

OBLIGATIONS VERSUS RIGHTS: SUBSTANTIVE DIFFERENCE BETWEEN WTO AND INTERNATIONAL INVESTMENT LAW

*Chios Carmody**

ABSTRACT

WTO law remains relatively uncontentious whereas international investment law elicits much more debate. This article posits that the differences in reception are attributable to deeper substantive differences about what is protected under each regime. In WTO law what is protected is the sum total of all commitments and concessions under the WTO Agreement, something that can be thought of as a “public” good. When a country injures that good, the remedy is for the country to cease the injury, a requirement that naturally places emphasis on obligation. In international investment law, by contrast, what is protected is individualized to a particular investor. The violation is evidently “private”. When a country injures that good, the usual remedy is compensation, a requirement that naturally places emphasis on the investor’s rights. This difference suggests that WTO law is primarily a law of obligation which is equality-oriented, prospective, constitutive and deductive, whereas international investment law is primarily a law of rights which is fairness-oriented, retrospective, contractual and inductive. A law of rights is subtractive, and to that extent, less stable. The identification explains why there have been recent moves to constitutionalize international investment law by introducing a greater degree of obligation. The change is meant to redress the

* Associate Professor and Canadian National Director, Canada-United States Law Institute, Faculty of Law, Western University, London, Ontario, Canada N6A 3K7. The author can be reached at: ccarmody@uwo.ca.

perceived jurisprudential imbalance in the field and strengthen its sense of community.

KEYWORDS: *international economic law, WTO, investment law, obligation, right, jurisprudence, theory*

I. INTRODUCTION

The law of international trade embodied in the World Trade Organization (hereinafter “WTO”) and international investment law are often compared and contrasted. However, the exact nature of their contrast is unclear.¹ How do these two bodies of law differ, and why? Moreover, can the differences serve to explain why one body of law (WTO law) has on the whole been accepted and adopted much more readily than the other (international investment law)?

These are important questions inasmuch as both trade and investment law disciplines have been regarded as central to globalization since the 1980s. In the interim, however, they have generated starkly divergent reactions. On the one hand, the WTO and its legal system have come to be regarded as lynchpins in promoting the “stability and predictability” of the multilateral trading system. Since the conclusion of the WTO Agreement in 1994 over 50 countries have acceded to the organization. On the other hand, international investment law attracts much less consensus. There continues to be much debate about the benefits of foreign investment.² Arbitrators assign different values to awards of compensation.³ A number of commentators have called for the regime’s reform, if not its wholesale abolition.⁴ A few countries have even gone so far as to denounce the keystone instrument in the field, the ICSID Convention.⁵ Nothing remotely

¹ See for example Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties*, 102(1) AM. J. INT’L L. 48 (2008); Friedl Weiss, *Trade and Investment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 182 (Peter Muchlinski et al. eds., 2008); and JÜRGEN KURTZ, *THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS* (2016).

² See discussion in JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 18-24 (2011).

³ Note the contrasting outcomes in *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration Rules, Final Award (Sept. 3, 2001), where the dispute was brought under the U.S.–Czech Republic BIT and the tribunal dismissed the claims relating to a shareholding since there was no evidence “that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property”, *id.* ¶ 202, and *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration Rules, where a dispute was brought under the Netherlands–Czech Republic BIT and the tribunal determined that actions and inactions of Czech officials affected the value of the investor’s shareholdings in the amount of \$269 million. Zachary Douglas notes that the two cases involved “identical claims”. Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 367 (Zachary Douglas et al. eds., 2014). For discussion, see *id.* at 367-69.

⁴ See PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME—31 AUGUST 2010, <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010> (last visited Feb. 28, 2017) (recommending that “States should review their investment treaties with a view to withdrawing from or renegotiating them in light of . . . concerns . . . [and] should take steps to replace or curtail the use of investment treaty arbitration.”).

⁵ The ICSID Convention was denounced by Bolivia in May 2007, by Ecuador in July 2009 and by Venezuela in January 2012. The withdrawals were regarded as an expression of dissatisfaction by countries with elements of the “Washington Consensus”, of which investor-state arbitration is

similar has happened in relation to the WTO Agreement which, though not uncontroversial, continues to attract new members. The lingering question has to be why?

In this article I posit that the differences in reception are linked to deeper substantive differences involving what is protected under each regime. In WTO law what is protected is the total sum of all commitments and concessions under the WTO Agreement, something that can be thought of as a public good. This is in the special and limited sense that it belongs to the “public” of the WTO membership. When a country injures that good, the remedy is for the country to cease the injury, usually by means of withdrawing or amending its law. That requirement naturally places emphasis on what a country must do, or in other words, on its obligations.

In international investment law, by contrast, what is protected is individualized to a particular investor. In most instances the injury complained of involves an alleged interference with their interests or some degree of mistreatment that is considered to be a violation of the international minimum standard (hereinafter “IMS”) of treatment. The violation is evidently “private”. When a country injures that good or interest, the usual remedy is compensation. That requirement naturally places emphasis on the injury, and by extension, the investor’s rights.

This pair of differences—of obligations and rights—can be traced to two very different models or visions of the law, one the alter ego of the other. What do I mean? As mentioned, it is possible to see how WTO law is primarily a law of obligation. It stresses what countries must do in future. It is also a law of equality in the sense that most of its major standards (Most Favoured Nation, National Treatment, Non-discrimination) are expressions of equality and its dispute settlement system is understood, at least notionally, to re-establish the “equality of competitive conditions”. The body of law is “constitutive” in that it sets forth broad norms of behavior. Finally, it is reasoned deductively, that is, from premises drawn from general law or principle. All of this suggests a model of law in which normativity is chiefly understood to be obligation-oriented, prospective, equality-driven, constitutive and deductive in nature.

International investment law presents the obverse. It is chiefly a law of rights or interests. What the law is concerned with is the protection of those interests. When the law seeks to correct an injury done to an investor, it is implicitly making amends for the past. This correction might be thought to be equal to the injury suffered. However, because of the time value of money, litigation costs and pressure to settle, there is often a discount in investment awards so that the actual amount recovered by investors is

understood to be one. See Rodrigo Polanco Lazo, *Is There a Life for Latin American Countries After Denouncing the ICSID Convention?*, 11(1) *TRANSNAT’L DISP. MGMT.* 1 (2014).

simply “fair”, or what is appropriate.⁶ International investment law is likewise considered “contractual” in the sense that it emanates from bilateral agreements between countries. Finally, the law is logically inductive, that is, it is reasoned from multiple prior instances proven true which are combined to achieve a specific conclusion. All of this suggests a model in which normativity is chiefly understood to be rights-oriented, retrospective, fairness-driven, contractual and inductive in nature.

The foregoing two models of normativity are intriguing inasmuch as they present opposing yet complementary understandings of what the law might be. We can see, for instance, how the two models, taken together, present a series of neatly opposing pairs (obligation-right, future-past, equality-fairness, constitution-contract, deduction-induction) that provide a relatively complete picture of what the law is. Although this simple division might be challenged as a cartoon of what the law really is—after all, WTO law contains rights and investment law contains obligations—the division is useful in that it highlights the leading tendencies of the law generally and how they relate to one another. I will suggest that the exact position of any legal system will be somewhere *between* the two modes of law I have outlined above. That is, its precise degree of obligation- or right-orientation will be relative.

