT/DS7/R (Aug. 5, 1996) [hereinafter *European Communities—Trade Description of Scallops*].

suspected of creating health risks even though the countries of export were disease-free.²⁶⁹ Ports have been shut down to foreign imports, and the governments artificially created inspection measures for the express purpose of slowing down the import of foreign goods.²⁷⁰ Alternatively creative or predictably protective in crafting measures, governments have worked hard at protecting their domestic food sectors.²⁷¹ All of these clear cases are classified as both Investment Positive and Trade Positive.

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 disease or mad cow disease, but also production techniques like those involving genetically modified organisms or hormones that may create risks for the consumer.²⁷² 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.²⁷³ 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.²⁷⁴ For those cases, where there is a genuine and substantial question as to health or other domestic purposes 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

²⁶⁹ See Request for Consultations by the European Communities, *United States—Measures Affecting Imports of Poultry Products*, WTO Doc. WT/DS100/1 (Aug. 25, 1997) [hereinafter *United States—Measures Affecting Imports of Poultry Products*]; Request for Consultations by Switzerland, *Slovak Republic—Measures Concerning the Importation of Dairy Products and the Transit of Cattle*, WTO Doc. WT/DS133/1 (May 18, 1998) [hereinafter *Slovak Republic—Measures Concerning the Importation of Dairy Products and the Transit of Cattle*].

²⁷⁰ See *United States—Measures Affecting Imports of Poultry Products*, *supra* note 269; *Slovak Republic—Measures Concerning the Importation of Dairy Products and the Transit of Cattle*, *supra* note 269.

²⁷¹ Request for Consultations by Argentina, *United States—Tariff Rate Quota for Imports of Groundnuts*, WTO Doc. WT/DS111/1 (Jan. 8, 1998) [hereinafter *United States—Tariff Rate Quota for Imports of Groundnuts*]; Request for Consultations by the United States, *Korea—Measures Concerning the Shelf-Life of Products*, WTO Doc. WT/DSS/1 (May 5, 1995) [hereinafter *Korea—Measures Concerning Bottled Water*]; Request for Consultation by Canada, *Korea—Measures Concerning Bottled Water*, WTO Doc. WT/DS20/1 (Nov. 22, 1995).

²⁷² James Andrews, *Imports and Exports: The Global Beef Trade*, FOOD SAFETY NEWS (Nov. 18, 2013), <http://www.foodsafetynews.com/2013/11/imports-and-exports-the-beef-trade/#.Wf0rWmiPI54>; Donna Roberts & Laurian Unnevehr, *Resolving Trade Disputes Arising from Trends in Food Safety Regulation: The Role of the Multilateral Governance Framework*, in INTERNATIONAL TRADE AND FOOD SAFETY: ECONOMIC THEORIES AND CASE STUDIES 28, 29–30 (Jean C. Buzby ed., 2003).

²⁷³ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493, art. 5, ¶ 7; Roberts & Unnevehr, *supra* note 272.

²⁷⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493, art. 5, ¶¶ 6, 8.

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 outcomes of the Food Cases are summarized in the following table:

DS 3: Korea—Measures Concerning the Testing and Inspection of Agricultural Products ²⁷⁵	TN	IN
DS 5: Korea—Measures Concerning the Shelf-Life of Products ²⁷⁶	TP	IP
DS 7: European Communities—Trade Description of Scallops ²⁷⁷	TP	IP
DS 18: Australia—Measures Affecting Importation of Salmon ²⁷⁸	TP	IP
DS 20: Korea—Measures Concerning the Bottled Water ²⁷⁹	TP	IP
DS 21: Australia—Measures Affecting the Importation of Salmonids ²⁸⁰	TP	IP
DS 26 & 48: European Communities—EC Measures Concerning Meat and Meat Products (Hormones) ²⁸¹	TN	IPP
DS 41: Korea—Measures Concerning Inspection of Agricultural Products ²⁸²	TN	IN
DS 58: United States—Import Prohibition of Certain Shrimp and Shrimp Products ²⁸³	TP	IPP
DS 72: European Communities—Measures Affecting Butter Products ²⁸⁴	TP	IP
DS 74: Philippines—Measures Affecting Pork and Poultry ²⁸⁵	TP	IP

²⁷⁵ Request for Consultations by the United States, *Korea—Measures Concerning the Testing and Inspection of Agricultural Products*, WTO Doc. WT/DS3/1 (Apr. 4, 1995).

²⁷⁶ Korea—Measures Concerning the Shelf Life of Products, *supra* note 271.

²⁷⁷ European Communities—Trade Description of Scallops, *supra* note 268.

²⁷⁸ Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (adopted Oct. 20, 1998).

²⁷⁹ Korea—Measures Concerning Bottled Water, *supra* note 271.

²⁸⁰ Australia—Measures Affecting the Importation of Salmonids, *supra* note 267.

²⁸¹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Jan. 16, 1998).

