



Society of  
International  
Economic  
Law

Online Proceedings  
Working Paper No. 2016/15

**FIFTH BIENNIAL GLOBAL CONFERENCE  
JULY 7-9, 2016  
MANDELA INSTITUTE  
UNIVERSITY OF THE WITWATERSRAND**

**How does International Economic Law regulate the right of  
entry of investments in services?**

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June 29, 2016

Published by the Society of International Economic Law

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## **How does International Economic Law regulate the right of entry of investments in services?**

Murilo Lubambo<sup>1</sup>

**Abstract:** This paper analyses the different ways that international law regulates the entry of foreign investments. By comparing the provisions in the regimes of trade and investment law, this paper argues that there is more liberalization in investment treaties and more investment regulation in the GATS than commonly thought. Different clauses reflect the varied techniques used to regulate the entry of foreign investments and investors in services. No matter how divergent the goals of trade and investment treaties may be, in relation to the entry of investments and investors, the interpretation of the wording of their provisions leads to particularly similar results. The concept of commercial presence in the GATS includes aspects equivalent to the so-called establishment of foreign direct investments. The interpretation of GATS rules as covering potential service suppliers bear a resemblance to concepts already present in BIT practice in relation to investors that seek to invest. Therefore, there are some signs of an increasing conceptual and substantive convergence of rules. The way the admission clauses evolved to establishment clauses in some treaties shows that the difference between them, while less radical and of limited practical relevance, may indicate a step towards a convergence with international trade law. There has also been a trend towards treaty language granting more entry rights and commitments. This was done by the progressive introduction of national treatment for entry rights, the expansion of services coverage in Mode 3 and the recognition and clarification of the rights to potential investors. The increasing number of ITs containing establishment rights is noted especially in light of the new mega-regionals. There has also been a disposition to include provisions related to the entry of investors coming from the international trade law world into the investment law arena. In sum, the substantive convergence of the rules related to entry of investments in treaty-making is becoming more evident.

**Keywords:** International Investment Law, International Trade Law, WTO, GATS, Entry Rights, Establishment, Admission

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## **1. Introduction**

This paper analyses the content of the international rules regulating the entry<sup>2</sup> of foreign investments, with a particular emphasis on the services sector. The focus on entry is explained by the great potential for substantive overlap between rules of trade and investment law in this regard. In general terms, international trade is about access, and to the extent that investment law regulates the entry of investments, it also regulates access.

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<sup>2</sup> The paper uses the term “entry” as a general, all-encompassing term, broader than the more specific terms “admission”, “establishment”, “commercial presence” and “access”.

The interrelation between international trade law and investment law has been highlighted by recent academic literature.<sup>3</sup> It has been noted that government regulation progressively affects both trade and investment flows and that the growing convergence between trade and investment will probably not be reversed.<sup>4</sup> Strong convergence is evident when the same economic activity fulfils both definitions in trade and investment treaties.<sup>5</sup> Thus, differences in adjudication seem to be an “accident of legal history”<sup>6</sup>. Some identify progressive trend of convergence in the discourse and case law, when comparing the regulatory space.<sup>7</sup> Some even claim that the convergence should lead to a rethinking of investment and trade law as merged systems, part of an emerging international economic law regime.<sup>8</sup>

Others are more cautious. Some underline that the conceptual differences between trade and investment explain the different regulations, each responding to particular policy purposes and challenges.<sup>9</sup> There have been critiques of the reliance on arguments raised during dispute settlement in the World Trade Organisation - WTO to solve investment cases, on grounds of legitimacy.<sup>10</sup> The criticism focuses on the undue transplantation of interpretations, approaches and solutions from trade law to investment law and underline the broader mandate of WTO tribunals and the wider flexibility of WTO treaty language.<sup>11</sup> Some emphasise the deep normative differences underlying the systems and claim that cross-fertilization will remain limited, so that the convergence is far from real.<sup>12</sup>

It has been argued there is nothing wrong in having two regimes challenging the same measures<sup>13</sup> and competing for the best regulatory approach.<sup>14</sup> These kinds of

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<sup>3</sup> One cannot do justice to the expressive literature arguing for and against the unity of international economic law and referring to systemic integration. A good compilation on cross-fertilization between WTO law and investment law by means of shared normative interpretation and on the argument of persuasiveness vs authoritativeness of WTO case law can be found in Diane Desierto, ‘Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making’ (2014) 26 *Florida Journal of International Law* 51, 58–66.

<sup>4</sup> Piet Eeckhout, ‘The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch’ (2010) 13 *Journal of International Economic Law* 3, 5.

<sup>5</sup> Tomer Broude, ‘Investment and Trade: The “Lottie and Lisa” of International Economic Law?’ in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 146–147.

<sup>6</sup> Eeckhout (n 4) 5.

<sup>7</sup> Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ (2014) 36 *University of Pennsylvania Journal of International Law* 1, 86–87.

<sup>8</sup> Sergio Puig, ‘International Regime Complexity and Economic Law Enforcement’ (2014) 17 *Journal of International Economic Law* 491, 515; Sergio Puig, ‘The Merging of International Trade and Investment Law’ (2015) 33 *Berkeley Journal of International Law* 1, 59.

<sup>9</sup> Desierto (n 3) 54–55.

<sup>10</sup> Debra Steger, ‘International Trade and Investment: Towards a Common Regime?’ in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 165.

<sup>11</sup> Desierto (n 3) 56–57.

<sup>12</sup> Mark Wu, ‘The Scope and Limits of Trade’s Influence in Shaping the Evolving International Investment Regime’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 209.

<sup>13</sup> Arwel Davies, ‘Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does A Measure Relate to Investment?’ (2012) 15 *Journal of International Economic Law* 793.

norms are a fact of international law and a facet of its fragmentation,<sup>15</sup> a view that supports a pluralist account.<sup>16</sup> Anyway, some aspects of these international rules regulating the entry of investments may constitute what has been labelled as multi-sourced equivalent norms. In this regard, it should be noted that:

Even if norms expressed in different rules of international law *have similar or identical content*, they may have different conditions of creation, application or termination and *different institutions and mechanisms* that ensure their implementation.<sup>17</sup>

There has been, though, a recognition that when treaty-practice has consciously and clearly incorporated WTO trade provisions within investment agreements there is a need to refer to WTO case law.<sup>18</sup> In fact, some aspects of the bifurcation are difficult to justify, since the historical and political causes for it may have disappeared.<sup>19</sup> This remark applies particularly to the area of investments in services, as will be shown.

Issues of the interpretation of fundamental concepts have arisen in both investment and trade treaties.<sup>20</sup> The paper will deal, firstly, with the idea of entry expressed by the concept of admission and the qualified obligation to admit in the practice of traditional bilateral investment treaties – BITs – or, more generally investment treaties – ITs. It will do so by analysing the evolution of the interpretation of treaty clauses governing states' rights and obligations in relation to the admission of investments. Subsequently, it will focus on the concept of establishment, another concept expressing entry. The paper includes an overview of the US BIT model and of the practice of the North American Free Trade Agreement – NAFTA.<sup>21</sup> It will briefly comment on recent trends towards establishment rights and obligations.

The following section will cover entry of investments as expressed in the concepts of commercial presence, market access and discrimination of the General Agreement of Trade in Services (GATS)<sup>22</sup>, with a focus on service suppliers. Finally, the

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<sup>14</sup> Christian Tietje, 'Perspectives on the Interaction between International Trade and Investment Regulation' in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 171.

<sup>15</sup> Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Draft Conclusions – Appendix (2 May 2006) UN Doc A/CN.4/L.682/Add.1 paras 11-16.

<sup>16</sup> For a critique, see Jürgen Kurtz, 'On the Evolution and Slow Convergence of International Trade and Investment Law' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 123; Jürgen Kurtz, 'The Intersections between International Trade and Investment Law' in N Jansen Calamita and others (eds), *Current issues in investment treaty law* (British Institute of International and Comparative Law 2013) 180–181.

<sup>17</sup> Martins Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Hart 2011) 14–15 fns omitted, emphasis added.

<sup>18</sup> Desierto (n 3) 62–63.

<sup>19</sup> Broude (n 5) 155.

<sup>20</sup> Eeckhout (n 4) 5; 26.

<sup>21</sup> North American Free Trade Agreement (adopted 17 December 1992) 32 ILM 289, 605 (1993) (NAFTA)

<sup>22</sup> General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade

last section will cover the approaches to entry of investors adopted in the Trans-Pacific Partnership Agreement - TPP and in the Comprehensive Economic Trade Partnership – CETA, involving the European Union and Canada.

This paper suggests that, at least in the provisions of entry of investments in services, there are some signs of an increasing convergence of both concepts and rules. The enforcement of these rights and obligations, including jurisdictional aspects and remedies will be dealt with in another paper.

## 2. Admission

### A) General International Law

Before addressing the concept of admission, it is useful to briefly explore the backdrop of international law in the area. While there is a general duty for States to admit their own nationals into their territory, there seems to be no general rule that obliges a state to grant access to a foreign individual or entity.<sup>23</sup> A state cannot claim the absolute right of its nationals to enter into or reside on the territory of any foreign state.<sup>24</sup> A state has great discretionary powers to accept foreigners and allow them to perform economic activities in its territory.<sup>25</sup> By treaty, however, a state may impose on itself the obligation not only of the entry of foreigners but also of the settlement of business activities.<sup>26</sup>

In the context of foreign investments, all the general observations above apply. The right of the state to prohibit, control or allow entry of foreign investors arises from a dimension of sovereignty.<sup>27</sup> There appears to be no general legal obligation on the matter of admission of investments from the viewpoint of customary international law.<sup>28</sup> Thus, there is consensus that each state is fully sovereign to admit investments

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Negotiations 284 (1999), 1869 UNTS 183 (GATS).

<sup>23</sup> Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978) 136–137.; *Nottebohm Case (Liechtenstein v Guatemala)* (Dissenting Opinion by Judge Read) [1955] ICJ Rep 4, 46

<sup>24</sup> Robert Yewdall Jennings, *Oppenheim's International Law* (9th ed, Longman 1992) 897; Goodwin-Gill (n 23) 196.

<sup>25</sup> Dominique Carreau, Patrick Juillard and Thiébaud Flory, *Droit International économique* (2 éd refondue et augm, Librairie générale de droit et de jurisprudence 1980) 444.

<sup>26</sup> Goodwin-Gill (n 23) 160–197; Jennings (n 24) 898.

<sup>27</sup> Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 10; Giorgio Sacerdoti, 'The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties' (2000) 1 *The Journal of World Investment & Trade* 105, 105; Rudolf Dolzer and Christoph H Schreuer, *Principles of International Investment Law* (2nd ed, OUP 2012) 88; M Sornarajah, *The International Law on Foreign Investment* (3rd ed, CUP 2010) 88.

<sup>28</sup> Ibrahim FI Shihata, 'Recent Trends Relating to Entry of Foreign Direct Investment' (1994) 9 *ICSID Review* 47.

and set the conditions for their admission. But the definition of the exact features of this inherent right is essential to provide the background in which states operate in the absence of mutual commitments.

