

TRADE AND INVESTMENT CONVERGENCE AND  
DIVERGENCE:  
REVISITING THE NORTH AMERICAN SUGAR WAR

Alvaro Antoni\* and Michael Ewing-Chow\*\*

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**Abstract.** Trade and investment have been seen as two inseparable sides of the process of globalisation. Nonetheless, there is no comprehensive regime for trade and investment coherence, which could lead to situations of legal uncertainty, a threat of inconsistent jurisprudence, and conflicting decisions on cases with similar factual backgrounds and causes of action. This article explores the pathology of this complex interaction, looking at one point of convergence and one point of divergence. The article focuses on the sugar disputes between Mexico and the United States, as these disputes have as a point of convergence, a cause of action based on violations of the national treatment discipline, and as a point of divergence, an underexplored jurisprudence on countermeasures. With respect to national treatment, the article argues that a superficial convergence should be avoided and instead, what should be attempted is coherence with respect to the effects that the different regimes have on the system of international economic law. Regarding countermeasures, the article argues that this may be the area where coherence in the jurisprudence is most needed in order to avoid a clash between the WTO regime and the investor-to-state system.

**Key words.** Fragmentation of international law; WTO; NAFTA; national treatment; countermeasures; sugar disputes; *Mexico – Soft Drinks*; *Archer Daniels v. Mexico*; *Corn Products v. Mexico*; *Cargill v. Mexico*.

\*LLM (New York University and National University of Singapore), Abogado (Universidad Católica Andrés Bello). E-mail: alvaro.antoni@nyu.edu.

\*\*Associate Professor & WTO Chair, Faculty of Law, National University of Singapore, Head Trade/Investment Law and Policy, Centre for International Law ([www.cil.nus.edu.sg](http://www.cil.nus.edu.sg)).

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## I. INTRODUCTION

*t*rade agreements and investment treaties have a common ancestor: the treaties on friendship, commerce and navigation concluded from 1778 onwards, which regulated, among other things, the level of protection to be accorded to individual aliens involved in foreign

trade.<sup>1</sup> Recently, the Director-General of the World Trade Organization (WTO) stated that “in today’s economy, trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization”.<sup>2</sup>

Indeed, numerous WTO instruments deal directly with areas of foreign investment: (1) the General Agreement on Trade in Services<sup>3</sup> (GATS) covers the provision of services through commercial presence in the territory of any other WTO member, *i.e.* foreign investment in the services sector; (2) the Agreement on Trade-Related Investment Measures<sup>4</sup> (TRIMS) deals with certain types of performance requirements; and (3) the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>5</sup> (TRIPS) covers standards of protection of intellectual property, which is an essential component to promote foreign investment. Other WTO instruments, like the General Agreement on Tariffs and Trade<sup>6</sup> (GATT), and the Agreement on Government Procurement<sup>7</sup> also deal, albeit incidentally, with investment issues. At the same time, many bilateral investment treaties and international investment agreements (IIAs) include provisions that textually are very similar to GATT provisions against non-discrimination, a fundamental discipline under these regimes.

Nonetheless, there is no comprehensive regime for trade and investment coherence. DiMascio and Pauwelyn suggested that harmonised multilateral rules were needed for trade because of the dangers of trade diversion, but that this was not the case for investment rules.<sup>8</sup> This is true mainly because few investment regimes provide for unqualified pre-establishment rights, thus preventing distortions in mode 3 of trade in services (commercial presence).<sup>9</sup> Moran’s new

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<sup>1</sup> M. Sornarajah, *The International Law on Foreign Investment* 209 (2d ed. 2004).

<sup>2</sup> WTO Press Release no. PRESS/42, Foreign direct investment seen as primary motor of globalization, says WTO Director-General (1996), [http://www.wto.org/english/news\\_e/pres96\\_e/pr042\\_e.htm](http://www.wto.org/english/news_e/pres96_e/pr042_e.htm).

<sup>3</sup> General Agreement on Trade in Services (1994), 1869 UNTS 183, 33 ILM 1167 (GATS).

<sup>4</sup> Agreement on Trade-Related Investment Measures (1994), 1868 UNTS 186.

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), 1869 UNTS 299, 33 ILM 1197.

<sup>6</sup> General Agreement on Tariffs and Trade (1994), 1867 UNTS 187, 33 ILM 1153 (GATT).

<sup>7</sup> Agreement on Government Procurement (1994), COM(94)143 final/2.

<sup>8</sup> N. DiMascio and J. Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AJIL 1, 48-89 (2008).

<sup>9</sup> If pre-establishment rights were provided and market access scheduled, these investment agreements would create GATS plus preferential treatment for those covered

book<sup>10</sup> on the different dynamics of foreign direct investment (FDI) opines that even with regard to utility reasoning, different forms of investment rules will need to be developed to fit different types of FDI. Thus, attempts to create a uniform multilateral treaty on investment, such as the Organisation for Economic Co-operation and Development Multilateral Agreement on Investment and the proposal for the inclusion of investment as one of the Singapore Issues in the WTO Doha Development Agenda, have all failed. Basically, in the absence of a concern for trade diversion, we may agree that we like the idea of convergence, but we do not know at a global level where we want to converge towards.