²⁸² Korea—Measures Concerning Inspection of Agricultural Products, *supra* note 267.

²⁸³ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

²⁸⁴ Panel Report, *European Communities—Measures Affecting Butter Products*, WTO Doc. WT/DS72/R (adopted Nov. 24, 1999).

²⁸⁵ Request for Consultations by the United States, *Philippines—Measures Affecting Pork and Poultry*, WTO Doc. WT/DS74/1 (Apr. 7, 1997).

DS 76: Japan—Measures Affecting Agricultural Products ²⁸⁶	TP	IPP
DS 100: United States—Measures Affecting Imports of Poultry Products ²⁸⁷	TP	IPP
DS 102: Philippines—Measures Affecting Pork and Poultry ²⁸⁸	TP	IP
DS 105: European Communities—Regime for the Importation, Sale and Distribution of Bananas ²⁸⁹	TP	IP
DS 107: Pakistan—Export Measures Affecting Hides and Skins ²⁹⁰	TP	IP
DS 111: United States—Tariff Rate Quota for Imports of Groundnuts ²⁹¹	TP	IP
DS 120: India—Measures Affecting Export of Certain Commodities ²⁹²	TP	IP
DS 133: Slovak Republic—Measures Concerning the Importation of Dairy Products and the Transit of Cattle ²⁹³	TP	IP
DS 134: European Communities—Restrictions on Certain Import Duties on Rice ²⁹⁴	TP	IP
DS 143: Slovak Republic—Measure Affecting Import Duty on Wheat from Hungary ²⁹⁵	TP	IP
DS 144: United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada ²⁹⁶	TP	IPP
DS 148: Czech Republic—Measure Affecting Import Duty on Wheat from Hungary ²⁹⁷	TP	IP

²⁸⁶ Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WTO Doc. WT/DS76/AB/R (adopted Feb. 22, 1999).

²⁸⁷ United States—Measures Affecting Imports of Poultry Products, *supra* note 269.

²⁸⁸ Request for Consultation by United States, *Philippines—Measures Affecting Pork and Poultry*, WTO Doc. WT/DS102/1 (Oct. 9, 1997).

²⁸⁹ Request for Consultation by Panama, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS105/1 (Oct. 29, 1997).

²⁹⁰ Request for Consultations by the European Communities, *Pakistan—Export Measures Affecting Hides and Skins*, WTO Doc. WT/DS107/1 (Nov. 20, 1997).

²⁹¹ United States—Tariff Rate Quota for Imports of Groundnuts, *supra* note 271.

²⁹² Request for Consultations from the European Communities, *India—Measures Affecting Export of Certain Commodities*, WTO Doc. WT/DS120/1 (Mar. 23, 1998).

²⁹³ Slovak Republic—Measures Concerning the Importation of Dairy Products and Transit of Cattle, *supra* note 269.

²⁹⁴ Request for Consultations by India, *European Communities—Restrictions on Certain Import Duties on Rice*, WTO Doc. WT/DS134/1 (June 8, 1998).

²⁹⁵ Request for Consultations from Hungary, *Slovak Republic—Measure Affecting Import Duty on Wheat from Hungary*, WTO Doc. WT/DS143/1 (Sept. 21, 1998).

²⁹⁶ United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada, *supra* note 267.

²⁹⁷ Request for Consultations from Hungary, *Czech Republic—Measure Affecting Import Duty on Wheat from Hungary*, WTO Doc. WT/DS148/1 (Oct. 15, 1998).

DS 154: European Communities—Measures Affecting Differential and Favourable Treatment of Coffee ²⁹⁸	TP	IPP
DS 155: Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather ²⁹⁹	TP	IPP
DS 161 & 169: Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef ³⁰⁰	TP	IP
DS 193: Chile—Measures Affecting the Transit and Importation of Swordfish ³⁰¹	TP	IP
DS 205: Egypt—Import Prohibition on Canned Tuna with Soybean Oil ³⁰²	TP	IPP
DS 209: European Communities—Measures Affecting Soluble Coffee ³⁰³	TP	IP
DS 231: European Communities—Trade Description of Sardines ³⁰⁴	TP	IP
DS 237: Turkey—Certain Import Procedures for Fresh Fruit ³⁰⁵	TP	IP
DS 240: Romania—Import Prohibition on Wheat and Wheat Flour ³⁰⁶	TP	IP
DS 245: Japan—Measures Affecting the Importation of Apples ³⁰⁷	TP	IPP
DS 250: United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products ³⁰⁸	TP	IP

²⁹⁸ Request for Consultations by Brazil, *European Communities—Measures Affecting Differential and Favourable Treatment of Coffee*, WTO Doc. WT/DS154/1 (Dec. 11, 1998).

²⁹⁹ Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc. WT/DS155/R (adopted December 19, 2000) [hereinafter 2000 Argentina-Bovine Hides and Finished Leather Panel Report].

³⁰⁰ Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R, WT/DS169/AB/R (adopted Dec. 11, 2000).