But why should this dual structure matter? And how is it related to the issue of regime acceptability highlighted at the outset of this article? Here I will suggest that international investment law is controversial because what is usually at issue in investor-state arbitration is rights—essentially claims that emphasize “competing rather than unified positions”.⁷ Hence, the body of law is fragmented and pluralized. In many instances it is hard to know exactly what the law of international investment is.

All of this is ultimately a reflection of its community. The term “community” is used in many different ways today. However, in the sense used here, it refers to what actors hold *in common*. Simply put, actors hold much less in common in international investment law than they do in WTO law. Recent moves to constitutionalize international investment law are likely a recognition of the need for more obligation—in essence, more “community”—in the field.

This article is divided into four parts. Following this Introduction, Part Two examines the respective development of WTO and international investment law. Part Three examines the way in which WTO law is chiefly obligation-oriented, prospective, equality-driven, constitutive and deductive, and conversely, the way that international investment law is chiefly rights-oriented, retrospective, fairness-driven, contractual and inductive. The distinct nature of international investment law means that it

⁶ Jeffrey Standen, *The Fallacy of Full Compensation*, 73(1) WASH. U. L.Q. 145, 225 (1995).

⁷ PETER GERHART, PROPERTY LAW AND SOCIAL MORALITY 10 (2014).

is hard to understand as an ordered system, lacks precedent, and is characterized by substantial diversity. Part Four goes on to examine why reform and “constitutionalization” are now being discussed with such vigour in international investment law and how this is likely to move the law in a direction that is more obligation- and community-oriented.

II. WTO AND INTERNATIONAL INVESTMENT LAW: DIFFERENT DEVELOPMENT, DIFFERENT DESTINATIONS

To understand the difference between WTO and international investment law it is necessary to have some idea of their respective development. The origins of the WTO Agreement lie in the General Agreement on Tariffs and Trade (hereinafter “GATT”), a treaty concluded between 23 governments in 1947.⁸ The treaty’s immediate aim was to promote stability in international trade relations and thereby avoid the variable economic behaviour that had led to political extremism and global conflict in World War II.

Policy makers who designed GATT concluded that the most effective way to promote stability in international trade relations was to oblige member countries to “bind”—or fix—their tariffs at individually negotiated levels. Thus, the centerpiece of GATT was the requirement in GATT Art. II that members not exceed their individually negotiated tariff rates. An additional requirement was the obligation in GATT Art. I for members to extend their best, or “most favoured”, tariff or treatment (hereinafter “MFN”) to the remainder of the GATT membership. The key obligations of GATT Arts. I and II were complemented by a national treatment obligation under GATT Art. III to treat imports as well as domestically produced goods and a general obligation under GATT Art. XI to eliminate quotas.

GATT Arts. I-III and XI were supplemented by a range of other trade-related rules. Some involved trade administration, such as the freedom of transit (GATT Art. V), transparency (GATT Art. X), exchange arrangements (GATT Art. XII) and state trading activities (GATT Art. XVII). Others involved disciplines on non-tariff barriers such as safeguards (GATT Art. XIX), anti-dumping and countervailing action (GATT Arts. VI, XVI). The purpose of these additional rules was to prevent the erosion of the original tariff concessions.

The focus on obligations under GATT is traceable to the treaty’s emphasis on stability.⁹ A bound tariff undertaken by the U.S. is not merely

⁸ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194.

⁹ “Most studies of WTO governance and institutional reform concur that a core purpose, if not the core purpose of the WTO . . . should be to protect a stable, multilateral, rules-based approach to international trade.” Carolyn Deere Birkbeck, *Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analysing the WTO System* 9 (Glob. Econ. Governance Programme, Working Paper No. 2009/50, 2009).

about imports today. Rather, it is principally a promise by the U.S. government to treat imports in a certain way in future. That promise gives security to producers and exporters in other countries that their goods will encounter a foreseeable kind of treatment when entering the U.S. The tariff therefore serves as an important basis for upstream decisions about investment, production and exports.¹⁰

The WTO Agreement was concluded at the end of the Uruguay Round (1986-94) to consolidate GATT and to make number of improvements to the functioning of the GATT system. The WTO Agreement merged existing GATT obligations into a “single undertaking”, thereby replacing the patchwork that had arisen under GATT and its side codes, and extended basic GATT disciplines to a wider range of goods, services and intellectual property than had been the case previously.¹¹ A streamlined dispute settlement system was introduced.

The resulting engagement strongly emphasizes what WTO members share in common. Negotiated reciprocity remains formally important within the scheme of the treaty, but with the obligation to extend concessions via MFN to over 160 countries, it has lost much of its original significance. In effect, WTO concessions have become so diffuse that they are hard to quantify. The real value of the endeavour lies in all that has evolved, which includes tariff concessions as well as many evolved practices and procedures—a heritage sometimes referred to as the “WTO *acquis*”.¹²

To determine whether countries are living up to their undertakings, a system of panels arose under GATT Art. XXIII that sought to determine whether national measures “nullified or impaired” a country’s GATT trade commitments. However, the quality of outcomes under panels was uneven and individual decisions were sometimes vetoed by defendant countries.¹³ The WTO Dispute Settlement Understanding (DSU) addresses many of these problems by streamlining dispute settlement procedures, removing the veto to dispute settlement results and introducing the option of appellate

¹⁰ See generally Warrick Smith & Mary Hallward-Driemeier, *Understanding the Investment Climate*, 42(1) FIN. & DEV. 40 (2005).

¹¹ Over several decades GATT had evolved into an unwieldy array of instruments involving GATT 1947, a number of side codes and other commitments. One of the functions of the WTO Agreement was to consolidate these in a single undertaking. The original GATT also applied to goods alone. In the WTO Agreement parallel disciplines were introduced covering services and intellectual property.

¹² For use of the term “*acquis*” in WTO practice, see Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 174, WTO Doc. WT/DS202/AB/R (adopted Mar. 8, 2002); Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008).

