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TRIMS and the Concept of Investment Under the WTO Agreement

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I. INTRODUCTION

The Agreement Establishing the World Trade Organization (WTO Agreement) is an important source of global rules and norms about international trade law. It is also a source of rules and norms about investment. Given the lack of consensus about an international agreement on investment, it is useful to examine the WTO Agreement’s investment-related rules in order to consider how the concept of investment is being progressively articulated under that treaty. Vigourous WTO dispute settlement has provided a venue within which to detail and elaborate upon international investment disciplines, something that countries failed to achieve when negotiations broke down over a Multilateral Agreement on Investment (MAI) in 1998. However, the WTO’s limited rules on investment and its role as a “forum by default” should temper its approach to investment-related claims.

II. THE WTO AND INVESTMENT

The WTO Agreement is a treaty aimed at limiting tariffs, controlling the use of non-tariff

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1 Assistant Professor, Faculty of Law, University of Western Ontario. Email: ccarmody@uwo.ca. The writer would like to thank the Faculty of Law, University of Western Ontario, for making attendance at the Third Trilateral Conference possible.
3 Persistent concern over the nature and substance of a global framework for investment lead to the collapse of efforts to conclude a Multilateral Agreement on Investment (MAI) in 1998. A draft MAI is reproduced at
barriers, and eliminating discriminatory treatment in international trade. It came into being in 1994 to succeed the General Agreement on Tariffs and Trade (GATT) and expands upon basic GATT disciplines for trade in goods by providing 12 additional multilateral trade agreements (MTAs). The MTAs regulate trade in goods more specifically and they prevail over GATT in the event of a conflict. One of the MTAs is the Agreement on Trade-Related Investment Measures (TRIMS) which was included in the WTO Agreement in recognition of the fact that government rules about investment can have important effects on international trade. For instance, competition can be affected by government regulations requiring investors to purchase or use products of domestic origin, or that impose quotas on imports tied to investors’ rate of exports or foreign exchange earnings.

Prior to the WTO Agreement, some GATT cases did deal with investment-related rules\(^4\) and a few GATT panels took into consideration the reasonable expectations of investors in finding national legislation non-compliant.\(^5\) On the whole, however, an international consensus about rules relating to investment was lacking. As a matter of theory national laws about investment may influence trade, but it is not always clear that they do. For instance a commitment to sell a certain percentage of production within the country of investment does

\[\text{www.essential.org/monitor/mai/contents.htm (Jan. 13, 1997).}\]

\(^4\) See Canada – Administration of the Foreign Investment Review Act, B.L.S.D. 30\(^{th}\) Supp. 140 (1982). The United States in that case alleged that commitments obtained by the Canadian government from foreign investors to purchase Canadian goods or from Canadian suppliers constituted “requirements” inconsistent with the national treatment obligation of GATT Art. III:4. The panel agreed, ruling that the purchasing requirement infringed the rights of exporters who would otherwise have supplied the investor. However, it found no violation of investor rights or the rights of the investor’s home country. It observed that “The purpose of GATT Art. III:4 is not to protect the interests of the foreign investor but to ensure that goods originating in any other contracting party benefit from treatment no less favourable than domestic (Canadian) goods, in respect of the requirements that affect their purchase (in Canada).” See Ibid., p. 160.

\(^5\) See for instance Japanese Measures on Imports of Leather, B.L.S.D. 26\(^{th}\) Supp. 320 (1979), para. 55. In this respect see also United States – Measures Affecting Alcoholic and Malt Beverages, B.L.S.D. 39\(^{th}\) Supp. 206 (1992), para. 5.60, where legislation was found to constitute a GATT violation even though it was not being enforced, for the following reason:

Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply
influence international trade because it depresses demand for imports, whereas it is less clear that a swift approvals process for foreign investment will. Hence, investment disciplines were included in the WTO Agreement in a very limited form and an attempt was made to ensure that they were strictly trade-related.