The admission does not apparently require justification or reasoning and appears to be at the state's own convenience. While, ideally, the rule of law is a feature that should guide all internal actions of the state, its precise characteristics at the international level are not fully defined.<sup>29</sup> One might say that a state may admit an investment even if it is prohibited under its domestic regulations or deny it even if it should be allowed.

This may be tempered by considerations based on the principle of good faith, which is not a rule, but can be perhaps understood as a limitation on a State's external sovereignty.<sup>30</sup> Good faith may play a role in cases of state unilateral acts strongly encouraging or granting admission, followed by an unjustified refusal, when actual entry is attempted.<sup>31</sup> The writings of classical authors already indicated a more nuanced approach, suggesting perhaps a relative right of settlement to exercise economic activities in a foreign territory and the need to justify a refusal.<sup>32</sup>

Another aspect of the right becomes evident if the reasons for non-entry or discrimination breach rules which have been considered as *jus cogens*.<sup>33</sup> One example is racial prejudice.<sup>34</sup> While state practice indicates a degree of recognition of discretion in that regard,<sup>35</sup> the principle of non-discrimination on racial grounds exerts a limit on the

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<sup>29</sup> Rosalyn Higgins, 'The Rule of Law: Some Sceptical Thoughts', *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009) 1339.

<sup>30</sup> Cf Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, 58.

<sup>31</sup> Robert Kolb, *La Bonne Foi En Droit International Public: Contribution à L'étude Des Principes Généraux de Droit* (1ère éd, Presses universitaires de France 2000) 108; 323-338; 357-393; 482-486.

<sup>32</sup> Francisco de Vitoria, *Francisci de Victoria De Indis et De Ivre Belli Relectiones* (The Carnegie Institution of Washington 1917) 151-154; 161-162; Hugo Grotius and Francis W Kelsey, *De Jure Belli Ac Pacis Libri Tres. Vol. 2, The Translation* (Oceana : Wildy & Sons 1964) 201-205; Hugo Grotius, Robert Feenstra and Jeroen Vervliet, *Hugo Grotius Mare liberum, 1609-2009: original Latin text (facsimile of the first edn, 1609) and modern English translation* (Brill 2009) 33; 131-133; see also Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (New edn corr, tr from the French, G G J and J Robinson 1793) 35-39; 134; 156-160; 167-168; 171; 173.

<sup>33</sup> *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4 p 22; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 79; Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 53.

<sup>34</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 para 34; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6 para 64; Study Group of ICL (n 15) paras 33-35; Charter of the United Nations (entered into force 24 October 1945) 892 UNTS 119 (UN Charter) arts 1 (3), 13(1)b, 55(c), 76(c); ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 85.

<sup>35</sup> Fiona C Beveridge, 'Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria' (1991) 40 ICLQ 302; Fiona Beveridge, *The Treatment and Taxation of Foreign Investment under International Law: Towards International Disciplines* (Juris ; Manchester University Press 2000) 11.

state's decision-making power.<sup>36</sup> It is to be accepted that blatant acts against prospective investors, which are arbitrary and unjustified, that is, motivated solely by racial discrimination and lacking objective justification<sup>37</sup> are to be considered unlawful and prohibited under general international law.

In any case, the establishment of permanent presence and settlement of foreign businesspeople and foreign investors has been historically granted by formal agreements.<sup>38</sup> The right to remain and engage in business activities granted by early Friendship, Commerce and Navigation Treaties – FCNs encompassed the settlement of some form of investments, such as warehouses.<sup>39</sup> It is important to point out that FCN treaties, unlike BITs, were often concluded between capital exporting countries.<sup>40</sup> At the beginning of the 20th century, a right of settlement in relation to industry (manufacturing and mining) started to be present in treaties, mainly in the form of a non-discrimination principle.<sup>41</sup>

## **B) Typical Clauses**

The main instruments to promote obligations of admission are treaties negotiated by states by which they commit themselves to accept those investments. The so-called admission model, or investment-control model, is followed by the majority of BITs and has been characterised as reserving to the host state the discretion to set admission procedures and the conditions of entry, which may change from time to time.<sup>42</sup> The full flexibility has been interpreted to allow for discretion to carry out national development goals.<sup>43</sup>

Several policy and economic arguments support this approach and a good number of them also refute it.<sup>44</sup> They are not going to be dealt with here, since they represent choices resulting from political processes and economic realities. But the absence of any international commitments may indicate a lack of will to attract

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<sup>36</sup> Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978) 187–188; 196; Randolph John Nogel, 'Human Rights and Uganda's Expulsion of Its Asian Minority' (1973) 3 *Denver Journal of International Law and Policy* 107, 105.

<sup>37</sup> Beveridge, *The Treatment and Taxation of Foreign Investment under International Law* (n 35) 11–13; Cf. Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 *British Yearbook of International Law* 264, 319. Cf *Barcelona Traction* (n 34) para 33–34.

<sup>38</sup> Karl Moore and David Lewis, 'The First Multinationals : Assyria circa 2000 B.C.' (1998) 38 *Management International Review* 95; Peter Frankopan, 'Byzantine Trade Privileges to Venice in the Eleventh Century: The Chrysobull of 1092' (2004) 30 *Journal of Medieval History* 135; Eric A Posner, *Economic Foundations of International Law* (Belknap Press of Harvard University Press 2013) 291.

<sup>39</sup> Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (OUP 2010) 415.

<sup>40</sup> Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Pub 2006) 71.

<sup>41</sup> Vandeveld (n 39) 30–31; 416.

<sup>42</sup> Joubin-Bret (n 27) 11–12.

<sup>43</sup> Pollan (n 40) 76.

<sup>44</sup> *ibid* 139–141.

investments. Admission policies and procedures represent an important and visible signal to investors, as the first point of contact, setting the tone and attitude for the following long-term relationship.<sup>45</sup>

The logical purpose of admission model treaties is that the state maintains the right to decide on the admission.<sup>46</sup> So, they apply several formulas in their clauses, which resort to the following language:<sup>47</sup>

I.

A state shall admit such investments:

II.

- in conformity (accordance) with the applicable laws and regulations;<sup>48</sup>
- subject to its laws and regulation;<sup>49</sup>
- in accordance with its laws and regulations;<sup>50</sup>
- in accordance with its legislation;<sup>51</sup>
- subject to its rights to exercise powers conferred by its laws or regulations;<sup>52</sup>
- in accordance with its laws and investment policies applicable from time to time;<sup>53</sup>
- subject to its rights to exercise powers in accordance with the applicable laws and regulations.<sup>54</sup>

Some BITs did not even include the duty of admission in accordance with local laws but used the language “endeavour” to admit; in fact, the language “shall admit” in the first part is to be noted as rather imperative.<sup>55</sup> The language of the second part of the clause appears to mean that the final admission decision depends on internal rules of the host state.<sup>56</sup>

In this regard, a careful analysis of the meaning of these terms in treaties should follow the interpretative rules of the VCLT.<sup>57</sup> As a proxy to the ordinary meaning of the

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<sup>45</sup> *ibid* 3;17;139.

<sup>46</sup> Joubin-Bret (n 27) 28.

<sup>47</sup> All ITs and model BITs and all the investment decisions mentioned here are available at the UNCTAD Database and Italaw respectively in <<http://investmentpolicyhub.unctad.org/IIA> > and <<http://www.italaw.com> > accessed 8 June 2016.

<sup>48</sup> See eg China-Japan BIT 1988; art III(2) of the Treaty of Friendship, Commerce and Navigation between the USA and the Italian Republic 79 UNTS 171;

<sup>49</sup> See eg art II of Jamaican Model BIT.

<sup>50</sup> See eg Switzerland-Peru [1991].

<sup>51</sup> See eg Germany-Estonia BIT [1994].

<sup>52</sup> See eg Dutch Model BIT.

<sup>53</sup> See eg art 3.1 Australia-Vietnam BIT [1991].

<sup>54</sup> See eg art 2.1 of the China-Japan-Korea Investment Treaty [2014].

<sup>55</sup> Antonio R Parra, ‘Principles Governing Foreign Investment, as Reflected in National Investment Codes’ (1992) 7 ICSID Review 428, 430.

<sup>56</sup> Pollan (n 40) 76.

<sup>57</sup> VCLT (n 33) arts 31-32

expression, one starting point would be to mention the definitions below from dictionaries. This technique has been resorted to in *Churchill*:<sup>58</sup>

In accordance with the rules of treaty interpretation, the Tribunal will start by ascertaining the ordinary meaning of the terms of Article 2(1). ... *According to the Oxford Dictionary of English, the verb "to admit" means "to allow" or "to accept". That same dictionary defines the noun "admission" as "the process or fact of entering or being allowed to enter a place or organization"*.

More specialized dictionaries bring the following definition to "admitted corporation": "A corporation licensed or authorized to do business within a particular state. – Also termed *qualified corporation; corporation qualified to do business*."<sup>59</sup>

This kind of language has been taken for granted and interpreted as unnecessary.<sup>60</sup> However, as shown in the first section, customary law also allows for arbitrary and non-reasoned decisions, perhaps tempered by *jus cogens* and good faith. Admission clauses are not merely a reinstatement of customary international law, since the discretion is to be exercised within the framework of the law and not on the basis of a frivolous decision.<sup>61</sup> Sacerdoti correctly recognises the progress of this language in comparison with previous expressions focusing on the conformity with national development policies and underlining specific procedures.<sup>62</sup> Vandeveldelde recognises that the provision is not without effect since:

It incorporates local law with respect to establishment into the BIT so that a failure by the *host state to adhere to its own law violates the BIT* ... Thus, while the host state may change its law at any time, it must adhere to its own law until such time as that law has been changed.<sup>63</sup>

The unqualified nature or extent of the reference to legislation is to be understood as its existence from time to time, not only at the time of the conclusion of the BIT but also subsequently.<sup>64</sup> The host state is free to review its laws after the BIT has entered into force.<sup>65</sup> It is important to recall that a "denial of admission or *its subjection to requirements not in conformity with the law* would therefore be a violation of the treaty, if not towards the investor, surely *in respect of its national state*."<sup>66</sup> The host state itself is bound by the obligation, and has itself to observe, for example, procedures of registration and authorization.

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<sup>58</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 para 288, fns omitted, emphasis added

<sup>59</sup> Bryan A Garner and Henry Campbell Black (eds), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 415 emphasis in the original.

<sup>60</sup> For instance, while Shihata emphasises that this provision establishes a presumption in favour of admission, he claims it is not a fundamental change compared to the absence of a BIT, since it would reflect customary law in the matter. Shihata (n 28) 55.

<sup>61</sup> Parra (n 55) 431-433.

<sup>62</sup> Sacerdoti (n 27) 108.

<sup>63</sup> Vandeveldelde (n 39) 413 emphasis added.

<sup>64</sup> Shihata (n 28) 55.

<sup>65</sup> Dolzer and Schreuer (n 27) 89.