¹³ In the 48-year history of GATT 101 of 132 panel reports were adopted. See WTO DISPUTE SETTLEMENT BODY DEVELOPMENTS IN 2011, https://www.wto.org/english/tratop_e/dispu_e/spech_johansen_13mar12_e.htm (last visited Feb. 28, 2017).

review. WTO members continue to be able to take each other before panels (as they did under GATT) when there is reason to believe that the domestic law of another member country “nullifies or impairs” benefits accruing under the treaty. Panel proceedings may be followed by an appeal to the Appellate Body. If a violation is identified, a recommendation is normally made to the defendant country to bring its law “into conformity” with the WTO Agreement. This is forward-looking and implicitly invites the countries to negotiate so as to settle their disputes *inter se*. In response, countries have worked out a number of forward-looking, transformative solutions to WTO disputes.¹⁴

Why is the desire for settlement so pronounced in WTO law? Settlement is important in any legal system because it is synonymous with communal peace, but it assumes additional importance in WTO law because of the need for the preservation of legal relationships. This is acute in a legal regime characterized by uninterrupted application.¹⁵ In the Anglo-

¹⁴ One source on transformative justice has observed: “A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups are in competition with one another to one in which groups recognize their mutual interests in arriving at workable solutions.” LAW COMMISSION OF CANADA, FROM RESTORATIVE JUSTICE TO TRANSFORMATIVE JUSTICE (1999). What are distinctive features of transformative outcomes in WTO law? First, in virtually all instances strict compliance with the treaty has *not* been achieved. Rather, countries have used the “substance of a conflict as a means of exploring options and establishing responses”. There is no absolute requirement of compliance. Instead, the law remains pliant. It constitutes a basis for discussion as opposed to a target to be met. Second, the amount of trade involved in the disputes is of secondary, even diminished, importance. Outcomes are a considerable distance from estimates of “value of trade blocked”, the “equality of harm”, or the “amount of subsidy conferred” that might be focused on to determine the purpose of WTO law, dispute settlement and countermeasures. In many instances they exhibit considerable creativity and imagination. As a result, relationships are “develop[ed] and strengthen[ed]”. In the process, interdependence is promoted. Third, parties assume responsibility for crafting an outcome. They become true architects of their relationships going forward. They must listen to their counterparts and be prepared to accommodate more than their own interests, including potentially—and from a normative perspective, most intriguingly—the general interest in *non*-compliance. An example of transformation occurred in *U.S. — Shrimp*, WT/DS58, a dispute that involved a complaint by India, Malaysia, Pakistan and Thailand against U.S. legislation (and U.S. court decisions made pursuant to it) imposing a ban on the importation of shrimp not caught in a “turtle friendly” manner. In settlement of the case the U.S. agreed to modify its program to allow greater flexibility for foreign shrimping regimes to meet the U.S. criteria. It also provided certain technical assistance to fishing fleets in claimant states. In addition, the U.S. concluded the Inter-American Convention for the Protection of Sea Turtles with American and Caribbean partners and later an Indian Ocean and South East Asian Marine Turtle Memorandum of Understanding with Asian and Australasian partners in order to promote turtle conservation globally. These last two initiatives were undertaken to fulfill an expressed preference in the Appellate Body report for “consensual means of protection and conservation”. Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 172, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

¹⁵ WTO members must comply with their WTO obligations “cumulatively and concurrently”, a compliance frame which differs significantly from other bodies of law, such as international criminal law, whose jurisdiction is generally episodic (*i.e.*, on the happening of certain events) and residual (*i.e.*, only where, in most instances, national authorities are unable or unwilling to prosecute).

American common law, for instance, private law is predicated upon a view of individuals as autonomous bearers of rights and obligations who are relatively interchangeable.¹⁶ If one party breaches an agreement or commits a wrong, the solution in most instances is damages since another party can always be found to fulfill the original obligation.¹⁷ No continuing relationship is foreseen.¹⁸ WTO law is different. It applies to highly subjective and idiosyncratic relations among countries. In most instances the specific rights and obligations cannot be fulfilled by another country. Due to MFN a settlement will confirm rights and obligations among the immediate parties as well as among the membership as a whole. To that extent, the results of dispute settlement are an important expression of community.¹⁹

In contrast, the origins of international investment law lie in diplomatic protection. Under international law a home state was allowed traditionally to intervene on behalf of its nationals with investments in a host state.²⁰ This power was recognized for the purpose of avoiding discrimination

¹⁶ An indication of the difference is reflected in the remedies available in WTO (and international trade) law versus international investment law. In WTO (and international trade) law the “default” remedy involves withdrawal of a law. Thus, DSU Art. 3.7 provides that “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned” Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. In international investment law the typical remedy is payment of damages, reflecting a corrective and “atomistic” view of legal relations. Countries are under no obligation to amend their laws.

¹⁷ In tort, for instance, “The general object of an award of damages is to compensate the claimant for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant’s tort.” CLERK & LINDSELL ON TORTS 1883 (Anthony M. Dugdale & Michael A. Jones eds., 20th ed. 2010).

¹⁸ The preference of compensation over specific performance is evident in the U.S. Restatement of Contracts (2d) which references compensation ahead of specific performance. Thus, section 345 notes that “[i]n most contract cases, what is sought is enforcement of a contract. Enforcement usually takes the form of an award of a sum of money due under the contract or as damages. . . . A court may also enforce a promise by ordering that it be specifically performed or, in the alternative, by enjoining its non-performance. In doing so, it protects the promisee’s expectation interest.” RESTATEMENT (SECOND) OF CONTRACTS § 345 cmt. b (1981).

¹⁹ A similar distinction is sometimes made in German law between *Begriffsjurisprudenz* and *Interessenjurisprudenz*. Writing in 1975 René David described the distinction as follows: “There is a general tendency to think not in terms of rights but rather, following *Ihering*, in terms of mere ‘legally protected interests’, and to endow rights with limits, with ‘relative character’, with ‘functions’, thus modifying profoundly not only their content but their very nature. According to this new theory the mission of law no longer appears as the protection of the egoistic interests constituted by absolute prerogatives belonging to men The function of the law becomes more the balancing of conflicting interests” RENÉ DAVID, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: VOLUME II 1-24 (1975).

²⁰ For an overview of the evolution from diplomatic espousal to investor-claims, see ANDREW PAUL NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 1-73 (2009); Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12(1) U.C. DAVIS J. INT’L L. & POL’Y 157 (2005); William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39(1) VAND. J. TRANSNAT’L L. 1, 5-14 (2006).

against foreign nationals and the possibility of prejudice in host state proceedings. Foreign government intervene had shortcomings, however, notably in the requirement of diplomatic espousal.

During the 19th century diplomatic espousal was dispensed with in some cases. A few investor claims did proceed in this way and a modest body of case law came into existence.²¹ In the usual instance, an investor would pursue action against a host state before an arbitral tribunal alleging breach of an investment agreement or the international minimum standard of treatment. Over time, countries began to do away with the requirement of espousal. What resulted was a direct right of action by investors against host governments. In such cases the host state was the respondent, never a claimant.²²

Under the typical investment treaty an investment claim arose when a host state had failed to protect an investment or to accord the necessary standard of treatment. By definition, therefore, an investment claim dealt with events in the past. It was inherently backward-looking.

“Pastness” is vital to appreciating the particular form that international investment law came to assume. The law’s orientation to the past helped to fix the interests in issue. They become well-defined, discrete and unitary. The injury could be sharply delineated in time and space. As a result, they were amenable to classic corrective justice.²³ Corrective justice is problematic, however, to the extent that it espouses zero-sum outcome. A country’s loss in arbitration could be construed as a specific investor’s gain, redolent with connotations of private benefit and favoritism towards foreign investors.

Eventually, the need for certainty in international investment law prompted countries to negotiate bilateral investment claims procedures which took a more elaborate form in bilateral investment agreements. These agreements increased substantially in number after 1959.²⁴ In 1966

²¹ NEWCOMBE & PARADELL, *supra* note 20.

²² CAMPBELL MCLACHLIN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 5 (2007).