Much of the convergence therefore occurs in the regional trade agreements (RTAs), such as the North American Free Trade Agreement<sup>11</sup> (NAFTA), which often now include an extensive investment component.

However, the regulation of the international trade and foreign investment regimes in different ways potentially creates a systemic pathology which could lead to situations of legal uncertainty, a threat of inconsistent jurisprudence, and conflicting decisions on cases with similar factual backgrounds and causes of action. In 2003, perhaps presciently, Pauwelyn in his seminal book<sup>12</sup> already highlighted this problem though his suggestion that “WTO law must be construed and applied in the context of all other international law”<sup>13</sup>; suggestion which has not been followed by most of the subsequent WTO jurisprudence. While Pauwelyn suggests that conflict of law rules could be used to resolve some of these problems<sup>14</sup>, others like Gao and Lim have suggested – rather more controversially – that the WTO dispute settlement system should be used to resolve at least extra-WTO RTA disputes so as to increase the relevance of the WTO.<sup>15</sup>

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by the investment agreement.

<sup>10</sup> T. H. Moran, *Foreign Direct Investment and Development: Launching a Second Generation of Policy Research; Avoid the Making of the First, Reevaluating Policies for Developed and Developing Countries* (1st ed. 2011).

<sup>11</sup> North American Free Trade Agreement, Canada-Mexico-United States (1993), 32 ILM 289 and 605 (NAFTA).

<sup>12</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (1st ed. 2003).

<sup>13</sup> *Id.*, 492.

<sup>14</sup> *Id.*, generally.

<sup>15</sup> H. Gao and C. L. Lim, *Saving the WTO From the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as A ‘Common Good’ for RTA Disputes*, 11 JIEL 4, 899-925 (2008).

We shall not attempt to suggest a universal solution for this problem, but instead, with the benefit of hindsight now that the investment cases arising from the North American sugar war have been settled, we hope to explore the pathology of this complex interaction between the WTO regime, RTA disciplines and IIA obligations looking at one point of convergence and one point of divergence. We will conduct our analysis in light of the North American sugar war, as it encompasses disputes before the WTO such as *Mexico – Corn Syrup*<sup>16</sup>, *Mexico – Soft Drinks*<sup>17</sup> and several NAFTA cases<sup>18</sup> with a similar factual background. In specific, we will focus on *Mexico – Soft Drinks* on the trade side, and the three NAFTA Chapter 11 (investment) cases: *Archer Daniels v. Mexico*, *Corn Products v. Mexico*, and *Cargill v. Mexico*; on the investment side, as these disputes have as a point of convergence, a cause of action based on violations of the different national treatment provisions contained in GATT and Chapter 11 of NAFTA; and as a point of divergence, an underexplored jurisprudence regarding countermeasures.

## II. FEATURES OF GATT AND THE INVESTMENT COMPONENT OF NAFTA: OBJECTIVES, SCOPE AND DISPUTE SETTLEMENT MECHANISMS

In order to understand the differences in the interpretation of the national treatment provisions by the WTO and NAFTA sugar adjudicators, it is necessary to make a comparative analysis of the legal framework of the WTO and NAFTA. In particular and in order to put into context the different provisions, we deem necessary to understand the common and divergent elements in: (1) the objectives and scope of GATT and the investment component of NAFTA; and (2) their dispute settlement mechanisms (DSMs).

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<sup>16</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (2000), WT/DS132/R (*Mexico – Corn Syrup*).

<sup>17</sup> Panel and Appellate Body Reports, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (2005 and 2006), WT/DS308/R and WT/DS308/AB/R (*Mexico – Soft Drinks*).

<sup>18</sup> *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America* (2001), MEX-USA-98-1904-01 (*Antidumping Determination on HFCS*); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (2007), ICSID ARB(AF)/04/5 (*Archer Daniels Midland v. Mexico*); *Corn Products International, Inc. v. Mexico* (2008), ICSID ARB(AF)/04/1 (*Corn Products v. Mexico*); and *Cargill, Inc. v. Mexico* (2009), ICSID ARB(AF)/05/2 (*Cargill v. Mexico*).

Let us look first at the objectives and scope of GATT. Here, we are not attempting an interpretation based on the object and purpose of GATT, but rather simply outlining the framework for the text. The objectives and scope of the multilateral trading system were first set in the preamble to GATT: “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and *expanding the production and exchange of goods*”<sup>19</sup>, and then expanded in the preamble to the Marrakesh Agreement Establishing the WTO<sup>20</sup> (WTO Agreement), with the incorporation of the services sector and the objective of sustainable development.<sup>21</sup> The preambles to GATT and the WTO Agreement continue by stating that “these objectives [are to be achieved] *by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment*”.<sup>22</sup> At its core, GATT seeks to impose disciplines on barriers to trade, and to expand the production and exchange of goods, through reciprocal concessions and non-discriminatory obligations between governments.

Let us turn now to the investment regime. The objectives and scope of NAFTA are set in Article 102 and are to: “(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of [NAFTA parties]; (b) promote conditions of fair competition in the free trade area; (c) *increase substantially investment opportunities* in the territories of [NAFTA parties]; (d) provide adequate and effective protection and enforcement of intellectual property rights in each [party’s] territory; (e) create effective procedures for the implementation and application of this [agreement], for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this [agreement]”.<sup>23</sup> Moreover, Chapter 11 of NAFTA “*establishes the mechanism for the settlement of investment disputes that assures both equal treatment among investors of [NAFTA parties]* in accordance with the principle of international

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<sup>19</sup> GATT preamble (emphasis added).