Recently, however, investor expectations have been “rediscovered” by WTO panels as a justification for declaring national legislation WTO-inconsistent. Two recent WTO panels have made clear that even the potential of proposed or discretionary government measures to impact upon individual investors is reason to find national laws WTO-inconsistent. The problem with this development is that whereas the text of TRIMS is careful to apply international rules about investment to trade-related measures, no such care is taken by panels in defining the scope of reasonable “investor expectations”. Almost any government measure – from zoning regulations to changes in the discount rate – could be said to impact upon individual investor decisions. Unfortunately, panels have not given any indication when the reasoning of expectations will be applied. Consequently, the latest interpretations offer overly broad scope for WTO dispute settlement to constrain government action.

III. THE TRIMS AGREEMENT AND ITS INTERPRETATION

Daniel Price and Bryan Christy observe that while “proponents of investment discussions in the Uruguay Round had high hopes for the conclusion of a new multilateral agreement on investment”, the final text of the WTO Agreement made only a modest contribution to the protection of investment. The TRIMS Agreement only covers trade in goods. It does not apply

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investment disciplines to the two other domains of WTO coverage, services or intellectual
property.\footnote{TRIMS Art. 1 states that “This Agreement applies to investment measures related to trade in goods only”. Akira Kotera has pointed out that the GATS in effect provides for investment disciplines by allowing for WTO member countries to specifically commit to the commercial presence of foreign service providers within their national territory. See Akira Kotera, \textit{Are Multilateral Investment Rules Necessary and Possible?: On Trade and Investment in the WTO's Multilateral Trade Negotiations}, elsewhere in this volume.}

The TRIMS’ nine articles cover national treatment and quantitative restrictions, differential treatment for developing countries, notification of non-conforming measures and transitional provisions, transparency, and institutional arrangements. The core TRIMS obligations are set out in TRIMS Art. 2, which reads:

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMS that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

By this article WTO members are prohibited from applying trade-related investment measures in a way that contravenes the national treatment obligation in GATT Art. III or the prohibition on quantitative restrictions in GATT Art. XI. This means, for example, that governments cannot condition national treatment on the use of a specific volume or value of domestic products nor can they restrict an investor’s imports based on its rate of local production. Additionally, under TRIMS Art. 5.2 WTO members have committed to phase-out all existing non-conforming TRIMS by 2002.

A preliminary matter in determining the ambit of the TRIMS Agreement is the definition of “investment measures”. TRIMS contains an Illustrative List of prohibited investment measures, but this uses the term “includes” and is therefore not exhaustive. There remains
considerable scope for the identification of prohibited TRIMS in the course of WTO dispute
settlement.

In *Indonesia – Certain Measures Affecting the Automobile Industry*\(^9\) the panel stated that it did not intend to provide a uniform definition. Instead the panel emphasized that “our characterization of the measures as “investment measures” is based on an examination of the manner in which the measures at issue in this case relate to investment”\(^10\), adding that “There may be other measures which qualify as investment measures within the meaning of the TRIMS Agreement because they relate to investment in a different manner.”\(^11\) In that instance the panel concluded that investment measures were measures necessarily having “a significant impact on investment” in the industrial sector under scrutiny, automobile manufacturing. The panel also concluded that the specific measure at issue, a local content requirement, was “trade-related” because it tended to distort domestic production, with inevitable consequences for imports.\(^12\)

The definition offered by the panel in *Indonesia – Autos* is open-ended, offering little guidance for panels identifying investment measures in the future. The panel’s focus on the manner of the measure’s application was essentially effects-based, yet there was little in its methodology about what criteria are to used to determine effect. Many government measures can tend to distort domestic production and can therefore be said to be “trade-related”. Consider a business tax or a pollution abatement measure. Likewise, there was no indication when the effect would be considered to have gone beyond some permissible threshold and have an impermissible “significant impact”. One possibility might be to say that the manner of a measure’s application

\(^10\) Ibid., para. 14.80.
\(^11\) Id.
\(^12\) “We now have to determine whether these investment measures are “trade-related”. We consider that, if these measures are local content requirements, they would necessarily be “trade-related” because such requirements, by definition, always favour the
where it is production-related, that is, where it has a demonstrable impact upon the production of a good. Again, however, this reasoning is speculative. Ultimately, the analysis in Indonesia – Autos is vague and unsatisfying.