²³ These circumstances correspond to the five basic ideas around which corrective or compensatory justice is organized: 1) that the event producing the injury is both discrete and unitary, 2) that the injury is sharply defined in time and space, 3) that the defendant’s conduct has clearly caused the harm suffered, 4) both plaintiff and defendant are easily identifiable, 5) apart from the goal of compensation, existing rights are held constant. The law is not to engage in any kind of social reordering or social management except in so far as those functions are logically entailed by the principle of compensation. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 319 (1993).

²⁴ As Andrew Newcombe and Lluís Paradel·l note:

Germany is commonly cited as the first state to develop a BIT program and to sign the first BIT, with Pakistan, in 1959. The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany-Pakistan (1959)) contains many of the substantive provisions that have become common in subsequent BITs.

the creation of the International Centre for the Settlement of Investment Disputes (hereinafter “ICSID”), an arm of the World Bank, introduced a common framework for many investment arbitration proceedings.²⁵ Proceedings under ICSID were slow to begin but by the early 2000s had become popular among investors.

Today the substance of international investment law focuses on the elaboration of an IMS of treatment that is to be accorded to investors. The standard is understood to be customary and therefore constantly evolving.²⁶ Thus, investors and investments are entitled to the IMS, but what the IMS consists of in any given instance has to be worked out case-by-case.²⁷

In an earlier era the IMS was defined largely in terms of nationalizations and expropriations involving specific “takings”—that is, the taking of property. As government behavior has become more wide-ranging and sophisticated, however, there has been pressure for the IMS to respond to a broader range of official behavior. Today the IMS has effectively splintered into a series of sub-standards that have an uncertain relationship with the IMS. The outcome is a more fragmented, less conceptually coherent IMS, especially as the focus of international investment law shifted from a concern with protection to a concern with treatment.²⁸ The resulting sub-standards are classed in two categories: contingent and non-contingent. In the case of contingent sub-standards the particular standard, such as MFN, is linked to a comparator that is different from national treatment. In the case of non-contingent standards, such as Fair and Equitable Treatment (hereinafter “FET”) or Full Protection and Security (FPS), the substandard is not linked to a specific comparator but is instead considered absolute.

NEWCOMBE & PARADELL, *supra* note 20, at 42. As of 2014 UNCTAD indicated that there were 3,271 international investment agreements (2,926 BITs and 345 “other” international investment agreements). UNCTAD, *WORLD INVESTMENT REPORT 2015*, at 106 (2015).

²⁵ ICSID was established by multilateral treaty in 1965 provide facilities for conciliation and arbitration of investment disputes between contracting states and individuals and companies that qualify as nationals of other contracting states. ICSID does not conciliate or arbitrate investment disputes itself. Instead, this task is left to individual conciliation commissions or arbitral tribunals, most of which are appointed *ad hoc*. As of mid-2016 161 countries had signed and/or ratified the ICSID Convention. Since 1978 ICSID also administers certain proceedings between states and nationals of other states *outside* the scope of the Convention under a set of procedures known as the Additional Facility Rules.

²⁶ MCLACHLIN ET AL., *supra* note 22, at 21, 205 *et seq.*; NEWCOMBE & PARADELL, *supra* note 20, at 236.

²⁷ Andrew Newcombe and Lluís Paradel·l note that “[t]he substantive content of the minimum standard . . . is usually not specified in any detail.” They go on to note that “the content of the minimum standard has been and remains contentious.” NEWCOMBE & PARADELL, *supra* note 20, at 234.

²⁸ IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 2* (2008) (noting that in the early 1980s “[t]he focus of . . . international rules shifted from the protection of investment to the treatment of investment”).

Surveyed side-by-side, WTO and international investment law are very different. One of these differences is the nature of the underlying good, or ‘thing’, protected by the law. In WTO law, as explained, the good arises out of obligations belonging to the WTO membership as a whole. It is the sum of all concessions and commitments made by WTO members. This inevitably places emphasis on obligations that are “public” and non-transferable, and in so being, attracts the application of distributive justice. The final product is emblematic of widespread consensus about the worth of the WTO Agreement.

In international investment law, by comparison, the “good” is normally conceived of as the protection of specific investments composed of rights to something—to land, assets, or more controversially, intangibles such as intellectual property²⁹, profits³⁰ or goodwill.³¹ It also frequently involves the treatment of investors. Due to that private emphasis—of what is “mine, not yours”—there is bound to be more dissent about the law and its general merits.

III. TRADE AND INVESTMENT: SOME SUBSTANTIVE DIFFERENCES

The net result of the above differences means that the starting point of theoretical reflection—the sense of what is common, or “community”—is more diluted and harder to discern in international investment law than in WTO law. Perhaps the most graphic indicator of this is the fact that rather than being termed an ordered “system”, international investment law is often described as constituting a diffuse “framework” or “regime”.³² How

²⁹ Claims for intellectual property in international investment law have been relatively rare until recently. See Henning Grosse Ruse-Khan, *The Protection of Intellectual Property and International Investment Law*, 19(1) J. INT’L ECON. L. 87 (2016). For discussion, see Susy Frankel, *Interpreting the Overlap of International Investment and Intellectual Property Law*, 19(1) J. INT’L ECON. L. 121 (2016); Ramesh Karky, *Intellectual Property Rights and Foreign Investment Agreements*, in GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY: REFLECTING POLICY THROUGH CHANGE 209 (Mark Perry ed., 2016); and Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview* (OECD, Working Papers on International Investment No. 2010/01, 2010). Nevertheless, some guidelines for the valuation of intellectual property have been provided. See *International Valuation Guidance Note No. 4: Valuation of Intangible Assets*, in INTERNATIONAL VALUATION STANDARDS 245 (2007).

³⁰ IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 110 (2009); BORZU SABAH, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 94-101 (2011).

³¹ MARBOE, *supra* note 30, at 287; SABAH, *supra* note 30, at 130.

³² There has been much speculation about whether it is appropriate to refer to international investment law as a “system”. See Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 1, at 1188, 1189 (noting that “[t]he system, if it can even be called a system is, of investment treaty arbitration is not unitary in the sense of each tribunal sitting under the same source of jurisdiction.”).

else do the two bodies of differ at the level of substance?

A. Obligation Versus Right

I have already pointed out that the two bodies of law differ most fundamentally with respect to their jurisprudential orientation. WTO law is overwhelmingly focused on obligations whereas international investment law is focused on rights.

What does it mean to say that a legal system is a law of rights? A right is commonly defined as a “claim”, that is, a legally protected interest allowing the right-holder to “obtain certain willing and acting from another person.”³³ In the case of WTO law the “willing and acting” in question requires a country to bring themselves “into conformity” with the WTO Agreement, usually through withdrawal or amendment of national law. In many instances it has resulted in arrangements that, though not completely compliant, all WTO member countries can live with. Thus, formally inconsistent bans on hormone-treated meat or clove cigarettes have been allowed to remain in place.³⁴

In the case of international investment law the “willing and acting” normally assumes the form of compensation. Compensation tends to dilute the force of the rights in question since a government is not required to do anything in a positive legal sense like amending or withdrawing legislation. Instead, it is simply required to pay compensation. The wrong itself may continue. That is far from obtaining “*certain willing and acting*”.