³⁰¹ Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WTO Doc. WT/DS193/4 (June 3, 2010).

³⁰² Request for Consultations by Thailand, *Egypt—Import Prohibition on Canned Tuna with Soybean Oil*, WTO Doc. WT/DS205/1 (Sept. 27, 2000).

³⁰³ Request for Consultations by Brazil, *European Communities—Measures Affecting Soluble Coffee*, WTO Doc. WT/DS209/1 (Oct. 19, 2000).

³⁰⁴ Appellate Body Report, *European Communities—Trade Description of Sardines*, WTO Doc. WT/DS231/AB/R (adopted Sept. 26, 2002).

³⁰⁵ Request for Consultations by Ecuador, *Turkey—Certain Import Procedures for Fresh Fruit*, WTO Doc. WT/DS237/1 (Sept. 10, 2001).

³⁰⁶ Request for Consultations by Hungary, *Romania—Import Prohibition on Wheat and Wheat Flour*, WTO Doc. WT/DS240/1 (Nov. 17, 2001).

³⁰⁷ Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WTO Doc. WT/DS245/AB/R (adopted Nov. 26, 2003).

³⁰⁸ Request for Consultations by Brazil, *United States—Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products*, WTO Doc. WT/DS250/1 (Mar. 26, 2002).

DS 255: Peru—Tax Treatment on Certain Imported Products ³⁰⁹	TP	IP
DS 256: Turkey—Import Ban on Pet Food from Hungary ³¹⁰	TP	IPP
DS 270 & 271: Australia—Certain Measures Affecting the Importation of Fruits and Vegetables ³¹¹	TP	IPP
DS 275: Venezuela—Import Licensing Measures on Certain Agricultural Products ³¹²	TP	IP
DS 276: Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain ³¹³	TP	IP
DS 279: India—Import Restrictions Maintained Under the Export and Import Policy 2002–2007 ³¹⁴	TP	IP
DS 284: Mexico—Certain Measures Preventing the Importation of Black Beans from Nicaragua ³¹⁵	TP	IP
DS 287: Australia—Quarantine Regime for Imports ³¹⁶	TP	IPP
DS 297: Croatia—Measure Affecting Imports of Live Animals and Meat Products ³¹⁷	TP	IPP
DS 308: Mexico—Tax Measures on Soft Drinks and Other Beverages ³¹⁸	TP	IP
DS 334: Turkey—Measures Affecting the Importation of Rice ³¹⁹	TP	IP

³⁰⁹ Request for Consultations by Chile, *Peru—Tax Treatment on Certain Imported Products*, WTO Doc. WT/DS255/1 (Apr. 29, 2002).

³¹⁰ Request for Consultations by Hungary, *Turkey—Import Ban on Pet Food from Hungary*, WTO Doc. WT/DS256/1 (May 7, 2002).

³¹¹ Request for Consultations by the Philippines, *Australia—Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*, WTO Doc. WT/DS270/1 (Oct. 23, 2002); Request for Consultations by the Philippines, *Australia—Certain Measures Affecting the Importation of Fresh Pineapple*, WTO Doc. WT/DS271/1 (Oct. 23, 2002).

³¹² Request for Consultations by the United States, *Venezuela—Import Licensing Measures on Certain Agricultural Products*, WTO Doc. WT/DS4275/1 (Nov. 12, 2002).

³¹³ Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/AB/R (adopted Aug. 30, 2004).

³¹⁴ Request for Consultations by the European Communities, *India—Import Restrictions Maintained Under the Export and Import Policy 2002–2007*, WTO Doc. WT/279/1 (Jan. 9, 2003).

³¹⁵ Request for Consultations by Nicaragua, *Mexico—Certain Measures Preventing the Importation of Black Beans from Nicaragua*, WTO Doc. WT/DS284/1 (Mar. 20, 2003).

³¹⁶ Request for Consultations by the European Communities, *Australia—Quarantine Regime for Imports*, WTO Doc. WT/DS287/1 (Apr. 9, 2003).

³¹⁷ Request for Consultations by Hungary, *Croatia—Measure Affecting Imports of Live Animals and Meat Products*, WTO Doc. WT/DS297/1 (July 14, 2003).

³¹⁸ Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, *supra* note 156.

³¹⁹ Panel Report, *Turkey—Measures Affecting the Importation of Rice*, WTO Doc. WT/DS334/R (adopted Sept. 21, 2007).

DS 367: Australia—Measures Affecting the Importation of Apples from New Zealand ³²⁰	TP	IPP
DS 369: European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products ³²¹	TP	IP
DS 381: United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (United States Tuna II) ³²²	TP	IPP
DS 384 & 386: United States—Certain Country of Origin Labeling (COOL) Requirements ³²³	TP	IP
DS 389: European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States ³²⁴	TP	IPP
DS 391: Korea—Measures Affecting the Importation of Bovine Meat and Meat Products from Canada ³²⁵	TP	IPP
DS 392: United States—Certain Measures Affecting Imports of Poultry from China ³²⁶	TP	IP
DS 400 & 401: European Communities—Measures Prohibiting Importation and Marketing of Seal Products ³²⁷	TP	IPP
DS 430: India—Measures Concerning the Importation of Certain Agricultural Products ³²⁸	TP	IP
DS 447: United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina ³²⁹	TP	IPP

³²⁰ Appellate Body Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WTO Doc. WT/DS367/AB/R (adopted Nov. 29, 2010).