<sup>66</sup> Sacerdoti (n 27) 109 emphasis added.

### C) Rescuing an Interpretation

Despite being explicitly referenced in BIT's preambles, the goal of promotion and, when present, liberalisation of investments has been commonly described as subsidiary to the protection granted to investments and as a natural consequence thereof.<sup>67</sup> But the discussion of access to investments raises the issue that the focus on protection in the interpretation of BITs is perhaps overshadowing the ordinary meaning of entry clauses, such as admission and establishment, as will be seen.

In international investment case law, most of the discussion on the legal concept of admission/authorization has been relevant in a slightly different context. The objective has been to check whether an investment is covered and protected by a BIT, that is, if it was regularly "admitted".<sup>68</sup>

Some argue that the admission clause acts as a filter to the protection by the BIT, preventing illegal or unlawful investments from being protected.<sup>69</sup> This draws on a line of awards in cases such as *Salini*,<sup>70</sup> *Tokios Tokeles*,<sup>71</sup> *Bayindir*<sup>72</sup> and *Inceysa*.<sup>73</sup> However, some arguments used to base decisions in these and other investment arbitration cases<sup>74</sup> indicate an increasing recognition that even in the absence of such or similar clauses, illegal investments are not to be protected.<sup>75</sup> An approach based on general principles is fully capable of excluding those investments.

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<sup>67</sup> For a discussion of the origins and aims of BITs, see Kenneth J Vandeveld, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard International Law Journal 469.

<sup>68</sup> For a recent decision that denies jurisdiction for the lack of an "admitted" investment, see *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 Award on Jurisdiction and Admissibility of 17 December 2015 (not yet published).

<sup>69</sup> Joubin-Bret (n 27) 18; 27.

<sup>70</sup> *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, Decision on Jurisdiction, Case No ARB/00/4 (July 23, 2001), 42 I.L.M. 609 (2003)

<sup>71</sup> *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18 Decision on Jurisdiction, 29 April 2004, paras 84-86, p. 28

<sup>72</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29 Decision on Jurisdiction, 14 November 2005, para 109

<sup>73</sup> *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 25 July 2006 paras 190-207.

<sup>74</sup> *Inceysa* (n 73) [paras 230-257]; *Plama Consortium Limited v Republic of Bulgaria*, Award, 27 August 2008, [paras 135-146]; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 10 June 2010 [paras 123-127]; *Yaung Chi Oo Trading Pte Ltd. v Government of the Union of Myanmar*, ASEAN ID Case No ARB/01/1 Award [para 58]; *Ioannis Kardassopoulos v The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007 [para 182]; *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 9 April 2009 [para 101]; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Final Award, 18 July 2014 paras 1349; 1352, p. 429-430;

<sup>75</sup> Stephan W Schill, 'Illegal Investments in Investment Treaty Arbitration' (2012) 11 Law and Practice of International Courts and Tribunals 281, 310-311; 314-315; 322; Dai Tamada, 'Host States as Claimants: Corruption Allegations' in Shaheez Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill 2014) 117.

Vandeveldel correctly points out that tribunals “have interpreted a provision that purports to expand investor rights as actually imposing a limitation on them.”<sup>76</sup> It is submitted that the correct way to assign meaning to the admission clauses, as developed above, is to consider it as the qualification of the obligation of the state to act in accordance with its *own* regulations. In *Aguas de Tunari*, the discussion developed around one objection to jurisdiction raised by Bolivia: that the language used in the admission clause prevented ICSID jurisdiction. The second sentence of Article 2 of the BIT between Bolivia and the Netherlands reads: “Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.”

The language makes reference to “rights to exercise powers”, which, to some commentators, means a “positive right to admit investments”.<sup>77</sup> The Tribunal said:

147. As to the second sentence, the Tribunal observes that if it omits the reference to Bolivian law, the second sentence states that both Bolivia and the Netherlands “shall admit” the investments of nationals of the other Contracting Party. *This obligation to allow the entry of foreign investment is a common provision in bilateral investment treaties, and is often termed an “admission clause.” The obligation to admit is “subject to” the decision of Bolivia (“its right”) to “exercise powers conferred by its laws or regulations.”*

The Tribunal concludes that the inclusion of the term “subject to” indicates that the *duty to admit investments* is limited by “the right to exercise powers conferred by its laws or regulations.”

The Tribunal notes that the reference specifically subjects the State's *duty to admit investments* not to the laws and regulations of Bolivia, but rather to the “right to exercise powers” conferred by such laws or regulations. The Tribunal finds this language significant as it implies an act at the time of admittance in accordance with the laws or regulations in force at that time.<sup>78</sup>

The paragraphs above support the interpretation presented here. Firstly, because the tribunal characterises the admission clause as an “obligation to allow the entry” and a “duty to admit investments”, which restores the meaning of the clause. Secondly, because it emphasises the “right to exercise powers” as expressed as a right to act or not at the time of admittance in accordance with the laws or regulations in force at that time. In a more nuanced approach, the *MTD* decision seems to accept the principle that there is no obligation of a State to issue licenses when this is against the “laws and regulations”; there is no right of an investor to a change of regulation, even for wrongly admitted investments.<sup>79</sup>

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<sup>76</sup> Vandeveldel (n 39) 418.

<sup>77</sup> Joubin-Bret (n 27) 23.

<sup>78</sup> *Aguas de Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005, para 147 emphasis added

<sup>79</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7 Award, Merit para 206 and Decision on Annulment Request para 107. MTD also reveal the principle that a State that admits an investment contrary to its own laws and regulations is in breach of the fair and equitable treatment. See Award, para 188

Thirdly, the decision in *Aguas de Tunari* reinforces the interpretation that the wrongfulness of an act of denial of admission contrary to domestic law should be evaluated with reference to the laws in force at the time the investor attempts an investment. That is the point in time to evaluate a violation of the host state resulting in a non-admission decision. This issue has also been highlighted in cases focussing on the illegality of investments.<sup>80</sup> So, in the context of entry, the point in time when compliance should be evaluated is generally the time an investment is about to be made.

It seems that one must not interpret “States shall admit” as a requirement of a formal act of admission, rather than a right, since this would mean that investments that generally do not require express authorization, licence or permit would be outside the scope of protection. In the same way, in the presence of expressions such as “accepted”, investments are covered even if they were not subject to an “acceptance” phase. That is the case, for instance, when they are made in a non-prohibited area or by the acquisition of shares, thus dispensing with any positive act of the host state.<sup>81</sup> The *Churchill* decision also recognises the principle that the admission requirement is to be analysed in the context of the legislation when admission occurs and where that legislation does not require approval, it should *not* be required afterwards.<sup>82</sup>

Acceptance takes place when an investor makes an investment when its internal law does not prohibit it. But the discussion in the *Yukos* exemplifies the complexity of the matter. There, it was explicitly recognised that the process of admission may involve a continuum of stages, consisting of several consecutive phases “rather than an instantaneous act”.<sup>83</sup> To find out the exact moment of “admission” is a task that will define the coverage of the treaty and the extent of the host state’s obligation.

To sum up, admission clauses in accordance with laws and regulations should be read as an obligation towards host states to avoid caprice or whimsicality. They are not a mere reflection of customary international law, but instead, represent a fairly small, but significant progress. They contain an obligation or duty regarding the entry of investments for host states to avoid discrimination not based on their domestic legal system.

Some additional comments are necessary. The first is why there are more reported cases on investors not complying with the laws than on states not respecting theirs. Denials of admission and omissions to admit legal investments are all acts that can be attributed to the state.<sup>84</sup> These decisions must follow internal laws and regulations. Otherwise, an internationally wrongful act will be committed at the moment of the refusal or omission to act in accordance with the law in force at the time an attempt to invest is made. This interpretation of the clause was blurred over the years by the discussion of the protection of illegal investments. While this fact may explain the

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<sup>80</sup> Schill (n 75) 309. See also Phoenix (n 74) [para 103]; *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25 Award, 16 August 2007 [para 345]; *World Duty Free Company Limited v the Republic of Kenya* ICSID Case No Arb/00/7 Award, September 2006 [para 142].

<sup>81</sup> *Fraport* (n 80), Annulment Decision paras 105-106.

<sup>82</sup> *Churchill* (n 58) paras 288-292.

<sup>83</sup> *Yukos Award* (n 74) paras 1368-1369. p. 434.

<sup>84</sup> See arts 4-11 ILC Articles (n 34)

lack of litigation, the absence seems also to be connected to the structure of enforcement of the investor-state mechanism.

The second is why states would act against their laws. While states with less resources, keen to attract investments, will not act to prevent investors, well-endowed states, where investors are naturally inclined to invest, may have incentives to be less transparent. This occurs especially if government decisions reflect the interests of domestic companies with protectionist aims. Some have acutely argued that investment barriers are often introduced by the public administration rather than by law, since administrators and public servants are more subject to pressure by internal interest groups.<sup>85</sup>

The main consequences of this reading relate to acts of public officials or local authorities producing arbitrary delays, with unjustified requests or extra requirements. For example, an undue delay in approving one's investment, in violation of an internal rule regulating mandatory deadlines or reasonable duration of process, may arguably constitute a breach of this kind of clause. This would also cover illegal requests of personal advantages in exchange of the admission of an investment.<sup>86</sup>

The recovery of the clause's full meaning and legal effects is important to show that current investment treaties are able to deal with these types of situations. It also sets the starting point for the transition from an international obligation to respect the states' own regulations towards an obligation that states' regulations conform to an international standard or to entry commitments, as will be shown.

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<sup>85</sup> Pollan (n 40) 20.

<sup>86</sup> Tamada (n 75) 119-120.

### 3. ESTABLISHMENT

#### A) The Concept of Establishment and the US Model

Obligations regulating the entry of investments have also been expressed using the concept of establishment. This section starts with an analysis of the emergence and interpretation of the concept. The aim is to provide elements to check whether its progressive adoption is part of a trend towards more convergence with international trade law.

Among the aims of the first American BITs was the removal of investment restrictions.<sup>87</sup> In this regard, the 1984 US BIT model played a key role in the modern transition from the language of “admit/permit” to the qualification associating it to national treatment. But the innovation to grant a right of “establishment” in BITs only appeared with the US BITs in the second half of the 80s. The language mentioned that Parties “shall permit such investments to be established” and granted national treatment.<sup>88</sup> The reference to national treatment is an indication that the use of this concept in treaties is more connected with international trade law than the concept of admission, as will be shown. From the Investment Chapter in the US-Canada Free Trade Agreement,<sup>89</sup> a new type of language emerged, later on replicated in NAFTA. Several other treaties started to use the concept of “establishment” as a substitute or as a supplement to “admission” or “permission”.

Regarding treaties with other countries, from 1994, the United States progressively, though not continuously, started to change the language to the following:

#### Article II<sup>90</sup>

1. With respect to the *establishment*, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment *no less favorable* than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter “national treatment”) or to investments in its territory of nationals or companies of a third country (hereinafter “most favored nation treatment”), whichever is most favorable (hereinafter “national and most favored nation treatment”). *emphasis added*

A related question is whether the wording of the US model clause on national treatment of establishment covers investments that do not require establishment in the

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<sup>87</sup> Patricia McKinstry Robin, ‘The Bit Won’t Bite: The American Bilateral Investment Treaty Program’ (1983) 33 American University Law Review 931, 946.