TRIMS Art. 2.1 is an application to investment measures of the national treatment obligation embodied in GATT Art. III. For instance in European Communities – Regime for the Importation, Sale and Distribution of Bananas\(^\text{13}\) (Bananas III) the panel observed that “the TRIMS Agreement essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned.” The panel added that “the TRIMS Agreement does not add to or subtract from those GATT obligations, although it clarifies that Article III:4 may cover investment-related matters.”\(^\text{14}\) This observation is confirmed by the scant jurisprudence on TRIMS to date. Countries have been more willing to invoke GATT rather than TRIMS, giving the agreement a secondary importance.\(^\text{15}\)

National treatment in GATT Art. III and national treatment of investors in TRIMS Art. 2.1 are not equal or co-extensive obligations. The panel in Indonesia – Certain Measures Affecting the Automobile Industry\(^\text{16}\) emphasized that while “the TRIMS Agreement codifies the GATT 1947 panel jurisprudence concerning Article III:4 arising out of such cases as Italian Tractors, EC - Parts and Components, and FIRA … more generally, Article III:2, Article III:4, and the TRIMS Agreement each impose legally distinct obligations on Members, and a single measure

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\(^{13}\) WT/DS27/R/USA (May 22, 1997).

\(^{14}\) Ibid., para. 7.185.

\(^{15}\) “The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMS Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia’s obligations under the TRIMS Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT.” Indonesia – Autos, para. 14.93; “a finding that the measure in question would not be considered a trade-related investment measure for the purposes of the TRIMS Agreement would not affect our findings in respect of Article III:4 since the scope of that provision is not limited to TRIMS and, on the other hand, steps taken to bring EC licensing procedures into conformity with Article III:4 would also eliminate the alleged non-conformity with obligations under the TRIMS Agreement.” Bananas III, para. 7.186.
may be found to be inconsistent with all three.”\textsuperscript{17} The panel went on to explain that “when the TRIMS Agreement refers to “the provisions of Article III”, it refers to the substantive aspects of Article III; that is to say, conceptually, it is the ten paragraphs of Article III that are referred to in Article 2.1 of the TRIMS Agreement, and not the application of Article III in the WTO context as such.”\textsuperscript{18}

The distinct nature of the legal obligation under TRIMS may be difficult to identify given that it is usually applied together with other WTO disciplines to a single legislative measure.\textsuperscript{19} The panel in Indonesia – Autos acknowledged this potential double aspect, that is, the provisions' national treatment character and their investment character. In that case the panel identified its task under TRIMS as being to determine the WTO consistency of local content requirements made effective through the custom duty and tax benefits for Indonesia’s car programs versus the more general GATT Art. III:4 task of discerning differential treatment between foreign and domestically produced automobiles in Indonesia.

The association of TRIMS Art. 2.1 with GATT Art. III:4 has tended to blend the analysis of both provisions. In Indonesia – Autos TRIMS was held to be \textit{lex specialibus} and to take precedence in the order of analysis.\textsuperscript{20} In Canada – Certain Measures Affecting the Automotive

\begin{thebibliography}{99}
\item \textit{Ibid.}, paras. 6.100-6.103.
\item The panel’s articulation of its reasoning is somewhat opaque. It added “Thus if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purpose of the TRIMS Agreement. This view is reinforced by the fact that Article 3 of the TRIMS Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMS Agreement were to refer to Article III as applied in the light of other (non Article III) GATT rules, there would be no need to refer to such general exceptions.” \textit{Id.}, para. 14.61. “…the TRIMS Agreement has an autonomous legal existence, independent from that of Article III. Consequently, since the TRIMS Agreement and Article III remain two legally distinct and independent sets of provisions of the WTO Agreement, we find that even if either of the two sets of provisions were not applicable the other one would remain applicable.” \textit{Id.}, para. 14.62.
\item “…we consider that we should first examine the claims under the TRIMS Agreement since the TRIMS Agreement is more specific than Article III:4 as far as the claims under consideration are concerned.” Indonesia – Autos, para. 14.63.
\end{thebibliography}
Industry\textsuperscript{21}, however, TRIMS was interpreted distinctly and supplementarily. There the panel observed:

\ldots we note that there is disagreement between the parties not only on whether the measures at issue can be considered to be "trade-related investment measures" but also on whether the Canadian value added requirements and ratio requirements are explicitly covered by the Illustrative List annexed to the TRIMS Agreement. It would thus appear that, assuming that the measures at issue are "trade-related investment measures", their consistency with Article III:4 of the GATT may not be able to be determined simply on the basis of the text of the Illustrative List but may require an analysis based on the wording of Article III:4. Consequently, we doubt that examining the claims first under the TRIMS Agreement will enable us to resolve the dispute before us in a more efficient manner than examining these claims under Article III:4.\textsuperscript{22}

The conceptual proximity of TRIMS with GATT means that WTO panels will rarely make a finding of violation based \textit{solely} on TRIMS. In \textit{Indonesia – Autos}, for instance, the panel found that tax and tariff benefits contingent on meeting local requirements under Indonesia’s car programs were impermissible advantages under TRIMS, but then went on to make findings under GATT Art. III:2.\textsuperscript{23} In contrast in \textit{Bananas III} the panel found that the allocation to certain operators of a percentage of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates was inconsistent with the requirements of GATT Art. III:4. Consequently, it reasoned that there was no need to make a finding on TRIMS Art. 2.\textsuperscript{24} Thus, a particular national measure may contravene Art. III, but that does not necessarily make it a violation of investment rules. This conclusion should strike a cautionary note about the need to examine and interpret WTO investment obligations reasonably and not simply because a national measure could conceivably affect investment decisions in some way.

TRIMS Art. 2.1 also refers to the possibility that an investment measure could violate the obligation to generally eliminate quantitative restrictions set out in GATT Art. XI:1. GATT Art.

\textsuperscript{21} WT/DS139/R, WT/DS142/R (May 31, 2000).
\textsuperscript{22} \textit{Ibid.}, para. 10.63.
XI:1 is essentially a catch-all. GATT and WTO panels have deemed a wide range of behaviour to contravene it.\textsuperscript{25} For this reason the Illustrative List in the Annex to TRIMS sets out trade-related investment measures which are clearly inconsistent with GATT Art. XI:1, including those which tie imports to the value of production exported or to foreign exchange inflows, or which restrict the total exports from an enterprise. To date there have been no successful challenges under this provision.

In conclusion, then, the similarity of TRIMS and GATT obligations makes TRIMS of secondary significance to the general obligation to treat imports and exports like national products. At the same time, the fact that at least one panel has made a distinction between TRIMS and GATT disciplines suggests that this difference may be further elaborated upon in future, perhaps in a decision on the relationship between TRIMS and GATT Art. XI:1.

IV. THE CONCEPT OF INVESTMENT UNDER THE WTO AGREEMENT

The relatively limited nature of TRIMS jurisprudence is to be contrasted with panel pronouncements in recent WTO cases where the concept of investment has been broadly interpreted to justify findings of inconsistency. Whereas the text of TRIMS is careful to tie investment rules to \textit{trade-related} activity, the latest interpretations appear to proscribe government measures because of their potential to impact on wide-ranging investor expectations, with considerable possibility for constraining government action. This goes well beyond the negotiated wording of TRIMS.

\textsuperscript{24} WT/DS27/R/USA, para. 7.187 (May 22, 1997).

\textsuperscript{25} GATT Art. XI:1 provides that “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting parties …”. The prohibition has been held to extend to “administrative guidance (Japan – Semi-conductors, B.I.S.D. 35\textsuperscript{th} Supp. 157), residual restrictions (French Import Restrictions, B.I.S.D. 11\textsuperscript{th} Supp. 94; EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong, B.I.S.D. 30\textsuperscript{th} Supp. 129), import or export prohibitions (United States – Restrictions on Imports of Tuna, B.I.S.D. 39\textsuperscript{th} Supp. 201; Canada – Measures Affecting the Export of Unprocessed Herring and Salmon, B.I.S.D. 35\textsuperscript{th} Supp. 98) and minimum price systems for imports or exports (EEC – Programme of Minimum Import Prices, Licences and Surety
At least two recent WTO cases stressed the need to provide “security and predictability” to investors as a basis for finding proposed government action WTO-incompatible. The phrase originates in the WTO Dispute Settlement Understanding26 (DSU) which provides an integrated set of dispute resolution procedures for the WTO. DSU Art. 3.2 describes the WTO dispute settlement system as “a central element in providing security and predictability to the multilateral trading system.”