³²¹ Request for Consultations by Canada, *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS369/1 (Oct. 1, 2007).

³²² Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012).

³²³ Appellate Body Reports, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted June 29, 2012).

³²⁴ Request for Consultations by the United States, *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WTO Doc. WT/DS389/1 (Jan. 20, 2009).

³²⁵ Panel Report, *Korea—Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WTO Doc. WT/DS391/R (adopted July 3, 2012).

³²⁶ Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, WTO Doc. WT/DS392/R (adopted Sept. 29, 2010).

³²⁷ Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted May 22, 2014).

³²⁸ Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R (adopted June 4, 2015).

³²⁹ Panel Report, *United States—Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WTO Doc. WT/DS447/R (adopted July 24, 2015).

DS 448: United States—Measures Affecting the Importation of Fresh Lemons ³³⁰	TP	IP
DS 455: Indonesia—Importation of Horticultural Products, Animal and Animal Products ³³¹	TP	IP

E. *Automobile and Gasoline Cases*

I grouped all cases involving the automobile industry into one category. I also included the cases “Reformulated and Conventional Gasoline” and “Retreaded Tyres” because of their connection to the car industry.³³² All of these cases fall in the Trade Positive—Investment Positive category with the exception of the “Retreaded Tyres” and the “Reformulated and Conventional Gasoline” cases.³³³ This outcome is not surprising given the traditional incentives to protect the automobile industry. This industry has had a relatively high rate of unionization in industrialized countries.³³⁴ The industry has created numerous skilled and semi-skilled jobs, and the outsourcing of component parts or assembly is common.³³⁵ Component parts may be subject to a separate duty, thereby creating gaming opportunities.³³⁶

At the same time, the industry involves obvious environmental and resource conservation concerns.³³⁷ Cars may be more eco-friendly if built with gasoline

³³⁰ Request for Consultations by Argentina, *United States—Measures Affecting the Importation of Fresh Lemons*, WTO Doc. WT/DS448/1 (Sept. 5, 2012).

³³¹ Request for Consultations by the United States, *Indonesia—Importation of Horticultural Products, Animals and Animal products*, WTO Doc. WT/DS455/1 (Jan. 14, 2013).

³³² Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Retreaded Tyres*]; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996) [hereinafter *Reformulated and Conventional Gasoline*].

³³³ *Retreaded Tyres*, *supra* note 332; *Reformulated and Conventional Gasoline*, *supra* note 332.

³³⁴ See William Serrin, *Shrinking U.A.W. Tries to Steer a Steady Course Through Troubled Time*, N.Y. TIMES (June 22, 1982), <http://www.nytimes.com/1982/06/22/us/shrinking-uaw-tries-to-steer-a-steady-course-through-troubled-times.html>.

³³⁵ JOEL CUTCHER-GERSHENFELD ET AL., *THE DECLINE AND RESURGENCE OF THE U.S. AUTO INDUSTRY* 20 (Econ. Pol’y Inst. 2015); Rick Haglund, *Auto Future: A Bounty of Jobs and Opportunity for Skilled Workers*, THE BRIDGE (July 24, 2013), <http://www.bridgemi.com/economy/auto-future-bounty-jobs-and-opportunity-skilled-workers>.

³³⁶ JEFFREY WILLIAMS ET AL., 2016 TOP MARKETS REPORT: AUTOMOTIVE PARTS 34 (Int’l Trade Admin. 2016).

³³⁷ John Mikler, *The International Car Industry And Environmental Sustainability: Moving Beyond Green-Washing?*, SUSTAINABILITY AND SOCIAL SCIENCE ROUND TABLE 125–27 (CSIRO 2004). The car industry is a major contributor to pollution on a worldwide basis and a prime candidate for regulatory intervention to internalize externalities. *Id.*; see also J. Sutherland et al., *A Global Perspective on the Environmental Challenges Facing the Automotive Industry: State-Of-The-Art and Directions for the Future*, 35 INT’L J. VEHICLE DESIGN 86 (2004).

consumption and other environmentally relevant considerations in mind, or they may be built more “ego-friendly” and may be subjected to stricter regulation or higher levels of taxation, like luxury cars with a high rate of gasoline consumption. This variation might create an incentive for governments to regulate in the name of environmental or resource conservation concerns, which could either amount to a disguised restriction or be insufficiently strong to justify the restriction on trade. The Reformulated and Conventional Gasoline case exemplifies this possibility, but 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.