B. Future Versus Past

Another difference between the two bodies of law pertains to their temporal direction. The importance of the future in WTO law arises from the scheme of the WTO Agreement itself. What is most relevant to the law as a normative phenomenon is the “security and predictability” of “reciprocal and mutually advantageous [trade] arrangements”. The concept has been repeatedly referenced in a line of WTO cases and is now understood to serve as a constitutive idea for the treaty as a whole.³⁵ The

³³ PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 161 (1990).

³⁴ See Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R (adopted Feb. 13, 1998); RENÉE JOHNSON, CONG. RESEARCH SERV., R40449, *THE U.S.—EU BEEF HORMONE DISPUTE* (2015); Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012); *U.S. Settles WTO Clove Cigarette Case with Indonesia; Keeps Ban in Place*, INSIDE U.S. TRADE, Oct. 10, 2014.

³⁵ Panel Report, *Korea — Taxes on Alcoholic Beverages*, ¶ 10.81, WTO Doc. WT/DS75/R (adopted Feb. 17, 1999), cited in Panel Report, *European Communities — Selected Customs Matters*, ¶ 7.431, WTO Doc. WT/DS315/R (adopted Dec. 11, 2006) and Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and*

basic idea is to create an environment in which trade will flourish going forward.

By comparison, an investment claim typically arises when a host state fails to protect an investment or to accord the necessary standard of treatment. By definition, therefore, an investment claim deals with events in the past. The particular nature of the interests involved that focus on the past means that international investment law is substitutive. The law seeks to compensate for breaches which have already happened.

Retrospectivity has other consequences. One of these involves precedent, or the reach of the past into the present and future. WTO law has developed a relatively strong doctrine of precedent in line with its character as a highly integrated legal system.³⁶ The strength of the doctrine can be linked to the WTO system's insistence on "stability and predictability". The same impulse is harder to discern in international investment law since the body of law emanates largely from ill-defined custom and a loose "network" of treaties. Within this structure, at least theoretically, individual investment awards should not matter much to each other since different decisions are sourced in different treaties.

However, the proliferation of investment arbitration in the last three decades has repeatedly raised the issue of precedent. Arbitrators generally recognize that "[r]eliance on past decisions is a fundamental feature of any orderly decision[-making] process" and that such reliance "[s]trengthens the predictability of decisions and enhances their authority."³⁷ At the same time, arbitrators and commentators have had difficulty describing what has arisen as strict precedent and have instead concluded that what has arisen is more akin to the *jurisprudence constante* of civil law. The reason given for this particular development is the bilateral nature of the applicable treaties, the limited multilateralism of the investment regime, and the absence of an appellate structure. The absence of appeals, in particular, means that flexibility should be preserved in international investment law to guard against "bad" precedent.³⁸

Audiovisual Entertainment Products, ¶ 7.1463, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010). For extensive comments, see Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, at 321 n.663, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000). "The purpose of many of [the GATT/WTO] disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this . . . activity to flourish." *Id.* ¶ 7.73.

³⁶ See for example Panel Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.105, WTO Doc. WT/DS344/R (adopted May 20, 2008) (observing that "even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar.").

³⁷ Schreuer & Weiniger, *supra* note 32.

³⁸ See Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, at 13, Presented at the 18th ICCA Congress: International Arbitration 2006: Back to Basics? (June 3, 2006), in *INTERNATIONAL ARBITRATION 2006: BACK*

C. Equality Versus Fairness

As mentioned, WTO law is largely a law of equality. Its chief standards are equality-driven.³⁹ Its defaults are likewise predicated on the idea of equality.⁴⁰ WTO dispute settlement aims to re-establish the “equality of competitive conditions”.⁴¹ Its equality orientation coheres with

TO BASICS? 879, 889 (Albert Jan van den Berg ed., 2007) (noting that “good awards will chase the bad, and set standards which will contribute to a higher level of consistent quality.”).

³⁹ This is evident in requirements of MFN and national treatment, which are together often placed under the general umbrella term of non-discrimination, as well as equivalence, harmonization and mutual recognition. For a discussion of non-discrimination in WTO law, see WILLIAM J. DAVEY, *NON-DISCRIMINATION IN THE WORLD TRADE ORGANIZATION: THE RULES AND EXCEPTIONS* (2012).

⁴⁰ Where the WTO Agreement text is silent, panels and the Appellate Body have developed a number of equality-related standards such as “evenhandedness”, “balance” and “parallelism” which project equality in situations of uncertainty. This practice appears to underline equality’s constitutive nature. The term “even-handed” has been used by panels in varying situations suggesting either equal or fair treatment. See for example Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 21, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan*, ¶ 148, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001). “Parallelism” has been identified as an obligation arising under WTO Safeguards Agreement Art. 2. The obligation of parallelism mandates that where, for the purposes of applying a safeguard measure, a WTO member has conducted an investigation considering imports from all sources, that member may not, subsequently, exclude imports from free trade area partners from the application of the safeguard. For discussion, see Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶¶ 433-74, WTO Doc. WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (adopted Dec. 10, 2003); Appellate Body report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶¶ 178-81, WTO Doc. WT/DS202/AB/R (adopted Mar. 8, 2002). Panels and the Appellate Body most often have referred to the concept of “balance” as a general requirement of WTO dispute settlement—namely, that dispute settlement results should not upset the balance of rights and obligations attained in the WTO Agreement. See DSU, *supra* note 16, art. 3.3.

⁴¹ In Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998) for instance, the Panel noted:

[W]e consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the “no less favourable treatment” standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US — Section 337*, has been followed consistently in subsequent GATT and WTO panel reports.

Id. ¶ 10.379. The Appellate Body quoted from Report of the Panel, *United States — Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 (Jan. 16, 1989), GATT BISD (36th Supp.), at 345 (1990), at length, noting how it explained the relevant test “in very clear terms”:

[T]he “no less favourable” treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment

the law's prospectivity and its aspiration to achieve equality in some more rational future.

International investment law, by contrast, is largely fairness-driven. Fairness is an elusive concept. In English usage what is "fair" is taken to be fitting or appropriate.⁴² We say, for instance, that a particular transaction is "fair", meaning that it is suitable for all concerned. This is not the same as saying that it is optimal. A fair transaction will simply be unobjectionable.

The foregoing observations infer that fairness is highly variable. The FET standard—the most popular standard pleaded in international investment law disputes today—is perhaps the best indicator of that variation. Commentators generally acknowledge that FET's application "will always remain a highly case specific exercise."⁴³ A flexible approach to the standard's interpretation that blends the terminological references of "fairness" and "equity" with a range of other considerations seems fitting. These include legal uncertainty, denial of due process, official coercion or harassment, stability of the legal framework, unjustifiable enrichment, bad faith, lack of transparency, and arbitrary or discriminatory treatment.⁴⁴

The inherent variability of decisions on FET has generated considerable controversy. A number of civil society groups have expressed concern about increasing abuse of the FET clause in recent investor-state proceedings. The reaction appears to be evidence of a broader communal expectation about the need for stability in arbitral decision-making.