<sup>88</sup> See eg US BITs in force with Senegal [1983], Democratic Republic of the Congo [1984] and Cameroun [1986].

<sup>89</sup> [1988] See art 1602 <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf>> accessed 8 June 2016

<sup>90</sup> US-Georgia BIT [1994].

long-term, as argued by Juillard.<sup>91</sup> Others think that the language in the US model covers both admission and establishment rights,<sup>92</sup> which raises the issue of how different the concepts really are.

The literature emphasises that there are points of distinction.<sup>93</sup> In general terms, one view is that, while entry rights encompass both admission and establishment rights, the admission refers to the ability to make an investment in a permitted form and the establishment deals with the type of presence permitted.<sup>94</sup> Another view is that the right of admission is related to the right of entry and the rules for admission; in turn, the right of establishment relates to the manner in which the activity will be carried out throughout the duration of the investment.<sup>95</sup>

For others, the right of admission can be temporary or permanent while the right of establishment relates to the permanence of presence, which is valuable to long-term investments.<sup>96</sup> In this vein, an investor with a short-term business might need no more than a right of admission compared to a long-term business where a right of establishment is necessary.<sup>97</sup> In foreign direct investment – FDI, the differences would lose their meaning since a long-term relationship is presupposed.<sup>98</sup> In addition, there have been claims that a right of admission works well in the case of portfolio investment in a local company, but both need to work together when transfer of capital and productive assets are necessary.<sup>99</sup>

As a proxy for ordinary meaning, legal dictionaries bring the following definitions:

establish, vb. (14c) 1. To settle, make, or fix firmly; to enact permanently.

established, *adj.* (17c) 1. Having existed for a long period of time; already in long-term use <an established legal rule>[...].”

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<sup>91</sup> Patrick Juillard, ‘Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment’ (2000) 15 ICSID Review 322, 337.

<sup>92</sup> Martín Molinuevo, *Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement* (Kluwer Law International 2012) 87.

<sup>93</sup> Ignacio Gómez-Palacio and Peter Muchlinski, ‘Admission and Establishment’ in Federico Ortino, Peter Muchlinski and Christoph H Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 229.

<sup>94</sup> Molinuevo (n 92) 77.

<sup>95</sup> Gómez-Palacio and Muchlinski (n 93) 230.

<sup>96</sup> UNCTAD ‘Admission and Establishment’ (New York and Geneva United Nations Publication 2002) UNCTAD/ITE/IIT/10 (vol. II) 12-13. See, generally, United Nations Centre on Transnational Corporations, ‘Key Concepts in International Investment Arrangements and their Relevance to Negotiations on International Transactions in Services’ (New York United Nations Publication 1990) UNCTC ST/CTC/SERA/13; UNCTAD ‘International Investment Agreements in Services’ (New York and Geneva United Nations Publication 2005) UNCTAD/ITE/IIT/2005/2, 31-33

<sup>97</sup> Dolzer and Schreuer (n 27) 88.

<sup>98</sup> Pollan (n 40) 54.

<sup>99</sup> Gómez-Palacio and Muchlinski (n 93) 232–233.

establishment, n. (15c) 1. The act of establishing; the quality, state, or condition of being established. [...] <sup>100</sup>

While the definitions emphasise permanence and duration, the history of the smooth transition from the admission/permission language to the establishment language indicates that it is hard to sustain a radical difference, based on type, form or manner, between these treaty terms. This would go in line with the view that considers the distinction without relevant legal significance; disregarding the duration of ownership and control: all acts of investing should be considered establishment.<sup>101</sup> Anyway, the extension of the definition of investor and investments is what will actually determine the coverage of the non-discrimination standard in treaties,<sup>102</sup> which is the subject of the next section.

## **B) Non-Discrimination in NAFTA**

The NAFTA investment chapter applies to all sectors, including services, covering most favoured nation – MFN and national treatment with respect to the “establishment” of investments (art. 1102 and 1103). The relevant NAFTA provisions are transcribed below:

### Article 1102: National Treatment

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

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

### Section C Definitions

#### Article 1139: Definitions

...

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, *that seeks to make*, is making or has made an investment. [emphasis added]

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<sup>100</sup> Garner and Black (n 59) 664.

<sup>101</sup> Vandeveld (n 39) 407.

<sup>102</sup> Most importantly, “if the term ‘investor’ includes only private entities, then the national treatment provision will *not guarantee to foreign investors the right to establish investment in sectors of the economy open only to state enterprises.*” *ibid* 414 emphasis added.

Moreover, NAFTA Chapter 12 covers service supply including “the presence in its territory of a service provider of another Party”.<sup>103</sup> NAFTA articles 1202 and 1203, respectively national treatment and MFN for services, only apply to service providers, arguably affecting mainly foreign investors in services.<sup>104</sup> The language is the following:

Article 1202: National Treatment

1. Each Party shall accord to *service providers* of another Party treatment no less favorable than that it accords, in like circumstances, to its *own service providers*.

...

Article 1213: Definitions

service provider of a Party means a person of a Party that *seeks to provide* or provides a service; [emphasis added]

The presence of the expressions “establishment, acquisition, expansion”, “seeks to make” and “seeks to provide” can be interpreted as giving rise to international obligations to grant access to investments and investors. These expressions are also connected with the interpretation of some provisions in the GATS, as will be shown. NAFTA included non-conforming measures (art. 1101.2, Annex I and II), in which countries could list all the areas where no obligations were undertaken, e.g. restricted investment areas.

The application of the concepts in those provisions requires the definition of a standard of comparison of non-discrimination. This has been developed through the case law related to the treatment of protected investments. But while “national treatment” and “like circumstances” deserved a lot of attention from case law and academic literature,<sup>105</sup> “establishment” did not have the same fate. Some interpret that the lack of disputes shows that the liberalising effect of national treatment with reference to establishment was accepted without resistance.<sup>106</sup>

However, it is important to point out that NAFTA cases focused on trade in services (*S.D. Myers*<sup>107</sup>) or trade in goods (*Pope & Talbot*,<sup>108</sup> *Canada Cattlemen*,<sup>109</sup> *Softwood Lumber*<sup>110</sup>) have been brought as investment disputes.<sup>111</sup> These NAFTA cases

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<sup>103</sup> art 1201.1 (d)

<sup>104</sup> *ibid.*

<sup>105</sup> Nicholas DiMascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin’ (2008) 102 AJIL 48, 71–79.

<sup>106</sup> Pollan (n 40) 98–99.

<sup>107</sup> *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, First Partial Award on Merit and Separate Opinion, 13 November 2000.

<sup>108</sup> *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Award on Merits, 10 April 2001.

<sup>109</sup> *Canadian Cattlemen For Fair Trade et al v US*, UNCITRAL Arbitral Award On Jurisdiction, 28 January 2008.

<sup>110</sup> *Re NAFTA and a Request for Consolidation by the USA of the Claims in Canfor Corporation v USA and Tembec et al. v USA and Terminal Forest Products Ltd. v USA*, 7 September 2005, Order of Consolidation. For a comment, see Joost Pauwelyn, ‘Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA “Spaghetti Bowl” Is Cooking’ (2006) 9 Journal of International Economic Law 197.

are arguably mixed trade/investment cases related to discriminatory denial of opportunities for market access.<sup>112</sup> As an example, the *S.D. Myers* award decided that an export ban interfered with the operations of the investor, which provided services of processing and disposal of hazardous waste. The discriminatory measure breached the national treatment obligation and resulted in compensation for lost income, derived of losses of market opportunities.<sup>113</sup>

The case involving Mexican investments in the United States (*Mexico v United States*)<sup>114</sup> was a rare example of a case directly dealing with establishment. It ruled that:

A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face, less favorable than the treatment accorded to U.S. truck service providers in like circumstances, and is contrary to Article 1102.

The US measure at issue was a general one, restricting *de jure* the establishment of foreign investors in services. Individual companies that sought to invest were also affected. But, what matters is that, in this NAFTA case, the non-admission of an investment affected the provision of international services and this is evidence of the relation between concepts of investment law and trade in services.

### C) The Return of Establishment Rights

It is to be highlighted that entry commitments are closely linked to domestic regulatory policy.<sup>115</sup> A stronger liberalisation effect is reached when national treatment is applied to the conditions to make an investment, regulating competitive opportunities for access. But it seems that it is politically more difficult to grant access to a large number of investments than to protect them.<sup>116</sup> A way to recognise the great political challenges involved in the liberalisation of barriers is the introduction of flexibilities. They allow for some policy space for legitimate regulation but also some breathing

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<sup>111</sup> Rodney Neufeld, 'Trade and Investment' in Daniel Bethlehem and others (eds), *The Oxford handbook of international trade law* (OUP 2009) 642.

<sup>112</sup> Gómez-Palacio and Muchlinski (n 93) 232.

<sup>113</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award on Merit, 21 October 2002 para 100

<sup>114</sup> Re *Cross-Border Trucking Services (Mexico v US)*, Case No USA-MEX-98-2008-01, NAFTA ch 20 Arb Trib. Panel Decision, Final Report, 2, (6 February 2001), para 292 <[https://www.nafta-sec-alena.org/DesktopModules/NAFTA\\_DecisionReport/pdf.ashx?docID=18355&lang=1](https://www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=18355&lang=1)> accessed 8 June 2016, emphasis added. For a recent analysis of the decision see Puig, 'The Merging of International Trade and Investment Law' (n 8) 19–23.

<sup>115</sup> UNCTAD, 'World Investment Report' (United Nations 2015) UNCTAD/WIR/2015 163; For the most recent statistics, see UNCTAD, 'World Investment Report' (United Nations 2016) UNCTAD/WIR/2016.