The outcomes of these cases are set forth in the table below:

DS 42: United States—Standards for Reformulated and Conventional Gasoline ³³⁸	TP	IPP
DS 54, 55, 59 & 64: Indonesia—Certain Measures Affecting the Automobile Industry ³³⁹	TP	IP
DS 139 & 142: Canada—Certain Measures Affecting the Automotive Industry ³⁴⁰	TP	IP
DS 146 & 175: India—Measures Affecting the Automotive Sector ³⁴¹	TP	IP
DS 195: Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector ³⁴²	TP	IP
DS 332: Brazil—Measures Affecting Imports of Retreaded Tyres ³⁴³	TP	IPP

³³⁸ Reformulated and Conventional Gasoline, *supra* note 332.

³³⁹ Panel Reports, *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 2, 1998) [hereinafter 1998 Indonesia-Automobile Industry Panel Report].

³⁴⁰ Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R (adopted May 31, 2000).

³⁴¹ Appellate Body Report, *India—Measures Affecting the Automotive Sector*, WTO Doc. WT/DS146/AB/R, WT/DS175/AB/R (adopted Mar. 19, 2002).

³⁴² Request for Consultations by the United States, *Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector*, WTO Doc. WT/DS195/1 (May 31, 2000).

³⁴³ Retreaded Tyres, *supra* note 332.

DS 339, 340 & 342: China—Measures Affecting Imports of Automobile Parts ³⁴⁴	TP	IP
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F. General Market Access

In this category, I grouped 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. The vast majority of the cases are both Trade Positive and Investment Positive. This should come as no surprise because general market access restrictions are the key aspects of protectionism. In fact, this category includes only one Trade Negative case: Japan—Measures Affecting Consumer Photographic Film and Paper.³⁴⁵ This case reflected a deep trade tension between Japan—whose economy had been export-oriented since after World War II—and the U.S., which sought to gain greater access to the Japanese market after its remarkable solidification.³⁴⁶ The U.S. claimed Japan was taking protective measures to defend Fuji, its local photographic film and paper manufacturer.³⁴⁷ The Panel found that none of the Japanese measures were improper.³⁴⁸ However, an arbitrator may cut through the traditionally protective market access structure of Japan and rule in favor of a complainant similarly situated to Kodak, the American photographic film manufacturer. I have, therefore, classified this case as an Investment Potentially Positive filing.

³⁴⁴ Appellate Body Reports, *China—Measures Affecting Imports of Automobile Parts*, WTO Doc. WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (adopted Dec. 15, 2008).

³⁴⁵ Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R (adopted Mar. 31, 1998) [hereinafter *Photographic Film and Paper*].

³⁴⁶ *Id.*; Wenyu Zang & Mark Baimbridge, *Exports, Imports and Economic Growth in South Korea and Japan: A Tale of Two Economies*, 44 APPLIED ECON. 361, 362 (2012); Patrick Christy, *America's Proud History of Post-War Aid*, U.S. NEWS & WORLD REPORT (June 6, 2014), <https://www.usnews.com/opinion/blogs/world-report/2014/06/06/the-lessons-from-us-aid-after-world-war-ii>.

³⁴⁷ *Photographic Film and Paper*, *supra* note 345.

³⁴⁸ *Id.*

DS 44: Japan—Measures Affecting Consumer Photographic Film and Paper ³⁴⁹	TN	IPP
DS 431, 432 & 433 China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum ³⁵⁰	TP	IPP
DS 116: Brazil—Measures Affecting Payment Terms for Imports ³⁵¹	TP	IP
DS 137: European Communities—Measures Affecting Imports of Wood of Conifers from Canada ³⁵²	TP	IPP
DS 149: India—Import Restrictions ³⁵³	TP	IP
DS 188: Nicaragua—Measures Affecting Imports from Colombia and Honduras ³⁵⁴	TP	IP
DS 197: Brazil—Measures on Minimum Import Prices ³⁵⁵	TP	IP
DS 198: Romania—Measures on Minimum Import Prices ³⁵⁶	TP	IP
DS 201: Nicaragua—Measures Affecting Imports from Colombia and Honduras ³⁵⁷	TP	IP
DS 233: Argentina—Measures Affecting the Import of Pharmaceutical Products ³⁵⁸	TP	IP
DS 246: European Communities—Tariff Preferences ³⁵⁹	TP	IP
DS 358 & 359: China—Measures Concerning Refunds, Reductions or Exemptions from Certain Taxes and Other Payments ³⁶⁰	TP	IP

³⁴⁹ *Id.*

³⁵⁰ Appellate Body Reports, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014).

³⁵¹ Request for Consultations by the European Communities, *Brazil—Measures Affecting Payment Terms for Imports*, WTO Doc. WT/DS116/1 (Jan. 13, 1998).

³⁵² Request for Consultations by Canada, *European Communities—Measures Affecting Imports of Wood of Conifers from Canada*, WTO Doc. WT/DS137/1 (June 24, 1998).