Much of the concern about FET appears to stem from the bare language of first-generation FET clauses. These have been described as "prone to expansive interpretation simply because an arbitral tribunal does not have sufficient interpretive guidance from the treaty." As Mark Jennings notes, "[t]he first generation of BITs '[m]ost commonly' required that FET be provided to covered investments 'without defining the standard in terms of any other standard'."⁴⁵ In some cases the FET clause in a treaty is linked to a particular substantive norm like non-discrimination whereas in others it is linked to the less well-defined customary IMS. This variation causes problems when, inevitably, one tribunal seeks to apply the

given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.

⁴² "Fair . . . free from bias, fraud or injustice; equitable, legitimate." *Fair*, THE OXFORD ENGLISH DICTIONARY: VOLUME V 671 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Legal dictionaries offer a slightly different definitions. "Fair means . . . 1. impartial; just; equitable; disinterested; 2. Free from bias or prejudice . . ." *Fair*, BLACK'S LAW DICTIONARY 615 (Brian Garner ed., 9th ed. 2009); "Fair means . . . reasonable." DAPHNE DUKELOW, *Fair*, THE DICTIONARY OF CANADIAN LAW 432 (4th ed. 2011).

⁴³ GEBHARD BÜCHELER, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION 3 (2015).

⁴⁴ TUDOR, *supra* note 28, at 154-81.

⁴⁵ Mark Jennings, *The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy*, 17(2) BUS. L. INT'L 127, 136 (2016).

interpretation arrived at under one treaty in the context of another.

D. Constitution Versus Contract

The idea of WTO law as a “law of obligation” referenced above foreshadows how WTO law and the WTO Agreement can be understood as constitutive. A constitution is defined as “[t]he fundamental laws of a state, governing the actions of officials and the making and execution of laws. A constitution is the organization of a government”⁴⁶

The WTO legal system is most evidently constitutive in the way that it binds adherents to a single undertaking in which all obligations apply “concurrently and cumulatively”.⁴⁷ This application is, of course, the product of MFN, various non-discrimination requirements, and standards of harmonization, equivalence and mutual recognition. Those requirements, taken together, impose a “unity” of obligation upon members. In addition, there are other factors within the treaty which work to reinforce the idea of unity. First, the obligations themselves must be appreciated within the context a legal order which is generally difficult to modify or amend. Second, the attitude developed by WTO panels and the Appellate Body towards the interpretation of WTO law has been exclusivist and generally wary of external interference.

International investment law, by comparison, appears heavily contractual. It is sourced largely in bilateral treaties concluded between pairs of countries that bear a certain resemblance to contracts. They are concluded between defined parties. They are understood to create rights and obligations for the parties alone. They may be amended or terminated according to their terms. In all of these respects, investment treaties place emphasis on the text as an expression of will.

⁴⁶ *Constitution*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: VOLUME I 221-22 (Stephen Michael Sheppard ed., 2011).

[T]he constitution of every government is essentially the customs and expectations shared by officials and the governed, often based on a document, according to which officials act and limit the scope of others’ actions with the support of different officials and the people who are governed by them. Constitutions therefore depend on the commitment of officials and of the people to be sustained, regardless of the language in constitutional texts.

ALLAN HUTCHINSON, *EVOLUTION AND THE COMMON LAW* 199 (2005). A constitution is also undoubtedly concerned with the future: “A constitution . . . is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.” *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155 (Can.), cited in ALLAN HUTCHINSON, *EVOLUTION AND THE COMMON LAW* 203 (2005).

⁴⁷ Panel Report, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina: Recourse to Article 21.5 of the DSU by Argentina*, ¶ 7.129, WTO Doc. WT/DS268/RW (adopted May 11, 2007).

The will-driven aspect of the law is not simply evident at the level of treaties or their interpretation. It is also apparent among those who pursue arbitration under them. Private parties have substantial flexibility in crafting their claims, a freedom that contributes substantially to the shaping of the law. As José Alvarez notes, “[w]ho is entitled to bring claims . . . matters a great deal with respect to the intensity with which issues may be pursued, the prospect of annulment or enforcement challenges or for settlement, and the likelihood that litigants will raise ‘political’ or other extraneous issues in the course of adjudication.”⁴⁸

The result is an autonomy that is at times disquieting, as Alvarez notes:

The intrusive nature of many of these [investment] claims— involving challenges to environmental regulations, to the way States conduct administrative proceedings at all levels of government, or to national measures taken to handle a financial crisis—is exacerbated by the unpredictability of the resulting awards. And the prospect of more arbitral legal precedents seem all the more troubling when these involve the application of vague standards such as fair and equitable treatment by ad hoc panels of three that only come together to resolve one dispute at a time with no prospect of an appeal⁴⁹

The unconstrained freedom—even license—of international investment law has provoked questioning of the basic contractualist assumptions underpinning the regime. First, there has been greater acknowledgment of its link to public international law. Thomas Wälde and others point to the growing recognition of international investment agreements as part of international law and therefore more properly influenced by interpretive approaches based upon canons of international law.⁵⁰ Second, there is the tendency to regard certain awards or “lines” of awards as setting down, or at least reflective of, customary international law. Traditionally, it was relatively easy to characterize investment treaties as creating *lex specialis* among the parties to them. By doing so, they were taken to have “contracted out” of international law. The more modern view is to see this practice is taking place within the broader corpus of international law and recognizes the intertwined nature of conventional and customary sources. Thus, Alvarez argues, for instance, that “[i]t may be misleading to state, as a leading casebook does, that [bilateral investment treaties] ‘[a]s *lex*

⁴⁸ ALVAREZ, *supra* note 2, at 48-49.

⁴⁹ *Id.* at 56.

⁵⁰ Thomas W. Wälde, *Interpreting Investment Treaties: Experience and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 724, 729 (Christina Binder et al. eds., 2009).

specialis between the parties . . . supersede any inconsistent customary international law and the embrace or exclude any incipient norms' The language of most BITs welcomes or even requires the residual application of customary international law . . . it is much harder to point to concrete instances where such treaties explicitly exclude it."⁵¹ Third, wariness of easy contractual analogies has important consequences for the sources of international investment law. Whereas many commentators appear to assume that the proliferation of investment treaties is leading to wholesale "treatification", that is, a kind of takeover of the field by conventional sources, some have questioned this opinion. That is for the simple reason that treaties themselves are interpreted against a greater background of customary sources.

Still, there are good reasons to continue treating international investment agreements as grounded in consent, that is, not to overstate the role of custom. First, custom is famously vague. To the extent it is hard to discover, custom serves as an imprecise basis for expectations about the normative framework, and ultimately, the arrangement of obligations and rights. Not surprisingly, arbitrators have tended to shy away from custom regardless of doctrinal purity.⁵² Second, many existing investment agreements were concluded in an era when including such agreements was considered the "thing to do" from a political or reputational standpoint.⁵³ There was little sense that they were *legally* binding. For this reason, a measure of interpretive restraint may be in order. That realization translates most directly into respect for their consensual origins. Third, a related point is that states parties to investment treaties are distinct "communities". As such, their policy preferences often reflect those of a government which is entitled to a measure of deference. International investment law exhibits moderate awareness of this idea. It is usually subsumed within the doctrine of proportionality.⁵⁴

E. Deduction Versus Induction

Law is normative, and it is often said to be so because it can be distinguished from fact.⁵⁵ The difference between law and fact means that

⁵¹ ALVAREZ, *supra* note 2, at 116 n.213.