In United States – Section 301-310 of the Trade Act of 197427 the measure at issue was ss. 304-306 of the United States Trade Act of 1974.28 This legislation is designed to authorize retaliation against foreign unfair trade practices. The Act permits the United States Trade Representative (USTR) to make a finding of inconsistency of a foreign measure under s. 304 of the Act, and establishes time limits within which determinations must be made and trade sanctions taken under ss. 305 and 306. The principal complaint of the European Community was that s. 304 contravened DSU Art. 23 by providing for an independent decision on compliance by the USTR versus a reconvened panel of the WTO, and that ss. 305-306 contravened the DSU more generally by precluding the United States from complying with DSU rules in situations where a prior multilateral ruling on the conformity of implementing measures had not yet been adopted by the WTO’s Dispute Settlement Body.29

The principal US submission contended that only legislation mandating a WTO

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29 DSU Art. 23.1 provides that:

When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of [the DSU].
inconsistency or precluding WTO consistency, could, as such, violate the WTO Agreement.\(^{30}\)

The panel disagreed. It observed with respect to s. 304 that:

> The statutory language which gives the USTR this discretion [to make a finding of inconsistency] on its face precludes the US from abiding by its obligations under the WTO. In each and every case when a determination is made whilst DSU proceedings are not yet exhausted, Members locked in a dispute with the US will be subject to a mandatory determination by the USTR under a statute which explicitly puts them in that very danger which Article 23 was intended to remove.\(^{31}\)

In particular, the panel was concerned that “a promise to have recourse to and abide by the rules and procedures of the DSU, also in one's legislation, includes the undertaking to refrain from adopting national laws which threaten prohibited conduct.”\(^{32}\)

What was the panel’s rationale for finding mere threatened, as opposed to actual, conduct WTO-inconsistent? The panel grounded its reasoning in the protection of individual economic activity, a protection implicitly linked to individual investment decisions. It stated:

> Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.\(^{33}\)

A source of this obligation was WTO Agreement’s requirement of “security and predictability” in the multilateral trading system. The panel added:

> The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

> Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of

\(^{30}\)WT/DS152/R, para. 7.51 (Dec. 22, 1999) [emphasis added].

\(^{31}\)Ibid., para. 7.61.

\(^{32}\)Ibid., para. 7.68.

\(^{33}\)Id., para. 7.73.
individuals within it. Sections 301-310 themselves recognize this nexus. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators.\textsuperscript{34}

The panel’s references to individual economic operators were undoubtedly connected with their individual investment decisions. In the panel’s conception, private actors conduct business activity based on the security of the trading environment and this, in turn, guides investment decisions. For this reason the \textit{prospective effect} on investment of threatened retaliatory action was enough to invoke the panel’s condemnation. The panel observed that “in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals.”\textsuperscript{35} The reference to “economic activity” is undoubtedly investment. This was made clear in the panel’s observation that:

a domestic law which exposed imported products to future discrimination was recognized by some GATT panels to constitute, by itself, a violation of Article III, even before the law came into force. Finally, and most tellingly, even where there was no certainty but only a risk under the domestic law that the tax would be discriminatory, certain GATT panels found that the law violated the obligation in Article III. A similar approach was followed in respect of Article II of GATT 1994 by the WTO panel on Argentina – Textiles and Apparel (US) when it found that the very change in system from \textit{ad valorem} to specific duties was a breach of Argentina’s \textit{ad valorem} tariff binding even though such change only brought about the potential of the tariff binding being exceeded depending on the price of the imported product.