³⁵³ Request for Consultations by the European Communities, *India—Import Restrictions*, WTO Doc. WT/DS149/1 (Nov. 12, 1998).

³⁵⁴ Request for Consultations by Colombia, *Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WTO Doc. WT/DS188/1 (Jan. 20, 2000).

³⁵⁵ Request for Consultations by the United States, *Brazil—Measures on Minimum Import Prices*, WTO Doc. WT/DS197/1 (June 7, 2000).

³⁵⁶ Request for Consultations by the United States, *Romania—Measures on Minimum Import Prices*, WTO Doc. WT/DS198/1 (June 8, 2000).

³⁵⁷ Request for Consultations by Honduras, *Nicaragua—Measures Affecting Imports from Honduras and Colombia*, WTO Doc. WT/DS201/1 (June 13, 2000).

³⁵⁸ Request for Consultations by India, *Argentina—Measures Affecting the Import of Pharmaceutical Products*, WTO Doc. WT/DS233/1 (May 30, 2001).

³⁵⁹ Report of the Appellate Body, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (Apr. 7, 2004).

³⁶⁰ Request for Consultations by the United States, *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WTO Doc. WT/DS358/1 (Feb. 7, 2007).

DS 421: Moldova—Measures Affecting the Importation and Internal Sale of Goods ³⁶¹	TP	IP
DS 438, 444, 445 & 446: Argentina—Measures Affecting the Importation of Goods ³⁶²	TP	IP

G. Textiles

I grouped under this heading all textiles cases raising a substantial Article III or Article XI concern. The cases discussed here reflect domestic efforts to protect growing textiles industries or, in some cases, to resist the textile production outsourcing to more cost-effective jurisdictions that have characterized the industry. Not surprisingly, these cases are all Trade Positive—Investment Positive filings.

The outcomes of these cases are summarized in the table below:

DS 29, 34 & 47: Turkey—Restriction on the Import of Textiles and Clothing Products ³⁶³	TP	IP
DS 90, 91, 92, 93, 94 & 96: India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products ³⁶⁴	TP	IP

³⁶¹ Request for Consultations by Ukraine, *Moldova—Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge)*, WTO Doc. WT/DS421/1 (Feb. 21, 2011).

³⁶² Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (adopted Jan. 1, 2015); Request for Consultations by Mexico, *Argentina—Measures Affecting the Importation of Goods*, WTO Doc. WT/DS446/1 (Aug. 29, 2012).

³⁶³ Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999); Request for Consultations by Thailand, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS47/1 (June 26, 1996); Communication from the European Communities, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS29/2 (Mar. 1, 1996).

³⁶⁴ Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R (adopted Aug. 23, 1999); Request for Consultations by the European Communities, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS96/1 (July 24, 1997); Request for Consultations by Switzerland, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS94/1 (July 23, 1997); Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS91/AB/R (adopted July 22, 1997); Request for Consultations by Canada, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS92/1 (July 22, 1997); Request for Consultations by New Zealand, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS93/1 (July 22, 1997).

DS 151: United States—Measures Affecting Textiles and Apparel Products (II) ³⁶⁵	TP	IP
DS 196: Argentina—Measures Affecting the Import of Pharmaceutical Products, Request for Consultation ³⁶⁶	TP	IP
DS 183: Brazil—Measures on Import Licensing and Minimum Import Prices ³⁶⁷	TP	IP
DS 451: China—Measures Related to the Production and Exportation of Apparel and Textiles ³⁶⁸	TP	IP
DS 366: Colombia—Ports of Entry—Panama Colón Free Zone ³⁶⁹	TP	IP

H. Intellectual Property

I grouped under this heading the cases involving national treatment, Article XI of the GATT, SPS, or TBT claims related to intellectual property protection of foreign products.³⁷⁰ Excluding cases involving public health considerations,³⁷¹ I classified these cases as Trade Positive—Investment Positive.

The outcomes of the Intellectual Property cases are outlined in the table below:

³⁶⁵ Request for Consultations by the European Communities, *United States—Measures Affecting Textiles and Apparel Products (II)*, WTO Doc. WT/DS151/1 (Nov. 25, 1998).

³⁶⁶ Request for Consultations by India, *Argentina—Measures Affecting the Import of Pharmaceutical Products*, WTO Doc. WT/DS233/1 (May 30, 2001).

³⁶⁷ Request for Consultations by the European Communities, *Brazil—Measures on Import Licensing and Minimum Import Prices*, WTO Doc. WT/DS183/1 (Oct. 25, 1999).

³⁶⁸ Request for Consultations by Mexico, *China—Measures Relating to the Production and Exportation of Apparel and Textile Products*, WTO Doc. WT/DS451/1 (Oct. 18, 2012).

³⁶⁹ Panel Report, *Colombia—Indicative Prices and Restrictions on Port of Entry*, WTO Doc. WT/DS366/R (adopted Apr. 27, 2009) [hereinafter 2009 Colombia—Indicative Prices and Restrictions Panel Report].