⁵² *Id.* at 230.

⁵³ "Today's treaties follow (and largely copy) standard language that was developed in the late 1950s and 1960s when such treaties were in practice and effect more political goodwill statements than legally binding and enforceable treaties." WÄLDE, *supra* note 50, at 737.

⁵⁴ See generally BÜCHELER, *supra* note 43.

⁵⁵ "Nobody can deny that the statement: 'something is'—that is, the statement by which an existent fact is described—is fundamentally different from the statement: 'something ought to be'—which is the statement by which a norm is described." HANS KELSEN, A PURE THEORY OF LAW 5-6 (1967). The distinction between fact and law is particularly relevant to the work of the Appellate Body, since DSU Art. 17.6 observes that "[a]n appeal shall be limited to issues of law covered in

the law must have a method of identifying, organising and appreciating the facts.⁵⁶ The totality of these methods is referred to as the law's rationality.

There are two dominant rationalities in law, deductive and inductive. In deductive logic reasoning "entails establishing a framework and then applying the framework to a problem."⁵⁷ In deductive logic mental patterns are established and then projected in the form of specific rules.

WTO law is weighted in favour of deductive logic in the sense that it relies heavily on presumption. This is for several reasons. First, deduction is particularly important in WTO law because real-world statistics and other evidence may not adequately convey the trade effects of government measures.⁵⁸ Second, the preventative function is important in WTO law. WTO law is not concerned with mechanics of competition in specific instances or the impairment of trade flows *per se*, but with the maintenance of broad conditions of competition and hence threats to *potential* trade. Some means are needed to apprehend injury and this normally happens through the operation of assumptions. Third, the machinery of WTO dispute settlement is equipped with limited fact-finding ability.⁵⁹ In many cases dispute settlement outcomes depend on what countries choose to disclose, meaning there is a need for inferences that operate in the absence of fact.

By contrast, in international investment law the need for proof arises

the panel report and legal interpretations developed by the panel." DSU, *supra* note 16, art. 17.6. In practice, the distinction between fact and law can be a fine one. In *U.S. — Aircraft* the Appellate Body observed that it is often "difficult to disentangle legal conclusions or legal reasoning from factual findings." Appellate Body Report, *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 958, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012).

⁵⁶ Philip Allott observes that "all the discourse of the public mind is structured around the capacity of the human mind to universalise the particular and to particularize the universal." PHILIP ALLOTT, *THE HEALTH OF NATIONS* 269 (2002).

⁵⁷ ROGER MARTIN, *THE OPPOSABLE MIND* 144-45 (2007).

⁵⁸ Reference is often made to the GATT cases of Report of the Panel, *Japan — Measures on Imports of Leather*, L/5623 (Mar. 2, 1984), GATT BISD (31st Supp.), at 94 (1985), and Report of the Panel, *United States — Taxes on Petroleum and Certain Imported Substances*, L/6175 (June 5, 1987) GATT BISD (34th Supp.), at 136 (1988). In the latter case the panel "concluded from its review . . . that, while the Contracting Parties had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, *the presumption had in practice operated as an irrefutable presumption.*" *Id.* ¶ 5.1.7 (emphases added).

⁵⁹ "The DSU does not give panels and the Appellate Body powers of investigation comparable to those of domestic courts; they merely have the right to seek information from any individual or body, but they do not have the power to force individuals to testify before them." Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 123, 140 (Ernst-Ulrich Petersmann ed., 1997). This limited ability has been hampered in some cases by claims of privilege and the need for Highly Confidential Business Information (HCBI) and Business Confidential Information (BCI). The Appellate Body has also noted the power of panels to draw adverse inferences. See Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶¶ 181-206, WTO Doc. WT/DS70/AB/R (adopted Aug. 4, 2000); Panel Report, *Turkey — Measures Affecting the Importation of Rice*, ¶¶ 7.90-106, WTO Doc. WT/DS334/AB/R (adopted Oct. 22, 2007).

from the requirement of causation. An aggrieved investor needs to furnish evidence that the host state has caused the injury complained of before it can seek compensation.

In most instances the evidence presented in international investment law is tested by adversarial process. The process is described by Borzu Sabahi as follows:

[V]aluation experts usually present their assessments of what a particular enterprise or investment is worth or how the losses should be valued in the form of expert witness statements. These assessments may take into account a variety of data obtained from market and from other sources, including the parties. The assessments, however, ultimately require the exercise of judgment by the valuers. The opposing parties' valuers usually provide diverging forecasts about the value of investment at issue. Cross-examination of valuation experts helps to highlight the strong and weak points of the expert's assessments, particularly by testing the assumptions that valuers make when forecasting future profits of the business.⁶⁰

On the basis of the evidence put forward, arbitrators will arrive at a reasonable estimate of the damage. An award of compensation will follow.

The focus on valuation in international investment law means that the law tends towards empiricism. Empiricism is hampered, however, by the natural uncertainty of calculation and the need for baseline hypotheticals in that calculation. What is the correct hypothetical? Which version of the "past"—perfect profitability, investment cost, or constructed value—should be chosen in order to assess compensation? There are no easy answers. In many instances, arbitrators have shied away from full valuation of investments and inclined toward something less, again, in line with the idea of "fairness" noted above.⁶¹

IV. WTO AND INTERNATIONAL INVESTMENT LAW: CONTRASTING COMMUNITIES

The differences I have just highlighted are noteworthy both because of the way they draw out a contrast between the two bodies of law and because the way that their essential differences can be understood as falling

⁶⁰ SABAHI, *supra* note 30, at 184.

⁶¹ MARBOE, *supra* note 30, at 3 (noting that "in international [investment] jurisprudence the amounts awarded often remain[] below the actual loss suffered"); SABAHI, *supra* note 30, at 128 (noting, for instance, that international law "allows equity to some extent to correct the otherwise inevitable perpetuation of a hard deal in favor of the government.").

on opposite sides of a normative divide. The reason for the divide lies in the nature of community and the way in which each community has come to view the basic “good” involved. In WTO that good is unitary and relatively well-understood. It receives strong support from all members. In international investment law, that is less evident, principally because the relevant community is harder to discern.

The subject of community is familiar in conservation biology, wherein it has been observed:

Small societies occupying a small island or homeland can adopt a bottom-up approach to environmental management. Because the homeland is small, all of its inhabitants are familiar with the entire island, so that they are affected by developments throughout the island, and share a sense of identity and common interests with other inhabitants. Hence everyone realizes that they will benefit from sound environmental measures⁶²

The anthropologist Raymond Firth noted these conditions on Tikopia, a small island in the Solomons Archipelago, where land is allotted with an eye to efficient use, crops are planted to maximize nutritional value, and pig husbandry was eliminated several centuries ago to preserve scarce food resources.⁶³

To analogize, the 160-odd members of the WTO might be thought of as “Tikopians”. They know each other and possess a remarkable degree of agreement and value about core disciplines under the treaty, and by extension, the importance of community. Members also agree in large part on conservation and careful management of what is shared, and for this reason, on the necessary “stability and predictability” of expectations.