<sup>20</sup> Marrakesh Agreement Establishing the World Trade Organization (1994), 1867 UNTS 154, 33 ILM 1144 (WTO Agreement).

<sup>21</sup> *Id.*, preamble.

<sup>22</sup> GATT preamble (emphasis added); and WTO Agreement preamble (emphasis added).

<sup>23</sup> NAFTA Article 102 (emphasis added).

reciprocity and due process before an impartial tribunal”.<sup>24</sup> For purposes of Chapter 11, NAFTA defines “investment” as broadly as possible to cover most recognised forms of investment linked to the activities of an “enterprise”, but leaves out claims to money that do not involved the activities of an “enterprise”;<sup>25</sup> an “enterprise” is defined as “[an] entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association”<sup>26</sup>; and “investors of NAFTA parties” covers “a [NAFTA party] or state enterprise thereof, or a national or an enterprise of such [NAFTA party], that seeks to make, is making or has made an investment”.<sup>27</sup> In essence, the investment component of NAFTA is about increasing and protecting investment opportunities between NAFTA parties, through equal treatment and due process among its investors.

Finally, with regard to the DSMs of these disparate regimes, while the WTO DSM is reserved for WTO members, and “serves to preserve the rights and obligations of WTO members under the *covered agreements*”;<sup>28</sup> in contrast, under the investor-state mechanism of NAFTA, private investors may invoke protection directly against the foreign government.<sup>29</sup> Both are, however, compulsory: the WTO DSM is compulsory on all WTO members and has exclusive jurisdiction for the resolution of disputes on the so-called “covered agreements”<sup>30</sup>, which includes GATT<sup>31</sup>; and Chapter 11 of NAFTA is compulsory on NAFTA parties<sup>32</sup>, and its jurisdiction covers breaches of Chapter 11, and Articles 1502(3)(a) and 1503(2) of NAFTA.<sup>33</sup> Lastly, with respect to the nature of their prescribed remedies, they are prospective under the WTO and consist in bringing the WTO-inconsistent measures

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<sup>24</sup> *Id.*, Article 1115.

<sup>25</sup> *Id.*, Article 1139.

<sup>26</sup> *Id.*, Article 201.

<sup>27</sup> *Id.*, Article 1139.

<sup>28</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), 1869 UNTS 401, 33 ILM 1226 (DSU), Article 3.2.

<sup>29</sup> NAFTA Articles 1116 and 1117.

<sup>30</sup> DSU Article 23.

<sup>31</sup> Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut* (1997), WT/DS22/AB/R, 13.

<sup>32</sup> NAFTA Article 1122.

<sup>33</sup> *Id.*, Articles 1116(1)(a) and 1117(1)(a).

into compliance<sup>34</sup> within “a reasonable period of time”<sup>35</sup>; and are retrospective under Chapter 11, and almost without exception in the form of monetary damages and restitution.<sup>36</sup>

It is worthwhile to also note that a significant difference is the actual parties to the disputes. The WTO system requires state espousal of a claim as it is limited to state-to-state dispute settlement. However, the investor-to-state mechanism of Chapter 11 of NAFTA does not require such state espousal and individual investors may bring an action. Thus, despite the disputes arising from the same set of facts, the identity of the parties to a trade dispute and an investment dispute involving an investor-to-state claim will often overlap only with regard to the respondent, but not the claimant.

### III. NATIONAL TREATMENT UNDER GATT AND THE INVESTMENT COMPONENT OF NAFTA

With that said, we shall begin with the point of convergence. Non-discrimination is a fundamental principle of the multilateral trading system and the investment chapter of NAFTA. The principle of non-discrimination is embodied in various WTO instruments and in NAFTA. One of the most prominent manifestations of the non-discrimination principles is the national treatment provision, and a significant number of trade and investment disputes have involved national treatment violations. Our analysis will take into consideration the textual differences between the provisions, their objectives and scope, and the systemic differences among the DSMs of the trade and investment regimes.

In this section we will make a comparative analysis of the national treatment provisions contained in GATT and Chapter 11 of NAFTA, as the alleged violation of these provisions has been invoked as a cause of action in the disputes.

Non-discrimination is one of the most fundamental discipline of the multilateral trading system and has been embodied in numerous WTO instruments, including the WTO Agreement, GATT, GATS, TRIMS and TRIPS. The preambles to GATT and the WTO Agreement state that the objectives of the multilateral trading system are to be achieved

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<sup>34</sup> DSU Article 19.1.

<sup>35</sup> *Id.*, Article 21.3.

<sup>36</sup> NAFTA Article 1135(1).