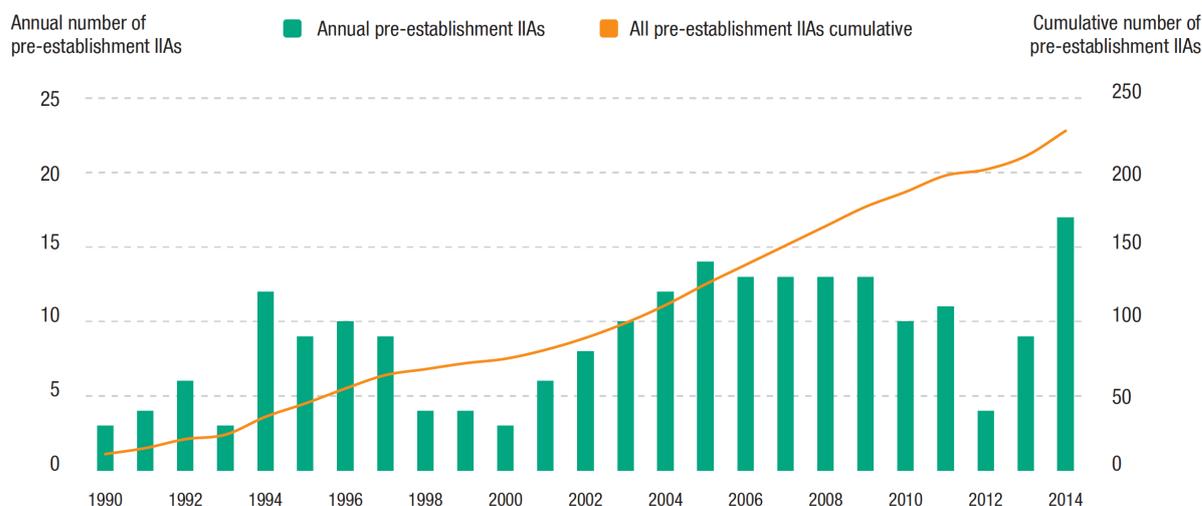
<sup>116</sup> Pollan (n 40) 42.

space to garner political support.<sup>117</sup> The requirement to negotiate reservations to specific investments or measures is generally costly to countries.<sup>118</sup>

To illustrate, the right of establishment was also discussed in the Organization for Economic Co-operation and Development (OECD) draft Multilateral Agreement on Investments (MAI). In a traditional north-south BIT, when investment flows are one-directional between a net capital importing country and net capital exporting country, the latter can be more selective in crafting the agreement and less reluctant in granting these establishment rights since few will benefit in exchange of the protection of their nationals in the host country.<sup>119</sup> For some developed countries, the introduction of establishment rights in MAI would mean the opening of sensitive sectors for other large developed countries; to the extent that this was probably not in their interest, the negotiations stalled.<sup>120</sup>

In this regard, while ten years ago commentators claimed that the liberalising effects of BITs were small,<sup>121</sup> now the trend has started to reverse.<sup>122</sup> There is a recognition of the rising number of ITs providing for establishment rights, representing an increasing percentage of the total number of BITs (228 by the end of 2014, as shown in the table below):

**Table 1 – International Investment Agreements with Entry Rights<sup>123</sup>**



Source: UNCTAD, World Investment Report 2015

<sup>117</sup> Kurtz, 'On the Evolution and Slow Convergence of International Trade and Investment Law' (n 16) 107.

<sup>118</sup> Friedl Weiss, 'Trade and Investment Law: What Relations?' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 91.

<sup>119</sup> Susan Rose-Ackerman, 'The Global BITs Regime and the Domestic Environment for Investment' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (OUP 2009) 320.

<sup>120</sup> *ibid.*

<sup>121</sup> Pollan (n 40) 74–75; Vandeveld (n 67) 493.

<sup>122</sup> Weiss (n 118) 93.

<sup>123</sup> UNCTAD, 'World Investment Report' (n 115) 110–112.

In fact, unilateral FDI liberalisation is on-going<sup>124</sup> and this may translate into liberalisation commitments in legal terms. At the same time these commitments increase attractiveness for host States, they tie-in the level of openness for investments, from the viewpoint of home States.<sup>125</sup> There is a valid claim that increasing competition for investment by means of an image of openness may explain why countries choose to incorporate liberal clauses unilaterally.<sup>126</sup> Some countries even choose an open admission model.<sup>127</sup> The attraction of foreign investment may help nations to compete in foreign markets; the integration may also raise the leverage of their region in negotiations.<sup>128</sup>

The United States, Canada, the EU, Japan, Finland, Peru, Singapore, South Korea, Chile and Costa Rica, for example, have each at least 10 ITs containing these obligations.<sup>129</sup> Norway also incorporates entry rights provisions.<sup>130</sup> The Dominican Republic-Central America FTA (CAFTA-DR) investment chapter contains national treatment in the establishment phase as well.<sup>131</sup> In addition, as already mentioned, large countries, well endowed in terms of natural resources and with burgeoning consumer markets, may also use entry rights in the bargain to obtain benefits in other areas during negotiations.

Most importantly, different from the admission in accordance with its own laws, the creation of establishment rights means that a discriminatory denial of entry is a violation of the treaty, irrespective of the national legislation, subject to reservations and justifications in the treaty. In this regard, it is true that there has been a trend for establishment rights to be excluded from investor-state dispute settlement.<sup>132</sup> But this fact, far from representing a move in the direction of divergence, is in reality indicating a trend towards common enforcement mechanisms, which will be dealt with in the next chapters.

To sum up, both admission and establishment express the idea of entry and access for investments. However, one must recognise that, in comparison to admission, the ordinary meaning of the establishment brings the nuanced element of the permanence of presence. Also, the concept has been traditionally accompanied by a reference to national treatment, unlike the mere reference to the state's own laws. These two features emphasize that establishment bears more than a passing resemblance to concepts in trade law, particularly to the notion of commercial presence, as will be seen.

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<sup>124</sup> *ibid* 103.

<sup>125</sup> *ibid* 111–112.

<sup>126</sup> Pollan (n 40) 78–79.

<sup>127</sup> *ibid* 194–195.

<sup>128</sup> *ibid* 85.

<sup>129</sup> UNCTAD, 'World Investment Report' (n 115) 111.

<sup>130</sup> Molinuevo (n 92) 86–87.

<sup>131</sup> Pollan (n 40) 101.

<sup>132</sup> UNCTAD, 'World Investment Report' (n 115) 148.

## 4. SERVICES

### A) Commercial Presence

The GATS has been described as a tool to open markets and as complementary to BITs.<sup>133</sup> As already indicated, the GATS concept of “commercial presence” is the starting point to understand the application of international trade law to the entry of investments. In general terms, it represents the “connecting factor” between the GATS and investments.<sup>134</sup> Before turning to it, one might benefit from analysing its emergence as a concept.

The most pressing questions during the Uruguay Round as to the definition of services were whether and how trade in services should be distinguished from foreign investment in services and whether it should include the movement of labour.<sup>135</sup> While the coverage of the former topic interested the developed countries, the latter issue was of interest to the developing world.<sup>136</sup>

Despite the recognition that some sort of right of establishment was essential to ensure the liberalisation of service sectors, WTO members wanted to avoid the impression that it was unqualified and absolute; the term was avoided, given the particular connotation to the European Union and the opposition of developing countries.<sup>137</sup> The solution described a specific mode for the delivery of services - Mode 3, defined in the GATS.<sup>138</sup> In that sense, Mode 3 (and also Mode 4<sup>139</sup>) commitments are seen as a way to liberalise FDI.<sup>140</sup>

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<sup>133</sup> Bart De Meester and Dominic Coppens, ‘Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?’, *Regulation of Foreign Investment*, vol 21 (World Scientific 2013) 111; 146; Vandeveldel (n 67) 502.

<sup>134</sup> Meester and Coppens (n 133) 99; Vandeveldel (n 67) 497; Martín Molinuevo, ‘Foreign Investment in Services and the DSU’ in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008) 319.

<sup>135</sup> Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (OUP 2011) 277.

<sup>136</sup> *ibid* 279.

<sup>137</sup> Ansgar M Wimmer, ‘The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment’ (1995) 19 *World Competition* 109, 113.

<sup>138</sup> art 1.2(c): ... the supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other member.”

This context gave rise to the formula of commercial presence in GATS art. XXVIII (d):

“commercial presence” means any type of business or professional establishment, including through (i) the *constitution, acquisition* or maintenance of a juridical person, or (ii) the *creation* or maintenance of a branch or a representative office, within the territory of a Member *for the purpose of supplying a service*; [emphasis added]

The concept of “commercial presence” includes not only the creation of a new juridical person but also the acquisition of an existing one.<sup>141</sup> The definition of “juridical person”<sup>142</sup> is complementary in this regard. It is noted that:

[t]he ‘constitution of a juridical person’ under the GATS is not limited to the administrative procedures of registering a juridical person. Indeed, the GATS defines ‘juridical person’ in broad terms, *de facto* equating it with the more general concept of ‘company’ or even ‘investment’. ... As such, *there seems to be no difference between the GATS concept of ‘constitution of a juridical person’, complemented by the reference to the ‘creation of a branch or representative office’, and the BIT’s and PTA’s general notion of the investment’s ‘establishment’.*<sup>143</sup>

Nevertheless, one may underline the narrow meaning of commercial presence compared to the asset-based definition of investment and the approximation of the concept of commercial presence to FDI: despite the lack of uniformity in the definition of the latter, all the elements of the definition of the former cover traditional aspects of FDI in services.<sup>144</sup> It is not clear, though, whether the term includes other categories, but certainly not bonds and portfolio investments.<sup>145</sup>

Early analysis of the GATS already argued that economic activities prior to the establishment of a business in services may be covered by the commercial presence definition.<sup>146</sup> The reference to the constitution of a juridical person includes all the procedures related to the setting-up of the company engaged in services in the host country.<sup>147</sup> The presence of the words “constitution”, “acquisition” and “creation” in the

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<sup>139</sup> It is to be emphasised that mode 4 commitment on temporary presence of physical persons are essential complements for the establishment and operation of commercial presence, since they deal with key personal and management and intra-corporate transferees; therefore, they should be deemed relevant. In Pierre Sauvé, *Trade Rules behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003) 303; 319.

<sup>140</sup> Puig, ‘The Merging of International Trade and Investment Law’ (n 8) 12.

<sup>141</sup> Meester and Coppens (n 133) 102.

<sup>142</sup> art. XXVIII (l), (m) and (n)

<sup>143</sup> Molinuevo (n 92) 90 emphasis added.

<sup>144</sup> Wimmer (n 137) 114–115.

<sup>145</sup> Sauvé (n 139) 302; 319. The Understanding on Commitments on Financial services defines commercial presence more broadly, including agencies, franchising operations, sole proprietorship and others. *ibid*

<sup>146</sup> Wimmer (n 136) 114 citing OECD ‘The General Agreement on Trade in Services (GATS): An Analysis’ (Paris 1994) OCDE/GD(94)123, 7-8.

<sup>147</sup> Molinuevo (n 92) 90.

definition suggests that the very process of establishment is covered.<sup>148</sup> This appears to be the reading of the panel report in *China – Publications and Audiovisual Products*.<sup>149</sup>

A particularly relevant related issue is the coverage in the GATS of *investors that have not yet made an investment*. As underlined in the previous sections, the expressions “seeks to make” and “seeks to provide” in the NAFTA and in other BITs can be interpreted as giving rise to international obligations to grant access to investors. The same occurs in relation to commercial presence. In its own right, the Appellate Body already recognised that WTO law is clearly concerned with the position of investors.<sup>150</sup>

In this vein, one can say that measures that *prevent* the possibility of commercial presence are covered.<sup>151</sup> This includes situations involving investors which are not *yet* a service supplier and seek to become one by acquisition, since they will be service suppliers at the moment of the investment.<sup>152</sup> It is important to recall that the existence of trade flows is not required for the GATS to apply. This is because the flows may have been prevented, though this has to be based on an examination of relevant facts.<sup>153</sup> Another argument to support this conclusion is the choice of the expression “for the purpose of supplying a service”.<sup>154</sup> Feinaugle acutely notes that the reason is that “in the case of commercial presence, establishment in the territory of a Member must take place first *before the services supply can start*”; so, in this phase, there is “only the *plan to supply the service*, and the *future service supplier* bears the burden of proof for this...”<sup>155</sup> This approach bears a similarity with the definitions of investor and service providers in several ITs. The last section will elaborate more on this issue, emphasising the connections of the likeness test of services suppliers with the concept of investors.