International investment law possesses little such conservation ethic. It possesses no single treaty text or institution. Claimants do not know each other and typically have an adversarial relationship with defendant states. Consequently, they have no collective interest in moderating their claims. Competition abounds. The result is that the nature of community and its attendant expectations are much more diffuse.

The ethos in international investment law might be likened to the situation that prevailed on Easter Island off the coast of Chile, where anthropologists speculate that the failure of groups to cooperate in exploiting natural resources—in essence, zealous promotion of their

⁶² JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 277-78 (2005).

⁶³ See RAYMOND FIRTH, *WE, THE TIKOPIA: A SOCIOLOGICAL STUDY OF KINSHIP IN PRIMITIVE POLYNESIA* xxi (1936). Firth took his title from the phrase “*Matou nga Tikopia*” (i.e., “we Tikopians”) because of his observation that it was constantly used by individual Tikopians to explain their perception of things and therefore indicative of the way that individual and communal identity are fused in Tikopian culture.

rights—eventually led to environmental devastation and communal collapse.⁶⁴ Easter Island’s indigenous population, traditionally characterized by competing clans, was only reconstituted through centralized military leadership (*matatoa*) that provided a modicum of protection until the arrival of European explorers in the 18th century.⁶⁵

Not surprisingly, the intensive rights-based ethos of international investment law, the unevenness of its jurisprudence and its “scorched earth” litigation tactics have generated a countermovement.⁶⁶ This approach appears to demand greater consideration of the public interest within what is a largely private system of investor protection, more transparency and direct attention to public interest issues in investment decision-making, as well as the proposed creation of a global investment court to standardize arbitral outcomes. Behind the countermovement seems to be a perception of imbalance between “public” and “private” in international investment law, at least as it currently stands, and necessarily and derivatively, a need to rebalance this “law of rights” to make it more obligation-oriented.

In particular, to instill more certainty in investor state arbitration, three possibilities are contemplated. First, there is the option of official interpretations. For example, a treaty like the NAFTA contains a mechanism whereby member countries can adopt binding interpretations of the treaty. So far, in the case of NAFTA, this method has been used only once. Christoph Schreuer and Matthew Weiniger have expressed the view that such an interpretative mechanism allows parties to “influence the outcome of judicial proceedings” and is therefore “incompatible with principles of a fair procedure and is hence undesirable.”⁶⁷ Second, there is the option of an appeals procedure. This would allow consistent review of arbitral decisions. For over a decade a number of U.S. bilateral investment treaties have foreseen this possibility and contained language to like effect. The idea has now borne fruit in efforts by the EU, begun in 2014, to create such an appellate mechanism linked to the conclusion of its own bilateral investment treaties and possibly housed in the WTO. However, as of early 2017 the outcome of the EU’s effort has been delayed due to general uncertainty over trade initiatives. Third, drawing on experience with preliminary rulings in EU law, a further option would be to introduce a parallel system of preliminary rulings in international investment arbitration. As Schreuer and Weiniger explain it, “[u]nder such a system, a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose.”⁶⁸ Such a system would have

⁶⁴ DIAMOND, *supra* note 62, at 79 *et seq.*

⁶⁵ *Id.*

⁶⁶ ALVAREZ, *supra* note 2, at 49.

⁶⁷ SCHREUER & WEINIGER, *supra* note 32, at 1201.

⁶⁸ *Id.* at 1204.

to confront the fact that that most investment treaties are carefully tailored to the particulars of the bilateral relationship they emanate from—an example of their “contractual” character previously mentioned—and, while they employ similar language, are not exactly the same. This fact suggests real limits to the degree of interpretive homogeneity that could be expected from such a system.

However, until more is done to achieve consistency, international investment law’s community will be one that is resistant to the creation of concrete expectations. A comparison helps to illustrate the point. GATT Art. XXI provides certain security exceptions under the treaty. It has rarely been invoked under GATT or the WTO Agreement. In one notable instance—retaliation by certain countries in response to Argentina’s invasion of the Falklands/Malvinas in 1982—a number of influential countries maintained that the provision was self-judging.⁶⁹ Today GATT Art. XXI is viewed by most commentators as the “ripcord” of the system. Countries are exceedingly cautious about its use, no doubt in the realization that regular invocation could undermine the entire system.⁷⁰

This is to be contrasted with the behavior of Argentina in several investment disputes. There, Argentina felt relatively unconstrained in invoking a necessity defence—the nearest investment law equivalent to GATT Art. XXI—in a succession of investment claims, no doubt aware that its actions would merit lesser scrutiny in a more diffuse community, backed up by the weight of opinion—and perhaps a little *viveza criolla* (native cunning)—that its defence was justified.⁷¹ Simply put, the diluted nature of the community allowed a country like Argentina to expect that its actions would be advantageous and would have no serious long-term

⁶⁹ Thus, in GATT Council discussions in 1982 concerning trade restrictions applied for noneconomic reasons by the European Economic Community [hereinafter EEC]:

[I]ts member States, Canada and Australia against imports from Argentina . . . the EEC stated that: “the EEC and its member States had taken certain measures on the basis of their inherent rights, of which [GATT Art. XXI] was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval . . . this procedure showed that every contracting party was—in the last resort—the judge of its exercise of these rights.”

WTO, GATT ANALYTICAL INDEX: VOLUME I 1600 (1995). *See generally also* Michael J. Hahn, *Vital Interests and the Law of GATT*, 12 MICH. J. INT’L L. 558 (1991).

⁷⁰ Peter Lindsay, *Note: The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1302 (2003) (noting how WTO members have infrequently invoked GATT Art. XXI, usually in conjunction with diplomatic solutions beyond the WTO that reflect the provision’s “constructive ambiguity”).

⁷¹ For an explanation of the role of “native cunning” in Argentina’s economic policy, see *Bello: The Luis Suárez of International Finance*, ECONOMIST (July 5, 2014), <http://www.economist.com/news/americas/21606268-argentinas-debt-stand-reflects-teenage-attitude-rules-are-there-be-br-oken-luis>.

repercussions. To date, that estimate appears to have been borne out.⁷²

In short, without a greater degree of community in international investment law expectations will remain in flux and dissatisfaction with the regime will persist. The distinction between obligation and right is instructive in the way that it illuminates this phenomenon and much else that is distinct about two communities—those of WTO and international investment law.

⁷² In four disputes—*CMS v. Argentina*, *LG&E v. Argentina*, *Enron v. Argentina*, *Sempra v. Argentina*—U.S. based companies asserted that Argentina’s emergency measures violated the FET, umbrella, non-discrimination, and expropriation guarantees of the Argentina–U.S. bilateral investment treaty. In each case arbitrators found a violation of FET and umbrella clauses and awarded significant amounts of compensation. Each award was later annulled pursuant to a procedure in ICSID Art. 52. For an overview, see generally Paul B. Maslo, *Are the ICSID Rules Losing Their Appeal? Annulment Committee Decisions Make ICSID Rules a Less Attractive Choice for Resolving Treaty-based Investor-State Disputes*, 54 VIRGINIA J. INT’L L. DIG. 1 (2014). See also ALVAREZ, *supra* note 2, at 247 *et seq.*

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