“by entering into reciprocal and mutually advantageous arrangements directed to (...) the elimination of *discriminatory treatment*”<sup>37</sup>

One of the most prominent WTO provisions on non-discrimination is the provision to provide national treatment to imports of foreign goods, contained in Article III of GATT. Article III:2 prohibits WTO members from imposing “directly or indirectly, (...) internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to *like domestic products*” (first sentence), and from applying “internal taxes or other internal charges to imported or domestic products [*so as to afford protection to domestic production*]” (second sentence)<sup>38</sup>, and according to the *Ad Note* to Article III:2, internal taxes “conforming to the requirements of the first sentence (...) would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between (...) *directly competitive or substitutable product[s]*”.<sup>39</sup> In essence, Article III:2 prohibits: (1) internal taxes or charges on imported products in excess of those applied to “like” domestic products; and (2) internal taxes or charges on imported products so as to afford protection to directly competitive or substitutable domestic. Furthermore, Article III:4 requires WTO members “[to accord] *treatment no less favourable* than that accorded to *like products of national origin* in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.<sup>40</sup> Finally, Article III:1 hints at the purpose of the national treatment provision and states that the measures referred to in Articles III:2 and III:4 “should not be applied to imported or domestic products *so as to afford protection to domestic production*”.<sup>41</sup>

It should be noted that the scope and application of the national treatment provision is limited by the definition of “likeness” and even then, any violations of the national treatment provision may be excused by the general exceptions to GATT found in its Article XX.

The basic criteria for determining “likeness” under GATT were laid down in the Report of the Working Party on *Border Tax Adjustments*<sup>42</sup>,

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<sup>37</sup> GATT preamble (emphasis added); and WTO Agreement preamble (emphasis added).

<sup>38</sup> GATT Article III:2 (emphasis added).

<sup>39</sup> *Id.*, *Ad Note* Article III:2 (emphasis added).

<sup>40</sup> *Id.*, Article III:4 (emphasis added).

<sup>41</sup> *Id.*, Article III:1 (emphasis added).

<sup>42</sup> Report of the Working Party, *Border Tax Adjustments* (1970), BISD 18S/97, at 18.

further developed by several panels and the Appellate Body<sup>43</sup>, and finally summarised by the Appellate Body in *EC – Asbestos*.<sup>44</sup> In this sense, the four main criteria suggested for determining, on a case-by-case basis, the “likeness” of the products at issue are: (1) their physical characteristics; (2) the extent to which they are capable of serving the same or similar end-uses; (3) the extent to which consumers perceive and treat them as alternative means of performing particular functions in order to satisfy a particular want or demand; and (4) their international tariff classification. The suggested criteria call for independent analysis of both competitive factors and physical characteristics, and an individual application of the concept of “likeness” to the case under analysis.<sup>45</sup> Since GATT is a commercial agreement, “likeness” is meant to describe a market phenomenon, *i.e.* competitiveness. This has been reaffirmed by the Appellate Body, which has established that a determination of “likeness” under Article III is a determination of the “nature and extent of a competitive relationship between and among products”.<sup>46</sup>

With respect to the general exceptions to GATT, Article XX prescribes a number of instances in which WTO members may be exempted from compliance with, among others, the national treatment provision. The general exceptions allow WTO members to take measures inconsistent with the national treatment provision but are, *inter alia*: “(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT]”.<sup>47</sup> The general exceptions are subject to the requirement that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where

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<sup>43</sup> Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/R, at 6.8; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*Japan – Alcoholic Beverages*), 21 and 22; and *Canada – Certain Measures Concerning Periodicals* (1997), WT/DS31/AB/R, 21-23.

<sup>44</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WT/DS135/AB/R (*EC – Asbestos*), at 101.

<sup>45</sup> R. E. Hudec, “Like Product”: *The Differences in Meaning in GATT Articles I and III*, in *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, 101-123 (Thomas Cottier & Petros Mavroidis, ed., University of Michigan Press 2000) (2000).

<sup>46</sup> Concerning Article III:2, Appellate Body Report, *Philippines – Taxes on Distilled Spirits* (2011), WT/DS396/AB/R, WT/DS403/AB/R, at 119; and concerning Article III:4, Appellate Body Report, *EC – Asbestos*, *supra* note 44, at 99.

<sup>47</sup> GATT Article XX.

the same conditions prevail, or a disguised restriction on international trade”.<sup>48</sup>

To sum up, the fundamental purpose of the national treatment provision is to avoid a regression towards protectionism.<sup>49</sup> More specifically, it attempts to ensure that internal measures are not applied to imported and domestic products so as to afford protection to the latter, and towards this end, WTO members are required “to provide *equality of competitive conditions* for imported products in relation to [‘like’] domestic products”.<sup>50</sup>

In contrast, the investment regime provides for a variety of standards of treatment that seek to encourage and protect flows of investment between states. Article 102 of NAFTA states that the objectives of NAFTA are “elaborated (...) through its principles and rules, including *national treatment*, most-favoured-nation treatment and transparency”.<sup>51</sup> Moreover, the national treatment provision is embodied in Article 1102, which requires a NAFTA party to accord investors of NAFTA parties and their investments “*treatment no less favourable* than that it accords, *in like circumstances*, to its own investors [and investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”.<sup>52</sup>

The rather simple structure of Article 1102 of NAFTA separates itself from the elaborated provision contained in GATT, and omits any guide as to its ultimate purpose.<sup>53</sup> As suggested before, it is not uncommon for IIAs to have less than comprehensive statements about their objectives. This usually is a result of the need to balance the interest of the capital exporting state with that of the capital importing one, which then results in the omission of any statement of purpose or an ambiguous statement that both sides can live with.