What matters most to this discussion are the commonalities between both regimes. There is some conceptual identification between commercial presence and establishment. It is also recognised that the interpretation of the provisions in both regimes cope with the situation of investors that seek to invest, that is, covering the very process of making an investment.

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<sup>148</sup> *ibid* 79.

<sup>149</sup> WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Panel*, (12 August 2009) WT/DS363/R, para 7974 <<http://docsonline.wto.org>> accessed 8 June 2016

<sup>150</sup> WTO, *China: Publications and Audiovisual Products – Report of the Appellate Body* (19 January 2010) WT/DS363/AB/R para 227 “...Thus, for example, *restrictions imposed on investors*, wholesalers, and manufacturers, as well as on points of sale and ports of entry, have been found to be inconsistent with Article III:4 or Article XI:1 of the GATT 1947 or 1994.” See also Eeckhout (n 4) 4.

<sup>151</sup> Meester and Coppens (n 133) 102.

<sup>152</sup> *ibid* 106.

<sup>153</sup> Eric H Leroux, ‘From Periodicals to Gambling: A Review of Systemic Issues Addressed by WTO Adjudicatory Bodies under GATS’ in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (CUP 2008) 271–272.

<sup>154</sup> See the expression in the context of the definition of GATS art. XXVIII (d), transcribed above.

<sup>155</sup> Clemens Feinäugle, ‘Article XXVIII’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO--trade in services* (Martinus Nijhoff Publishers 2008) 549 emphasis added.

## B) Reevaluating Market Access for Investments in Services

While there seems to be no major difference between liberalisation investment agreements and the GATS, they may vary in the general scope and clause drafting.<sup>156</sup> An investment measure is only covered by specific GATS obligations if a Member has scheduled mode 3 commitments to liberalise the service sectors to which the measure applies. This is the case of the obligations on “domestic regulation” (art. VI)<sup>157</sup> and also of those obligations subject to qualifications: “market access” (art. XVI) and “national treatment” (art. XVII).<sup>158</sup> Having presented the aspects related to commercial presence and its relations with the entry of investments, the following sections deal with the interpretation of the provisions on market access and on national treatment, when it comes to the regulation of the investments.

These provisions have constitutional-type features and functions: they employ general indeterminate concepts containing the fundamental principles of the system of regulatory schemes affecting trade in services.<sup>159</sup> In this regard, adjudication under the GATS has generated cases, though not numerous, containing technical, but important elements for its interpretation. The following sections also provide some background for the analysis of recent GATS cases affecting the entry of foreign investors (*China-Publications and Audiovisual Products*,<sup>160</sup> *China-Electronic Payment Services*<sup>161</sup> and *Argentina-Financial Services*<sup>162</sup>).

At first sight, an article named “market access” such as GATS art. XVI, when related to commitments in mode 3, seems to constitute the main provision dealing with the *entry* of foreign investments in services. But market access is, in essence, a legally defined concept, containing a list of six kinds of prohibited measures to scheduled services:

### *Market Access*

1. With respect to *market access through the modes of supply identified in Article I*, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for *under the terms, limitations and conditions* agreed and specified in its Schedule.

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<sup>156</sup> Molinuevo (n 92) 90.

<sup>157</sup> There is a GATS mandate to develop the disciplines on domestic regulation, see Andrew Lang and Joanne Scott, ‘The Hidden World of WTO Governance’ (2009) 20 *European Journal of International Law* 575, 586–587.

<sup>158</sup> On the other hand, the MFN treatment (art II) applies to all services and service suppliers, irrespective of scheduling and will be more thoroughly analysed in another paper.

<sup>159</sup> Eeckhout (n 4) 8; 11.

<sup>160</sup> See (n 149) and (n 150)

<sup>161</sup> WTO, *China: Certain Measures Affecting Electronic Payment Services – Report of the Panel* (31 August 2012) WT/DS413/R

<sup>162</sup> WTO, *Argentina: Measures Relating to Trade in Goods and Services – Report of the Panel* (30 September 2015) WT/DS453/R appeal pending

2. *In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:*

...

(e) measures which *restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and*

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of *individual or aggregate foreign investment*. [fns omitted, emphasis added]

Full market access under the GATS just means that none of the six measures are present, but it is far from openness to investments.<sup>163</sup> Anyway, the principle of progressive liberalisation is reflected in the structure of the GATS.<sup>164</sup> And the market access provision touches upon one of the main pillars in the process of the liberalisation of services: the removal of barriers that apply to both domestic and foreign providers.<sup>165</sup> In this context, the obligation applies also to non-discriminatory measures that concern or limit both domestic and foreigners (as well discriminatory ones) provided that they *affect* foreign services supplies.<sup>166</sup> This affects national quantitative restrictions, for example, including public monopolies. The feature means that the GATS goes beyond traditional liberalisation BITs, being complementary to national treatment.<sup>167</sup> So, the market access provision is essential but does not exhaust all the GATS regulation on access or entry, as will be shown in the next section.

As a starting point, a connection with the concept of admission is presented. This is the finding that a general measure that makes it impossible for an investment to take place in a scheduled sector violates art. XVI.<sup>168</sup> For this purpose, it does not matter whether the investment occurs through the acquisition of an existing enterprise or by the creation a new one (greenfield). This reading is supported by *US-Gambling*, which reveals that in sectors where commitments have been undertaken, full exclusions are not allowed.<sup>169</sup>

Among the several non-allowed measures, two are worth noticing. In letter “e” of art. XVI, the requirement of local presence is considered one of the prohibited restrictions.<sup>170</sup> In the NAFTA context, this is also present in art. 1205. This may be related to the fact that a requirement of local presence, that is, a requirement to set up a

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<sup>163</sup> Molinuevo (n 92) 84; Martín Molinuevo and Panagiotis Delimatsis, ‘Article XVI’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 377.

<sup>164</sup> *China – Audiovisual Products AB/R* (n 150) para 394.

<sup>165</sup> Lang (n 135) 293.

<sup>166</sup> Molinuevo and Delimatsis (n 163) 392.

<sup>167</sup> Molinuevo (n 92) 92.

<sup>168</sup> Meester and Coppens (n 133) 114.

<sup>169</sup> WTO, *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R paras 251-252.

<sup>170</sup> Sauv  (n 139) 304.

branch or a representative office, means more control and regulation by the host State. Rather than an investment restriction, a measure like that would be an *obligation to invest* in order to supply a service, which is prohibited in a scheduled sector.

It is also essential to note that art. XVI.2 (f) contains one of the few references to the expression “investment” (and not “commercial presence” or “services suppliers”)<sup>171</sup> in the whole set of WTO agreements.<sup>172</sup> According to Molinuevo and Delimatsis, this might suggest a broad coverage of the expression.<sup>173</sup> This is because it would encompass all measures that limit the total value of investments in the capital of companies. That would include measures limiting foreign equity even if it does not amount to a 50%, which would configure control, and, thus, commercial presence. So, this reference might regulate any other levels of participation of foreign investment.

Others, however, sustain a narrower interpretation. If no control is acquired, the measure would not *affect* trade in services in mode 3 at all.<sup>174</sup> This means that the GATS, as a whole, would not be applicable. In that regard, *China – Publications and Audiovisual Products* seems to reveal that only if a *clear* quantitative limitation is used would there be a breach of the article.<sup>175</sup>

There is another sign that there is more investment regulation in the WTO than commonly recognised. It is the obligation to allow the movement and transfers of capital essential to commitments made in mode 3 (and also in mode 1).<sup>176</sup> This is expressed in the second part of footnote 8 of GATS art. XVI:1:

8 ... If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to *allow related transfers of capital* into its territory. [emphasis added]

It contains a loose requirement of capital transfers “related” to the service (or investment). This is justified since “a commercial presence will often entail incidental capital transfers (for instance, *for the establishment of the presence* or the repatriation of gains) even if the service to be provided does not itself involve a capital transfer.”<sup>177</sup> In any case, it is convincing to believe that the provision is only limited to inward capital flows, given the expression “capital into its territory”; so that repatriation of capital is not encompassed in the provision.<sup>178</sup>

To sum up, the most striking aspect of the market access provision is that it potentially applies to the entry of investments in services, even if the measures are not

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<sup>171</sup> Molinuevo and Delimatsis (n 163) 389.

<sup>172</sup> The others are: Definition in the Annex on Financial Services, art 5(a)(xiii) and (xvi), which mention investments in “collective investment management” and “investment and portfolio research and advice”.

<sup>173</sup> Molinuevo and Delimatsis (n 163) 390.

<sup>174</sup> Meester and Coppens (n 133) 106.

<sup>175</sup> *China – Publications and Audiovisual Products* (n 149) paras 7,1392-7,1394

<sup>176</sup> Steger (n 10) 160.

<sup>177</sup> Benedict Christ and Marion Panizzon, ‘Article XI’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO--trade in services* (Martinus Nijhoff Publishers 2008) 250 emphasis added.

<sup>178</sup> Molinuevo and Delimatsis (n 163) 373.

discriminatory. This is in contrast even with the classical content of liberalisation BITs. But the provision is progressively being incorporated in an investment context, and this will be explored in the analysis of CETA. Finally, depending on how adjudication in the GATS develops, the scope of the provision on market access might be larger than ever thought in relation to investments, so the potential connections will become more evident.

### **C) National Treatment and Non-Discrimination on Entry: Potential Investors?**

This section deals with another constitutional concept in the GATS: the provision on national treatment. It highlights some important aspects, especially related to the entry of investments and investors, in order to provide context for the upcoming papers. The comparison with BITs in this regard is important since it paves the way for the question of whether substantive convergence is a positive development.

Direct language conferring entry rights is arguably unnecessary when national treatment is granted in relation to entry.<sup>179</sup> That is the technique used in GATS art. XVII:

#### *National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures *affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable *if it modifies the conditions of competition in favour of services or service suppliers of the Member* compared to like services or service suppliers of any other Member. [fns omitted, emphasis added]

The Appellate Body has not yet set a complete test related to this provision.<sup>180</sup> But the analysis naturally starts with likeness. Regarding the entry of investments, two aspects are relevant.

The first aspect is that the language of art. XVII (and also art. II) includes not only like services but also like “service suppliers”. A service supplier in Mode 3 is most likely considered an investor in the investment treaty language. There is a recognition of the inseparability between services and their suppliers but the practical difference among

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<sup>179</sup> Molinuevo (n 92) 79.