The rationale in all types of cases has always been the negative effect on economic operators created by such domestic laws. An individual would simply shift his or her trading patterns – buy domestic products, for example, instead of imports – so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or threat, when real, was found to affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products: This shift would be caused by, for example, an increase in the cost of imported products and a negative impact on economic planning \textit{and investment} to the detriment of those products. This rationale was paraphrased in the Superfund case as follows:

\textsuperscript{34} \textit{Id.}, 7.76-7.77.
\textsuperscript{35} \textit{Id.}, 7.81.
"to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles [GATT Articles III and XI] are not only to protect current trade but also to create the predictability needed to plan future trade".36

The U.S. – Section 301 panel therefore concluded that “Article III:2 is not only a promise not to discriminate in a specific case, but is also designed to give certain guarantees to the market place and the operators within it that discriminatory taxes will not be imposed.” Discretionary legislation permitting unilateral action would damage the marketplace itself because:

The mere fact of having legislation the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures.37

The investment-focused language employed by the panel in U.S. – Section 301 has had a profound effect. It has been cited in at least one subsequent WTO decision. In U.S. – Import Measures on Certain Products from the European Communities it was cited in support of the panel’s position that unilateral measures taken without prior WTO authorization violate the WTO Agreement.38 Moreover, the focus on investment can be seen as a key element in several other recent cases such as Canada – Patent Protection of Pharmaceutical Products39 and Canada – Certain Measures Affecting the Automotive Industry.40 In those instances the impact of laws on investment decision-making was clearly part of the panel’s conclusion to declare national legislation WTO-inconsistent.

Notwithstanding the expansive interpretation given to investment protection under WTO rules, there does not appear to be a similar concern about investment in the context of WTO-
authorized retaliation, a potential blindspot. This was evident in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under DSU Art. 22.6 (Complaint by Ecuador)*, one of several spin-offs from the WTO *Bananas III* litigation.

In the penultimate stage of the litigation Ecuador requested permission to retaliate against $1 billion worth of EC goods, services, and intellectual property to counter the effect of the EC’s discriminatory banana tariff. The Ecuadorian request was interesting inasmuch as retaliation until that time had focused on goods. There was considerable uncertainty about how service and intellectual property disciplines would be suspended. Ecuador therefore asked the arbitrator for suggestions about ways to do so.

The arbitrator’s comments are of interest because while WTO panels have emphasized the potential of discretionary legislation to detract from the security and predictability in the international trading system, the arbitrator appeared less concerned with the fate of those who might seek to take advantage of conditions created by WTO retaliation, that is, the “Ecuadorian CD bootleggers” and others, for investment purposes. The arbitrator found, for instance, that no trade in goods or intellectual services produced under a retaliatory regime could be traded internationally. For the purposes of its analysis the arbitrator considered goods produced under a retaliatory regime to be “counterfeit trade or pirated copyright goods” which countries have the right to suspend the import of under TRIPS Art. 51.

This seems an unnecessary conclusion given that such goods are not, strictly speaking, illegal, being manufactured by colour of right

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40 WT/DS139-142/AB/R (May 31, 2000).
42 See also United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Dec. 22, 1999); United States – Import Measures on Certain Products from the European Communities, WT/DS165/R (July 17, 2000).
43 Thus under TRIPS Art. 51 countries shall “adopt procedures to enable a right holder who has valid grounds for suspecting that the importation of counterfeit trade or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.”
pursuant to WTO authorization. The distinction was, however, lost on the arbitrator. Instead, the arbitrator asserted that limitation on their international trade would help to avoid “distortions in third-country markets”\textsuperscript{44} without considering the investment decisions of individual economic operators in a country authorized to retaliate. The arbitrator cautioned that:

\begin{quote}
Given this temporary nature of the suspension of concessions or other obligations, economic actors in Ecuador should be fully aware of the temporary nature of the suspension of certain TRIPS obligations so as to minimise the risk of them entering \textit{into investments} and activities which might not prove viable in the longer term.\textsuperscript{45}
\end{quote}

Here the difficulties of reconciling WTO authorization to retaliate with the reality of investment in the marketplace became starkly apparent. The arbitrator suggested that individual entrepreneurs might be interested in investing in a temporary regime for the manufacture of goods, provision of services, or the use of intellectual property, without taking into consideration that the \textit{very temporary nature} of such investment might be a \textit{disincentive} to retaliate. In other words, the arbitrator overlooked the specific concern articulated in \textit{U.S. – Section 301} and other cases that investment should occur under secure and predictable conditions; in a WTO retaliation scenario no security or predictability could be promised. This inherent disadvantage put into question the integrity of the concept of investment under the WTO Agreement.