Now, it should be noted that NAFTA provides for pre-entry and post-entry national treatment. At the pre-entry stage, it creates the right to enter into the NAFTA party unhindered by screening laws and the

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<sup>48</sup> *Id.*

<sup>49</sup> For the evolution of the purpose of the national treatment provision in GATT, see N. DiMascio and J. Pauwelyn, *supra* note 8.

<sup>50</sup> Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 43, 16 (emphasis added).

<sup>51</sup> NAFTA Article 102 (emphasis added).

<sup>52</sup> *Id.*, Article 1102 (emphasis added).

<sup>53</sup> For a similar conclusion, see J. Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EJIL 3, 749-771 (2009).

right to establish a business; and at the post-entry stage, it entitles the foreign investor to be treated equally with local investors.<sup>54</sup> However, like GATT, NAFTA limits the scope and application of the national treatment provision. The formulation “in like circumstances” seems to derive from Article III of GATT, and also has a restrictive effect. Moreover, a NAFTA party may “prohibit or restrict the acquisition of an investment in its territory by an investor of another [NAFTA party], or its investment”, on national security grounds.<sup>55</sup> This is a much more limited exception than the list found in Article XX of GATT. It should however be noted that NAFTA also allows some investment sectors to be exempted altogether from the standard of treatment.<sup>56</sup> Finally, under Chapter 11 of NAFTA, it is not clear from the jurisprudence of IIA disputes whether “competition” plays a role in the determination of “likeness”, as some panels have endorsed it as a condition of “likeness”<sup>57</sup> and some have rejected it.<sup>58</sup>

At this stage, after comparing the national treatment provisions contained in Article III of GATT and Article 1102 of NAFTA, we may conclude that NAFTA’s provision is broader in scope as it provides less guidance as to its purpose and has a more limited exception only for essential security. While Article 2101 of NAFTA incorporates by reference Article XX of GATT, it specifically excludes the application of the incorporated Article XX to investments and leaves only the essential security exception found in Article 2102 of NAFTA.

#### IV. THE FACTUAL BACKGROUND

The interaction between trade and investment is evident from an analysis of the sugar disputes between the United Mexican States (Mexico) and the United States of America (United States). The sugar war between Mexico and the United States originated because of contested American sugar import quotas allocated to Mexico under NAFTA.

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<sup>54</sup> M. Sornarajah, *supra* note 1, 320.

<sup>55</sup> NAFTA Article 1138.

<sup>56</sup> NAFTA Annex 1138(2).

<sup>57</sup> For example, see *S.D. Myers v. Canada* (2001), 4 ILM 1408, and *Pope and Talbot v. Canada* (2002), 41 ILM 1347.

<sup>58</sup> For example, see *Methanex Corporation v. United States* (2005), 44 ILM 1345.

Annex 703.2(A) of NAFTA deals with trade in sugar and syrup goods between Mexico and the United States, and provides for: (1) staged tariff elimination over a period of fifteen years; (2) an annual minimum tariff-free quota; (3) an increase in the tariff-free quota in case of producing a “net production surplus”; and (4) a common tariff for sugar imports from other countries.<sup>59</sup> Mexico did not have a “net production surplus” due to the inefficiencies of the sugar industry at the time of the negotiation of this clause. However, soon after the Mexican industry became more productive, it began to see surplus sugar.

Thus, in 1993, during the final negotiations of NAFTA, the United States Trade Representative and the Mexican Secretary of Commerce and Industrial Development exchanged a series of letters that created uncertainty, *inter alia*: (1) on the definition of “net production surplus”; and (2) the quotas allocated to Mexico (exchange of letters).<sup>60</sup> These letters were meant to placate concerns and to ensure that NAFTA would be passed by the Congress of the United States. However, the exact obligations in the exchange of letters were not exactly mirrored in the English letter by the United States and the Spanish letter by Mexico.

Regardless, with the entry into force of NAFTA in 1994, Mexico expected to export a substantial additional quantity of sugar to the United States. However, NAFTA failed to open the American market as much as Mexico expected, and Mexican imports of high-fructose corn syrup (HFCS) from the United States rapidly increased<sup>61</sup>, reducing the Mexican domestic market demand for Mexican sugar and increasing Mexico’s exportable surplus sugar. This situation had a negative impact on the Mexican sugar industry and prompted Mexico to take the matter before NAFTA.

In order to clarify the uncertainties created by the 1993 exchange of letters, Mexico attempted to make use of the DSM established in Chapter 20 of NAFTA, which is applicable to all disputes regarding the interpretation or application of NAFTA. To this effect, Mexico was entitled to request the establishment of an arbitral panel, and

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<sup>59</sup> NAFTA Annex 703.2(A), at 13-22.

<sup>60</sup> For the English and Spanish text of the letters, see *Archer Daniels Midland v. Mexico*, *supra* note 18, at 63-68.

<sup>61</sup> United States Department of Agriculture, Foreign Agriculture Service, Mexico and Sugar: Historical Perspective, <http://www.fas.usda.gov/htp/sugar/2004/History%20of%20sugar%20dispute%20final.pdf>. HFCS is an alternative sweetener produced from corn starch slurry, widely used in the beverage industry as a sugar substitute.