³⁷⁰ I have not included the “pure” TRIPS cases (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 cases in the sequel to this Article. Also, I have classified the plain packaging case as a Cigarettes and Related Products Case even though it could just as easily qualify as an Intellectual Property Case.

³⁷¹ See *infra* notes 367, 369.

DS 174: European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs ³⁷²	TP	IP
DS 199: Brazil—Measures Affecting Patent Protection ³⁷³	TP	IPP
DS 224: United States—US Patents Code ³⁷⁴	TP	IP
DS 434, 435 & 441: Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products ³⁷⁵	TP	IPP
DS 290: European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs ³⁷⁶	TP	IP
DS 186: United States—Section 337 of the Tariff Act of 1930 and Amendments Thereto ³⁷⁷	TP	IP

I. *Periodicals, Films, and Other Cultural Products*

I loosely labeled and categorized these cases as “Cultural Cases.” I have, as an operational rule, assumed that my IT will be interpreted with special deference to cultural industries. Therefore, any case in this section that would otherwise be Investment Positive has been downgraded to Potentially Positive.

³⁷² Panel Report, *Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs—Complaint by the United States*, WTO Doc. WT/DS174/R (adopted Mar. 15, 2005) [hereinafter *European Communities—Protection of Trademarks and Geographical Indications*].

³⁷³ Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WTO Doc. WT/DS199/1 (June 8, 2000).

³⁷⁴ Request for Consultations by Brazil, *United States—US Patents Code*, WTO Doc. WT/DS224/1 (July 2, 2001).

³⁷⁵ Communication from the Panel, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/15 (Oct. 27, 2014); Communication from the Panel, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/19 (Oct. 22 2014); Request for the Establishment of a Panel by Honduras, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/16 (Oct. 17, 2012).

³⁷⁶ Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs—Complaint by Australia*, WTO Doc. WT/DS290/R, (adopted Mar. 15, 2005) [hereinafter 2005 *Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*].

³⁷⁷ Request for Consultations by the European Communities and their member States, *United States—Section 337 of the Tariff Act of 1930 and Amendments Thereto*, WTO Doc. WT/DS186/1 (Jan. 18, 2000).

DS 31: Canada—Measures Concerning Periodicals ³⁷⁸	TP	IPP
DS 43: Turkey—Taxation of Foreign Film Revenues ³⁷⁹	TP	IPP
DS 363: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products ³⁸⁰	TP	IPP

J. Embargoes

This category includes a single case: a filing challenging the United States' secondary embargo targeting companies engaged in certain commercial activities with Cuba:

DS 38: United States—The Cuban Democracy and Solidarity Act.³⁸¹

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 agree completely on tactics, the issues that it presents may well recur. This case qualifies as a Trade Positive and an Investment Potentially Positive filing because the United States' measure will likely violate Article XI as it potentially breaches principles of customary international law.³⁸² 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. However, the national security justification for the measure may deter the tribunal from intervening; for this reason, this case is an Investment Potentially Positive.

³⁷⁸ Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (adopted June 30, 1997).

³⁷⁹ Request for Consultations by the United States, *Turkey—Taxation of Foreign Film Revenues*, WTO Doc. WT/DS435/1 (June 17, 1996).

³⁸⁰ Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

³⁸¹ Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/1 (Mar. 13, 1996).

³⁸² Request for Consultations by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. WT/DS38/1 (May 13, 1996); General Agreement on Tariffs and Trade, art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

K. Asbestos

I included the famed Asbestos case in this category. The Appellate Body in this case dismissed the NT claim,³⁸³ and an investment tribunal would have probably reached the same conclusion. It is therefore a Trade Negative and Investment Negative case.³⁸⁴

L. Technology Products

I included cases involving high-tech products in this category. They raise issues of competition and market access similar to those discussed in both the General Market Access and the Commodities, Energy, and Raw Materials categories. As in the General Market Access, one case was classified as Investment Potentially Positive because of the possible public health concerns, while the other two are both Trade Positive—Investment Positive:

DS 15: Japan—Measures Affecting the Purchase of Telecommunications Equipment ³⁸⁵	TP	IP
DS 291, 292 & 293: European Communities—Measures Affecting the Approval and Marketing of Biotech Products ³⁸⁶	TP	IPP
DS 309: China—Value-Added Tax on Integrated Circuits ³⁸⁷	TP	IP

M. Commodities, Energy, and Raw Materials

The history of trade and the WTO mirrors that of the trading nations' economies and their interactions.³⁸⁸ 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

³⁸³ Request for Consultations by Canada, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. WT/DS135/1 (June 3, 1998).

³⁸⁴ *Id.*

³⁸⁵ Request for Consultations by the European Communities, *Japan—Measures Affecting the Purchase of Telecommunications Equipment*, WTO Doc. WT/DS15/1 (Aug. 24, 1995).

³⁸⁶ Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 29, 2006) [hereinafter 2006 *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*].