V. A NEW MAI?

\textsuperscript{44} The arbitrator also referred to several cases where investment would be damaged by retaliatory action, observing for instance that “the requested suspension of certain TRIPS obligations ultimately interferes with private rights owned by natural or legal persons.” Likewise the arbitrator noted that “We are aware that the implementation of the suspension of certain TRIPS obligations may give rise to legal difficulties or conflicts within the domestic legal system of the Member so authorized (and perhaps even of the Member(s) affected by such suspension).” The arbitrator was also aware of the difficulties that suspension of certain service obligations would create:

\begin{quote}
In our view, it does not seem difficult to prevent EC service suppliers (in the pre-establishment stage) from establishing themselves in Ecuador. However, it may be possible in theory, but difficult to implement in practice, to prevent already locally established service suppliers of EC origin (in the post-establishment stage) from supplying services within Ecuador's territory. For example, it may cause administrative difficulties to close or limit the service output of a commercial presence in the form of a branch or representative office. Additional legal and administrative difficulties may arise when closing or limiting the output of a commercial presence in the form of an establishment enjoying legal personality in its own right due to the legal protection granted to juridical persons by national or international law.
\end{quote}

\textsuperscript{45} See WT/DS27/ARB/ECU (Mar. 24, 2000), para. 165 [emphasis added].
One remaining question is how the current protection of investment under the WTO Agreement compares with the Multilateral Agreement on Investment (MAI)? Do these emerging interpretations replicate the MAI? The central disciplines of the MAI concerned treatment of investors and investment and investment protection. MAI Part III provided for national treatment and MFN for investors and investment as well as on a number of “special topics” (key personnel, performance requirements, privatisation, monopolies/state enterprises, investment incentives and corporate practices, senior management and boards of directors). MAI Part IV provided for investment protection with respect to general treatment, expropriation and compensation, protection from strife, transfers, subrogation, protection of existing investments and the protection of investor rights from other agreements.

Basic TRIMS set out in the TRIMS’ Illustrative List cover only a small portion of MAI’s disciplines. However, the renewed emphasis on “security and predictability of the multilateral trading system” appears to go considerably further. The broad concept of investment could now encompass government mandated performance requirements, investment incentives and corporate practices, as well as aspects of general treatment, protection from strife, transfers, and subrogation. Even the sensitive topic of expropriation could conceivably fall within the “security and predictability” afforded to individual economic operators. As a result, new thinking about investment under the WTO Agreement may in fact replicate MAI disciplines in important respects.

The fundamental difficulty with the developing jurisprudence is its lack of adequate definition. Governments are constantly taking action that might somehow impact upon individual investment decisions. The reasoning pursued by the panel in U.S. – Section 301 and subsequently followed by other panels offers a poorly defined basis for distinguishing between pro- and anti-
investment measures and therefore between WTO-permissible and prohibited legislation. Indeed, one could ask what government measure does not impact the “security and predictability of the multilateral trading system”? Panels should be wary of expansive interpretations in this regard given the lack of consensus on investment disciplines that led to the abandonment of negotiations over an MAI.

VI. CONCLUSION

The concept of investment under the WTO Agreement has evolved from something modest into something considerably more ambitious. The TRIMS Agreement exists in close association with the substantive obligations of GATT Art. III and XI, which make it difficult to distinguish as a separate body of rules. However, experience with the TRIMS is to be contrasted with recent interpretation of the phrase “security and predictability of the multilateral trading system” in DSU Art. 3.2, where the words “multilateral trading system” have been taken to refer to the wider investment community and the potential impact of legislation on it. This concept of investment is a broad and ill-defined one that extends WTO disciplines, but at the same time is not always applied consistently, as the arbitrator’s comments on Ecuador’s request to retaliate in Bananas III revealed.

The developing jurisprudence about investment is notable at a time when the WTO must be acutely concerned about its legitimacy. The focus on individual economic interests is a renewed one, but is also problematic because legitimacy requires consistent treatment of economic operators in all circumstances of WTO action. So far panels has not developed any consistent logic on this point. Treatment of investment under the WTO Agreement obviously remains something to be more completely and comprehensively developed in the future.