Mexico and the United States had to select the panellists from a roster of individuals willing and able to serve as adjudicators.<sup>62</sup> However, Mexico's attempt to obtain a Chapter 20 ruling on the American sugar import quotas proved fruitless given that the roster of the United States had never been formally established and that the United States refused to cooperate in the composition of the panel.

Soon after, Mexico initiated an antidumping investigation of American exports of HFCS to Mexico, which led to the imposition of provisional duties in 1997 and definitive duties in 1998. The United States successfully challenged these duties before NAFTA<sup>63</sup> and the WTO, and Mexico was obliged to withdraw the duties.<sup>64</sup>

Thereafter, in 2002, the Mexican Congress, stating that it was "committed to protecting the domestic sugar industry"<sup>65</sup>, introduced a series of measures to "stop the displacement of domestic cane sugar by imported HFCS and soft drinks and syrup sweetened with HFCS"<sup>66</sup>: (1) a 20 per cent tax on the transfer and importation of soft drinks using any sweetener other than cane sugar (soft drinks tax); (2) a 20 per cent tax on the commissioning, mediation, agency, representation, brokerage, consignment and distribution of soft drinks using any sweetener other than cane sugar (distribution tax); and (3) a number of bookkeeping requirements on taxpayers subject to the soft drink tax and the distribution tax.

The United States challenged the Mexican measures before the WTO<sup>67</sup>, and a number of American corporations filed investment disputes against Mexico under the investor-state DSM established in Chapter 11 of NAFTA.<sup>68</sup>

The Mexican measures were temporarily suspended by the Mexican President in 2002. However, four months later, the suspension was lifted by the Mexican Supreme Court, which held that the measures had the purpose of "protecting the Mexican sugar industry".<sup>69</sup> In

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<sup>62</sup> NAFTA Articles 2008, 2009 and 2011.

<sup>63</sup> *Antidumping Determination on HFCS*, *supra* note 18.

<sup>64</sup> Panel Report, *Mexico – Corn Syrup*, *supra* note 16.

<sup>65</sup> *Archer Daniels Midland v. Mexico*, *supra* note 18, at 80.

<sup>66</sup> Mexico's first written submission, *Mexico – Soft Drinks*, *supra* note 17, at 111.

<sup>67</sup> Panel and Appellate Body Reports, *Mexico – Soft Drinks*, *supra* note 17.

<sup>68</sup> *Archer Daniels Midland v. Mexico*, *Corn Products v. Mexico*, and *Cargill v. Mexico*, *supra* note 18.

<sup>69</sup> Suprema Corte de Justicia de la Nación, *Sentencia relativa a la controversia constitucional 32/2002, promovida por la Cámara de Diputados del Congreso de la Unión, en contra del Titular*

2006, Mexico and the United States reached an agreement to achieve free trade in HFCS by 2008. As part of this agreement, the Mexican measures were repealed as of 2007.<sup>70</sup> However, the investor-state claims were not affected by this agreement and the investors continued to seek damages for their losses during the period when the measures were in place.

## V. THE DISPUTES

In this section we will analyse *Mexico – Soft Drinks*, *Archer Daniels v. Mexico*, *Corn Products v. Mexico* and *Cargill v. Mexico*.

### A. NATIONAL TREATMENT

Here, our analysis will be limited to the findings on the application of the national treatment provisions. In specific, we will examine the tests and requirements established to sustain a claim under Article III of GATT and Article 1102 of NAFTA, which have ultimately been based on the competitive relationship between the comparators and some form of protectionist intent.

#### 1. *The WTO Case: Mexico – Soft Drinks*

In 2004, the United States challenged the Mexican measures before the WTO, claiming a violation of the national treatment provisions contained in the first and second sentences of Article III:2, and Article III:4 of GATT.<sup>71</sup> The panel established different tests and requirements for a successful claim under these provisions.

With respect to the first sentence of Article III:2; “[t]he products of the territory of any contracting party imported into the territory of any

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*del Poder Ejecutivo Federal* [Mexican Supreme Court of Justice, *Decision on the constitutional objection 32/2002, raised by the Chamber of Deputies of the Mexican Congress, against the President of Mexico*] (2002), 69.

<sup>70</sup> *Archer Daniels Midland v. Mexico*, *supra* note 18, at 97; and *Cargill v. Mexico*, *supra* note 18, at 124.

<sup>71</sup> For a more precise description of the measures and products at issue, see Panel Report, *Mexico – Soft Drinks*, *supra* note 17, at 2.1-2.6.

other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”, the panel stated that when deciding whether a measure is inconsistent with the national treatment provision, only two questions need to be answered: (1) whether imported and domestic products are “like” products; and (2) whether the imported products are taxed “in excess” of the domestic products.<sup>72</sup> This interpretation is consistent with previous WTO jurisprudence and effectively makes Article III:2 a strict liability obligation since the purpose of the tax is irrelevant.

With respect to the second sentence of Article III:2, the panel decided that three elements need to be considered: (1) whether imported and domestic products are “directly competitive or substitutable”, and in competition with each other; (2) whether the products are not “similarly taxed”; and (3) whether the dissimilar taxation is applied “so as to afford protection to domestic production”.<sup>73</sup> This last element, *i.e.* the protectiveness of the measure, is not required under the first sentence of Article III:2. Thus, to find a violation of second sentence of Article III:2 not only must they be “like” or “directly competitive or substitutable” products, the measure must cause a disparate effect on the imported product.