<sup>180</sup> Jorge A Huerta-Goldman, ‘Cross-Cutting Observations on National Treatment’ in Jorge A Huerta-Goldman, Antoine Romanetti and Franz X Stirnimann (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Kluwer Law International 2013) 236.

them matters in the analysis of likeness.<sup>181</sup> Here, it is better to save the reader from the extensive discussion in academic literature on how to best address the likeness test of services and service suppliers.<sup>182</sup> All in all, it seems there are arguments to support that likeness should be analysed separately for services and service suppliers, but it is also true that there may be valid reasons to treat differently similar suppliers of like services (e.g. a bank and an insurance company).<sup>183</sup>

The definition of likeness of service suppliers had been interpreted in cases exclusively as *suppliers that provide like services*.<sup>184</sup> *China – Publications and Audiovisual Products* apparently started to attribute to the service supplier a special analysis,<sup>185</sup> which is a small but welcome development. The Panel had found that some of the Chinese measures related to the distribution of reading materials and audio-visual products, including foreign-invested entities, were in breach of the market access and national treatment provisions.<sup>186</sup> But since discrimination *de jure* was found, no deep analysis of likeness was necessary.

The second aspect, connected to the first, is the treatment of *potential service suppliers*, in this context, potential investors. As seen in relation to the broad extension of “commercial presence”, the GATS covers the situation when an investor is *seeking* to make an investment in services. Companies with the capability and opportunity to provide services (investors) have been considered *potential service suppliers*, and therefore also the object of article XVII in an analysis of competition conditions.<sup>187</sup> They benefit from national treatment, conferred to national like service suppliers, thus, national investors.<sup>188</sup> This proposition is not exempt from criticism.<sup>189</sup> Anyhow, Zdouc warns that:

[t]he possible exclusion of many *potential service suppliers* from the enjoyment of GATS rights as a result of an exceedingly narrow ‘likeness’ definition of service suppliers could undermine the liberalizing effect of the GATS which derives from the creation of market access opportunities for foreign service suppliers.<sup>190</sup>

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<sup>181</sup> Diebold (n 104) 177; 186–187.

<sup>182</sup> Werner Zdouc, ‘WTO Dispute Settlement Practice Relating to the GATS’ (1999) 2 *Journal of International Economic Law* 295, 333; Diebold (n 104) 198–203; 209–215; Markus Krajewski and Maika Engelke, ‘Article XVII’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 407–409.

<sup>183</sup> Diebold (n 104) 199.

<sup>184</sup> WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel* (25 September 1997) WT/DS27/R/USA para 7322 [WT/DS27/AB/R for the Report of the Appellate Body]; WTO, *Canada: Certain Measures Affecting the Automotive Industry – Report of the Panel* (19 June 2000) WT/DS139/R, WT/DS142/R] para 10.248 [Report of the Appellate Body WT/DS139/AB/R, WT/DS142/AB/R]

<sup>185</sup> Diebold (n 104) 195.

<sup>186</sup> *China – Publications and Audiovisual Products* AB/R (n 150) para 413.

<sup>187</sup> *EC-Bananas* Panel Report (n 184), para 7.320 Krajewski and Engelke (n 182) 406–407.

<sup>188</sup> Diebold (n 104) 185.

<sup>189</sup> *Canada Autos AB* Report (n 184) para 164; Feinäugle (n 155) 553–554.

<sup>190</sup> Zdouc (n 182) 333.

It has also been noted that there are blurred lines to differentiate measures that affect the right to enter a country and that affect the supply of the service.<sup>191</sup> Eeckhout highlights that when it comes to services, “the distinction between border measures and internal regulation *is not on the whole a useful classification*, due to the non-physical character of service transactions. International trade in services is affected and *hindered by all kinds of regulatory activity...*”.<sup>192</sup> Diebold brings the following clarification as to the two different moments where a measure could apply:

(i) at the stage the supplier *enters* the importing country or *establishes himself* on the territory of the importing country; or (ii) at the stage of service supply. In simple terms, the former are aimed at *preventing the supplier from entering or staying on the territory* and the latter try to prevent the supplier from providing the service on the territory of the importing country. ... *Concerning the mode of supply through commercial presence (mode 3), a measure on entering and establishing could take the form of more burdensome capital requirements, limitation of foreign capital, allowing only specific legal entities or joint ventures or an outright prohibition for foreign suppliers to set up an office, or any other legal entity. At the stage of supply, the restriction could occur, for example, in the refusal of a licence that is required to provide the service or by imposing unfavourable or additional supply conditions.*<sup>193</sup>

At the same time, this shows the artificial divide between discrimination or market access at the border and discrimination in domestic regulation. In several cases, the measure at issue will apply both to the entry and to the actual supply. Think of licences that require specific capital or financial requirements. It arguably makes sense to grant national treatment to *potential* service suppliers that could be providing the services, were it not for the measure.

Having established likeness, the analysis moves to the less favourable treatment. Since the focus is on investors, therefore, on mode 3, it is of interest whether this involves an impact test including other modes of supply. The challenge would be how to properly establish a group comparator. Services regulation generally applies to the supplier and supplier-based discrimination is more effective in relation to services supplied in modes 3 and 4,<sup>194</sup> in contrast to modes 1 and 2. So, in the case of investments, the comparison is easier to establish: foreign mode 3 suppliers have generally a counterpart, which is a like domestic company or natural person.<sup>195</sup>

But a mode-fragmented approach to the national treatment obligation may lead to unwanted results.<sup>196</sup> That is why some advocate for the criteria of competitive relationship in the definition of the group of comparators. Diebold suggests that “national treatment must be interpreted such that it protects the competitive opportunities of *all foreign services and suppliers* – regardless of the respective mode or method of supply ...”<sup>197</sup>. This goes in line with the recognition that *potential service*

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<sup>191</sup> Diebold (n 104) 214.

<sup>192</sup> Eeckhout (n 4) 11 emphasis added.

<sup>193</sup> Diebold (n 104) 213 emphasis added, footnotes omitted.

<sup>194</sup> *ibid* 178.

<sup>195</sup> *ibid* 221.

<sup>196</sup> *ibid* 234.

<sup>197</sup> *ibid* 230–231.

*suppliers* in mode 3 are to be taken into account either in the analysis of likeness or in the phase of less favourable treatment. This interpretation also resembles the language of BITs that confer entry rights and define investors as those that seek to invest.

In a cross-regime comparison with BITs, it is known that the different languages of the standards in the GATS and BITs lead to different substantial scopes of treatment and consequences.<sup>198</sup> In the latter, the analysis of a *legitimate policy objective* is undertaken in the like circumstances/similar situations. In the former, the analysis starts with likeness of service/suppliers, then the test of *less favourable treatment*, followed by the analysis of closed policy justifications, and, finally, the chapeau of art. XIV (unjustifiable discrimination).<sup>199</sup> There have been some claims to use approaches from one system to the others, but the different expressions make it more difficult to justify.<sup>200</sup>

Despite the differences, both systems have tried to deal with the development of a national treatment test that prevents discrimination against foreigners and is balanced with regulatory sovereignty.<sup>201</sup> This paper does not take position on the best approach to these issues, which, rather than specific to the entry of investors in services, affect the whole set of GATS` situations. But it recognises that an indication of functional convergence in both systems is the common aim of the anti-discrimination standard represented by the national treatment: to guarantee a level of equality and ensure the same competitive opportunities.<sup>202</sup> This is more evident in the context of entry rights. Anyway, a convergence and consistency between concepts in treaty-making initiatives<sup>203</sup> might be able to clarify the scope of commitments, reservations, exceptions and justifications.

## 5. NEW TRENDS

### A) TPP: Attempt to Invest

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<sup>198</sup> Molinuevo (n 92) 105; 118.

<sup>199</sup> Huerta-Goldman (n 180) 265–271.

<sup>200</sup> Krajewski and Engelke (n 182) 415–416; EH Leroux, ‘Eleven Years of GATS Case Law: What Have We Learned?’ (2007) 10 *Journal of International Economic Law* 749, 783; more generally, Weiss (n 118) 88.

<sup>201</sup> DiMascio and Pauwelyn (n 105) 89; Andrew Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing 2016) forthcoming.

<sup>202</sup> Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016) 84–85.

<sup>203</sup> Rudolf Adlung, ‘International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS’ (2016) 17 *The Journal of World Investment & Trade* 47, 84.

Chapter 9 on Investment of the recently concluded Transpacific Partnership<sup>204</sup> is of interest here, as an example of a recent plurilateral treaty conferring establishment rights. It includes a provision that clarifies the instruments regulating the process of establishment of investments in relation to prospective investors. So, how is the attempt to make an investment treated in TPP?

Like the US Model BIT, it defines investment widely, but covered investments are restricted to those already established, acquired or expanded.<sup>205</sup> However, similar to the US Model BIT and NAFTA, the standards are applicable to measures relating to investors.<sup>206</sup> The national treatment and MFN provisions are identical to the US Model BIT, covering both investors and investments and the establishment, acquisition and expansion phases.<sup>207</sup> It also sets out non-conforming measures, which are exempt from the application of national treatment and MFN.

The definition of investor also covers an investor that “attempts to make” investments. The US BIT 2004 model had introduced this. Douglas criticized the use of the expression in the following terms:

Difficult questions might arise as to whether the ‘attempt’ must be *bona fide* or reasonably capable of success. If there was a clear prohibition of foreign investment in a municipal legislation, could a national or enterprise nevertheless ‘attempt to make’ an investment in that sector and thereby attract the relevant minimum standards of treatment?<sup>208</sup>

The indeterminateness in the definition, criticised by Douglas, is partially addressed in TPP. The TPP adds and clarifies that “an investor ‘attempts to make’ an investment when that investor has *taken concrete action or actions to make an investment*, such as channelling resources or capital in order to set up a business, or applying for permits or licenses.”<sup>209</sup> This draws on the Chilean practice in their investment chapters in the FTAs with Colombia<sup>210</sup> and Peru<sup>211</sup> and also in the recent Pacific Alliance Investment Treaty.<sup>212</sup> There are also enforcement related issues that will be dealt with in the next papers.<sup>213</sup> Anyway, one can note the resemblance to the GATS’ approach on potential service suppliers.

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<sup>204</sup> Concluded 4 October 2015 <<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>> accessed 8 June 2016

<sup>205</sup> art 9.1

<sup>206</sup> art 9.2 (1 a)

<sup>207</sup> art 9.4 (1); art 9.5 (1) On the meaning of like circumstances, the TPP contains a footnote stating that it “depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments *on the basis of legitimate public welfare objectives*.” art 9.4 fn 14

<sup>208</sup> Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 138.