³⁸⁷ Request for Consultations by the United States, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/1 (Mar. 23, 2004).

³⁸⁸ Request for Consultations by the European Communities, *Japan—Measures Affecting the Purchase of Telecommunications Equipment*, WTO Doc. WT/DS15/1 (Aug. 24, 1995).

application of rational choice theory. Take, for example, the rare earths case pitting China against Western states,³⁸⁹ discussed in the General Market Access section above. Rare earths are necessary to a wide array of key products.³⁹⁰ China's restriction of raw material exports has the obvious effect of forcing foreign manufacturers to set up shop in China to have access to such 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 European nations are engaged in violations of their own—and are being taken to task by China.³⁹¹ Their consumer-hungry societies are also being fed by China-bought credit and their currencies by China-held debt.³⁹² The constant theme, as demonstrated by the review of hundreds of WTO cases in this Article, is that the WTO will seek to root out protectionism. Based on my understanding of the history of trade and the constant drives that propel it forward, I have not hesitated 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 predict Investment Positive outcomes:³⁹³

DS 1: Malaysia—Prohibition of Imports of Polyethylene and Polypropylene ³⁹⁴	TP	IP
DS 387, 388, 390, 394, 395 & 398: China—Measures Related to the Exportation of Raw Materials ³⁹⁵	TP	IP

³⁸⁹ Appellate Body Reports, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS531/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014).

³⁹⁰ U.S.G.S., *THE RARE-EARTH ELEMENTS – VITAL TO MODERN TECHNOLOGIES AND LIFESTYLES* (Nov. 2014).

³⁹¹ See, e.g., Int'l Ctr. for Trade & Sustainable Dev., *China Launches Solar Case Against E.U. at WTO*, 16 BRIDGES WEEKLY 4, 5 (2012) (describing “tit for tat” nature of China's filing against E.U.). See generally Matthew C. Turk, *Why Does the Complainant Always Win at the WTO?: A Reputation-Based Theory of Litigation at the World Trade Organization*, 31 NW. J. INT'L L. & BUS. 385 (2011) (applying rational choice theory to explain states' selection of largely meritorious cases advancing national interests).

³⁹² Yu Yongding, *Overcome the Fear of RMB Appreciation, in CHINA AND THE WORLD: BALANCE AND IMBALANCE 217–34* (Binhong SHAO, ed., Leiden 2013). China has accumulated \$350 billion worth of foreign exchange reserves and lent that amount to the United States. *Id.*

³⁹³ See *infra*, notes 394–99. One case was downgraded to Investment Potentially Positive—DS 456: India—Certain Measures Relating to Solar Cells and Solar Modules. See *infra*, note 399. This case is a Trade Positive and Investment Potentially Positive because it raises claims of performance requirements, which may or may not be exempted from a BIT under procurement exemptions.

³⁹⁴ Request for Consultations under Article XXIII.1 of the GATT 1994 by Singapore, *Malaysia—Prohibition of Imports of Polyethylene and Polypropylene*, WTO Doc. WT/DS1/1 (Jan. 13, 1995).

³⁹⁵ Request for Consultations by the United States, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/1 (June 25, 2009).

DS 426: Canada—Measures Related to the Feed-In Tariff Program ³⁹⁶	TP	IP
DS 431, 432 & 433: China—Export, Quotas, Duties and Other Restrictions on Rare Earths ³⁹⁷	TP	IP
DS 452: China—Measures Affecting the Renewable Energy Generation Sector ³⁹⁸	TP	IP
DS 456: India—Certain Measures Relating to Solar Cells and Solar Modules ³⁹⁹	TP	IPP

CONCLUSION

My review of 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 an overwhelming number of Trade Positive cases. I obtain the same results in the sequel to this piece, including as they relate to anti-dumping and other measures that I have not reviewed here but that have a profound impact on trade law. My findings illustrate that it is meaningless to attempt to define a boundary distinguishing between goods and investments. A baker sells bread through a bakery. Any regulation affecting the bread will obviously impact the baker and the bakery. The implications of these findings will be examined in a separate paper. For now, it is sufficient to emphasize that states cannot simply assume that their obligations to the self-contained system of the WTO end there. The constantly emerging role of investment arbitrations against states requires them to calculate their steps more carefully than in the past. Conversely, investment lawyers should also be aware of the attack on trade. While the WTO's self-contained system may have legitimacy because of its limits, the investment system may lose its legitimacy if it achieves outcomes that may exceed the legitimate reach of international economic law in relation to sovereign regulatory space, as it is currently at risk of doing.

³⁹⁶ Appellate Body Report, *Canada—Measures Relating to the Feed-In Tariff Program*, WTO Doc. WT/DS426/AB/R (adopted May 6, 2013).

³⁹⁷ Appellate Body Reports, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014).

³⁹⁸ Request for Consultations by China, *European Union and Certain Member States—Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/DS452/1 (Nov. 7, 2012).

³⁹⁹ Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R (adopted Sept. 16, 2016).