We will now draw the parallels between the first and second elements of the tests. The panel made a broad interpretation of the second sentence to encompass “directly competitive or substitutable products” that may or may not be “like”, and construed the first sentence narrowly to cover only a subset of directly competitive or substitutable products, *i.e.* “like products”. The latter requires a more demanding standard for product distinction, which is to say that the determination of “like products” requires a greater degree of likeness than the determination of “directly competitive or substitutable products”. The analysis of “likeness” and “directly competitive or substitutable” focused on the properties, nature, quality, end-uses and tariff classification of the products, and the consumers’ tastes and habits.<sup>74</sup> However, in the determination of “directly competitive or substitutable”, the panel also looked into the determination reached by the Mexican authorities<sup>75</sup> and considered the

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<sup>72</sup> *Id.*, at 8.25 and 8.128.

<sup>73</sup> *Id.*, at 8.66.

<sup>74</sup> *Id.*, at 8.30-8.35, 8.68-8.75, and 8.131-8.135.

<sup>75</sup> *Id.*, at 8.76 and 8.77.

criteria with the specific purpose of determining whether the products were in competition in the marketplace.<sup>76</sup>

In the consideration of “in excess” under the first sentence, the panel determined that a direct or indirect connection is required between the taxes and the products at issue<sup>77</sup>, and that the term encompasses even the slightest difference in the level of taxes.<sup>78</sup> Moreover, even though the panel did not consider the competitiveness of the products in the determination of “likeness”, when analysing whether there was an indirect connection between the measures and the products at issue, the panel looked into the effect that the taxes had in the competitiveness of the products.<sup>79</sup> With respect to “similarly taxed” under the second sentence, the panel determined that products are not “similarly taxed” if the tax burden on the products is different and this difference is more than *de minimis*<sup>80</sup>, which is to say that the determination of “similarly taxed” requires a tax differential analysis that is not required in the determination of “in excess”.

Lastly, in analysing the third element to be considered under the second sentence, *i.e.* whether the measures at issue were protectionist, the panel looked, *inter alia*, into the declared intention of the Mexican authorities.<sup>81</sup>

With respect to Article III:4, the panel resolved that in analysing whether a measure is inconsistent with the national treatment provision, three elements must be satisfied: (1) that the imported and the domestic products are “like”; (2) that the measures at issue are laws, regulations and requirements “affecting” their internal sale, offering for sale, purchase, transportation, distribution or use; and (3) that the imported products are accorded “less favourable treatment” than that accorded to the domestic products.<sup>82</sup>

Unlike the second sentence of Article III:2 which specifically expands “like products” to “directly competitive or substitutable product” pursuant to the *Ad Note* to paragraph 2 of Article III, Article III:4 merely refers to “like products”. Thus, the panel was forced towards an analysis of “like product” that fell somewhere between the first and second

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<sup>76</sup> *Id.*, at 8.68.

<sup>77</sup> *Id.*, at 8.42.

<sup>78</sup> *Id.*, at 8.52 and 8.146.

<sup>79</sup> *Id.*, at 8.45 and 8.57.

<sup>80</sup> *Id.*, at 8.79.

<sup>81</sup> *Id.*, at 8.86-8.94.

<sup>82</sup> *Id.*, at 8.101.

sentences of Article III:2, as it relied both on the criteria examined under Article III:2<sup>83</sup> and on the extent of the competitive relationship between the products at issue.<sup>84</sup> The panel then stated that the term “affecting” has a broad scope, and encompasses any laws or regulations which may adversely modify the conditions of competition between imported and domestic products.<sup>85</sup> Finally, the panel looked at the composition of sweeteners produced and imported in Mexico before and after the measures were instituted<sup>86</sup>, *i.e.* the effect of the measures at issue.

The panel concluded that the first sentence of Article III:2 was breached by the soft drink tax and the distribution tax which indirectly subjected beet sugar (a “like product” to Mexican cane sugar) to internal taxes in excess of those applied to Mexican cane sugar. The panel also concluded that the first sentence of Article III:2 was violated by tax on soft drinks and syrups sweetened by HFCS since they were “like products” to soft drinks and syrups sweetened by cane sugar. With respect to the second sentence of Article III:2, while HFCS was not a “like product” to cane sugar, it was a “directly competitive or substitutable” product to cane sugar as a sweetener for soft drinks and syrups. Thus, the panel concluded that the measures were applied in a way that afforded protection to domestic production of cane sugar and therefore inconsistent with the second sentence of Article III:2. The panel also found that Article III:4 was breached by the measures which resulted in less favourable treatment for non-cane sugar sweeteners – such as beet sugar and HFCS – than that of Mexican cane sugar.

Reading the panel report which incorporates the submissions of the parties, one is left with the impression that Mexico did not strenuously attempt to argue that the measures were not inconsistent with the national treatment obligations under GATT. Mexico, in all likelihood, understood that the measures were inconsistent but was forced to take them due to internal political pressure. In late 2001, Mexican sugar farmers marched on Mexico City, besieged the Mexican Ministry of the Economy, shut down its offices, and piled up political pressure on the new government of President Vicente Fox.<sup>87</sup> The measures were therefore an immediate response to a difficult situation. As the WTO DSM only

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<sup>83</sup> *Id.*, at 8.104 and 8.106.