<sup>209</sup> art 9.1 fn 12

<sup>210</sup> art 9.28 fn 18 and 19

<sup>211</sup> art 11.28 fns 15 and 16

<sup>212</sup> art 10.1 fns 4 and 5

<sup>213</sup> For instance, an interesting provision that clarifies it is art 9.28 [4]: “for claims alleging the breach of an obligation under Section A *with respect to an attempt to make an investment*, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages.” See

Some are cautious to conclude that there is more convergence from the fact that investment is being negotiated in trade treaties such as the TPP: in NAFTA, as the archetype of such a model, both paths have remained separate.<sup>214</sup> In the case of TPP, there are indeed some references from the chapter of cross-border trade in services to the chapter of investments.<sup>215</sup> But other treaty initiatives have shown a more integrated perspective, at least with regard to the entry of investors, as will be seen.

## **B) Extending Market Access**

The issue of the coverage of investments in services in recent regional trade agreements has been solved in several different ways: sometimes the obligations overlap and are contained in both the investment and the services chapters,<sup>216</sup> sometimes there is an exclusion of services from the investment chapter,<sup>217</sup> or an exclusion of investments in services from the services chapter.<sup>218</sup>

The solutions adopted by the Comprehensive Economic and Trade Agreement – CETA, between the European Union and Canada, are representative of a new trend. Firstly, it is noticed that it replicates the wide definition of investment, clarifying that covered investments are those that are made in accordance with the applicable law at that time.<sup>219</sup> Apart from sector exclusions (airlines, audiovisual, culture...), it provides for the possibility of non-conforming measures.<sup>220</sup>

Secondly, it is also applied to investors. And the investor's definition includes also those who "seek to make", similar to NAFTA:

investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, *that seeks to make*, is making or has made an investment in the territory of the other Party.

Most importantly, the establishment of an investor is regulated in a converged manner using a structure of market access commitments. The following language is used:

### Section 2: Establishment of Investments

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<sup>214</sup> Wu (n 12) 208.

<sup>215</sup> See eg art 10.2 (2) a

<sup>216</sup> An example are chs 7 and 8 of the Japan-Singapore Economic Partnership Agreement.

<sup>217</sup> An example of which is arts 22 and 32 of the EFTA-Chile FTA, which regulates FDI in services within the Services Section) See Federico Ortino, 'Public Services, Investment Liberalization and Protection', *Regulation of Foreign Investment*, vol Volume 21 (World Scientific 2012) 397.

<sup>218</sup> Carsten Fink and Martín Molinuevo, 'East Asian Free Trade Agreements in Services: Key Architectural Elements' (2008) 11 *Journal of International Economic Law* 263, 279–286.

<sup>219</sup> art 8.1. As to measures affecting both the moment of establishment and afterwards, it is worth mentioning fn 4 of art 8.2: "For greater certainty, a Party may maintain measures with respect to the establishment or acquisition of a covered investment and continue to apply such measures to the covered investment after it has been established or acquired."

<sup>220</sup> art 8.15

Article 8.4: Market Access

1. Neither Party shall adopt or maintain *with regard to market access through establishment by an investor of a Party*, either on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, measures that: ...

Arts 8.6 and 8.7 extend national treatment and MFN to establishment and expansion but exclude the former from ISDS (art. 8.18). This is the main difference from the approach of TPP. The CETA Services Chapter 9, as expected, applies only to cross border services.

It is important to note that the competence to negotiate treaties with establishment rights was already within the competence of the European Union, applied, though, in a fragmented manner.<sup>221</sup> As already mentioned, a focus on market access constitutes a trend that moves away from discrimination. It has been pointed out that European Union case law has gone “beyond discrimination” towards an analysis of whether a measure prevents or impedes market access so that that neutral non-discriminatory regulation may be considered a restriction to trade in services, unless justified.<sup>222</sup>

This move, evident in CETA, might illustrate an evolving international practice. Market access provisions inside investment or establishment chapters had also been a feature in some treaties,<sup>223</sup> such as the Cariforum-EU EPA<sup>224</sup> and the EU-Singapore FTA.<sup>225</sup> The latter have adopted different concepts such as “establishment” or “commercial presence” located in different sections of the treaties.

This has been coupled with the introduction of more flexibilities on investment regulation. In this regard, there is the incorporation of GATS art. XIV into investment treaties and in the investment chapters of the China-New Zealand FTA,<sup>226</sup> of the FTA between Switzerland and Japan<sup>227</sup> and in the EU-Singapore FTA.<sup>228</sup> However, some believe that a closed-exception type of article does not seem necessary in IIAs since there is national treatment subject to particular listed exceptions.<sup>229</sup> In addition, the

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<sup>221</sup> Filippo Fontanelli and Giuseppe Bianco, ‘Converging towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States’ (2014) 50 *Stanford Journal of International Law* 211, 225.

<sup>222</sup> Piet Eeckhout, ‘Constitutional Concepts for Free Trade in Services’ in Joanne Scott and Gráinne De Búrca (eds), *The EU and the WTO: legal and constitutional aspects* (Hart 2001) 216.

<sup>223</sup> Molinuevo (n 92) 91.

<sup>224</sup> Using the concept of “commercial presence” see art 67 of the Economic Partnership Agreement between the CARIFORUM States and the European Community, signed 15 October 2008.

<sup>225</sup> Using the concept of “establishment” see arts 8.8(d) and 8.10 of EU-Singapore Free Trade Agreement, authentic text as of May 2015, <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>> accessed 8 June 2016

<sup>226</sup> Barton Legum and Ioana Petculescu, ‘GATT Article XX and International Investment Law’ in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 344–345.

<sup>227</sup> Céline Lévesque, ‘The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy’ in World Trade Forum (ed), *Prospects in International Investment Law and Policy* (CUP 2013) 369.

<sup>228</sup> art 9.3 (3)

<sup>229</sup> Legum and Petculescu (n 226) 354.

absence of an article has arguably given flexibility to tribunals in interpreting the standard of like circumstances, so that their role becomes more limited.<sup>230</sup> It is debatable whether this practice also intends to import the WTO jurisprudence interpreting these provisions.<sup>231</sup>

The recognition of the shortcomings of the GATS is generally due to its limited scheduling, result of the adoption of a positive list approach. Liberalisation BITs and negative list Preferential Trade Agreements – PTAs have a larger sectoral scope.<sup>232</sup> The level of obligations on the entry of investments of some BITs has exceeded what was covered by the GATS.<sup>233</sup> Careful analysis shows that the US has maintained consistency in exclusion from its BITs and GATS commitments; on the other hand, its partners have undertaken more national treatment commitments than in the GATS.<sup>234</sup> It has been argued that a progressive, flexible and incremental approach<sup>235</sup> focussed on the GATS would be the most appropriate and pragmatic way to deal with investment liberalisation in the world trade law system.<sup>236</sup>

At the same time, there is the challenge posed by regional initiatives such as Trade in Services Agreement – TISA and the Transatlantic Trade and Investment Partnership – TTIP.<sup>237</sup> The methodological option here is to wait for the conclusion of the negotiations to analyse current provisions related to the entry of investors in those agreements. It would be interesting to see how TTIP covers establishment, market access and service providers (foreign investors) that “seek to supply services”. As to TISA, since Mode 3 will be covered, it would be exciting to see the interplay of the new scheduling techniques of commitments in investment in services. These are the scheduling of the *status quo* of restrictions and the ratchet clause to lock-in liberalizing investment measures in the service sector.

In any case, it seems fair to accept that the positive or negative listings are mere technicalities, which, if carefully crafted, may provide the same level of policy flexibilities.<sup>238</sup> The introduction of establishment rights and market access regulation constitutes a move towards a more liberal theory of investments on entry, which arguably delivers more economic benefits.<sup>239</sup> If this is coupled with carefully designed policy reservations and justifications, it provides a good parameter to international economic law agreements.

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<sup>230</sup> Lévesque (n 227) 367–70.

<sup>231</sup> Kurtz, ‘On the Evolution and Slow Convergence of International Trade and Investment Law’ (n 16) 113.

<sup>232</sup> Molinuevo (n 92) 130.

<sup>233</sup> Wimmer (n 137) 116.

<sup>234</sup> Rudolf Adlung and Martín Molinuevo, ‘Bilateralism in Services Trade: Is There Fire Behind the (Bit-) Smoke?’ (2008) 11 *Journal of International Economic Law* 365, 372.

<sup>235</sup> Jorge A Huerta Goldman, ‘Domestic, Regional and Multilateral Investment Liberalization’, *Regulation of Foreign Investment*, vol Volume 21 (World Scientific 2012) 87.

<sup>236</sup> Sauvé (n 139) 335–365.

<sup>237</sup> For the full argument, see Panagiotis Delimatsis, ‘Trade in Services and Regulatory Flexibility – 20 Years of GATS, 20 Years of Critique’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2655667 <<http://papers.ssrn.com/abstract=2655667>> accessed 8 June 2016.

<sup>238</sup> Fink and Molinuevo (n 218) 310.

<sup>239</sup> Vandeveldt (n 67) 501–502.

## 6. CONCLUSION

To sum up, this paper has shown that international law regulates the entry of foreign investments using rules from different international regimes. By comparing the provisions in the regimes of trade and investment law, this paper tried to argue that there is more liberalization in investment treaties as well as there is more investment regulation in the GATS than commonly thought. Within the background of general international law, the content of conventional rules is drafted using a wide array of languages, which share common features and point to some conceptual convergence.

The varied techniques used to regulate the entry of foreign investments and investors in services are reflected in different clauses. Consequently, the categorization of investment treaties as protection-driven as opposed to liberalisation-driven may not describe with precision their character. But no matter how divergent the goals of trade and investment treaties may arguably be, in relation to the entry of investments and investors, the interpretation of the wording of their provisions leads to particularly similar results. For instance, the concept of commercial presence in the GATS includes aspects equivalent to the so-called establishment of foreign direct investments. Also, the interpretation of GATS rules as covering potential service suppliers bear a resemblance to concepts already present in BIT practice in relation to investors that seek to invest.

This paper unassumingly concludes that, at least in the provisions of entry of investments in services, there are some signs of an increasing conceptual and substantive convergence of rules. Firstly, one ponders whether some concepts still provide a useful taxonomy to explain the regulation of entry. The way the admission clauses evolved to establishment clauses in some treaties shows that the difference between them, while less radical and of limited practical relevance, may indicate a step towards a convergence with international trade law. Moreover, measures tend to equally apply to both the entry and the operation of investments, thus affecting new investments/investors and those already established.

Secondly, there has been a trend towards treaty language granting more entry rights and commitments. This was done by the progressive introduction of national treatment for entry rights, the expansion of services coverage in Mode 3 and the recognition and clarification of the rights to potential investors. The increasing number of ITs containing establishment rights is noted especially in light of the new mega-regionals.

Thirdly, there has also been a disposition to include provisions related to the entry of investors coming from the international trade law world into the investment law arena. The introduction of the GATS founding concept of market access in the investment chapter of CETA seems to be an example. This has been carried out by a clear and almost literal adoption of GATS-style language. The open questions are to what extent the GATS case law would be resorted to in investment treaties with reference to

provisions such as market access and justifications.

The substantive convergence of the rules related to entry of investments in treaty making appears to be a promising sign. It would avoid inconsistencies and allow for clearer flexibilities.