<sup>84</sup> *Id.*, at 8.104.

<sup>85</sup> *Id.*, at 8.108.

<sup>86</sup> *Id.*, at 8.117-8.120.

<sup>87</sup> C. Kraul, *Third-World Imports Besiege Mexico Farmers*, LA Times, 10 September 2001, <http://articles.latimes.com/2001/sep/10/news/mn-44109>.

provides prospective remedies, Mexico was prepared to comply with its WTO obligations as evidenced from the 2006 agreement it reached with the United States once the heated political situation was defused. With the blocking of the NAFTA panel creation process by the United States, one feels somewhat sympathetic with the position of Mexico in this regard, being stuck between the WTO and a hard place.

Instead, in the WTO, Mexico focused on the countermeasure argument that we will outline shortly below. The reason for this is apparent from the pending NAFTA Chapter 11 cases which were sequenced in lock-step with the WTO dispute settlement process. As the remedies available for these investor-to-state claims were not just prospective but also retrospective with regard to compensation for losses, Mexico was rightly concerned about minimising the monetary cost of its measures taken for political expediency.

## *2. The NAFTA Chapter 11 Cases*

### *(a) Archer Daniels Midlands v. Mexico*

Immediately after the WTO case was initiated by the United States, in 2003, two American investors, *Archer Daniels Midland* and *Tate & Lyle Ingredients Americas* (claimants), also initiated arbitration proceedings against Mexico<sup>88</sup> claiming a violation of, *inter alia*, the national treatment provision contained in Article 1102 of NAFTA.<sup>89</sup>

The Arbitral Tribunal was of the view that in analysing the national treatment provision contained in Article 1102, the Arbitral Tribunal had to: (1) identify the relevant subjects for comparison (“like circumstances”); (2) consider the treatment that each comparator received (“discriminatory treatment”); and (3) consider any factors that may have justified a different treatment.<sup>90</sup>

Unlike the well-developed *jurisprudence constant* of “like products” in GATT, the jurisprudence of “like circumstances” in IIA cases is less clear. Instead, following the principles contained in the Vienna Convention on the Law of Treaties (VCLT)<sup>91</sup>, the Arbitral Tribunal examined the word “circumstances” according to its ordinary

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<sup>88</sup> *Archer Daniels Midland v. Mexico*, *supra* note 18, at 6 and 13.

<sup>89</sup> *Id.*, at 2-3. For a more precise description of the measures and products at issue, see *Archer Daniels Midland v. Mexico*, *supra* note 18, at 80-84 and 39-56.

<sup>90</sup> *Id.*, at 196.

<sup>91</sup> *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331, 8 ILM 679, Article 31(1).

meaning in the context, and in light of the object and purpose, of Article 1102.<sup>92</sup> The Arbitral Tribunal established that in order to determine the appropriate comparator, all “circumstances” in which the treatment was accorded; *i.e.* the conditions, facts, or events accompanying, conditioning, determining or surrounding the accorded treatment; were to be taken into consideration.<sup>93</sup> Moreover, the analysis of “like circumstances” focused on two elements: (1) the business and economic sectors in which the firms operated; and (2) the competitive relationship between the investors in the marketplace.<sup>94</sup> Furthermore, the Arbitral Tribunal determined that when no identical comparator exists, the foreign investor may be compared with “less like comparators”<sup>95</sup>, which resembles the degree of “likeness” we would find between and among non-like but “directly competitive or substitutable” products, within the meaning of the second sentence of Article III:2 of GATT.

Moving on to the “discriminatory treatment” element, the Arbitral Tribunal determined that a discriminatory treatment based on nationality is established by showing that the foreign investor has unreasonably been afforded “less favourable treatment” than domestic investors in like circumstances<sup>96</sup>, and in establishing whether the measures afforded “less favourable treatment”, the Arbitral Tribunal looked into the intent and effect of the taxes.<sup>97</sup>

Finally, when looking at whether there were any factors that may have justified a different treatment, the Arbitral Tribunal considered that the situation faced by Mexican sugar producers concerning their limited access to the American market was not relevant to the issue.<sup>98</sup>

*(b) Corn Products v. Mexico*

Right after this first investor salvo in the sugar war, in 2003, an American investor, *Corn Products International (CPI)*, initiated arbitration proceedings against Mexico<sup>99</sup> claiming a violation of,

<sup>92</sup> *Id.*, Article 31.1.

<sup>93</sup> *Archer Daniels Midland v. Mexico*, *supra* note 18, at 197.

<sup>94</sup> *Id.*, at 198 and 199.

<sup>95</sup> *Id.*, at 202.

<sup>96</sup> *Id.*, at 205.

<sup>97</sup> *Id.*, at 209-211.

<sup>98</sup> *Id.*, at 198.

<sup>99</sup> *Corn Products v. Mexico*, *supra* note 18, at 15 and 50.

again, the national treatment provision contained in Article 1102 of NAFTA.<sup>100</sup>

After an analysis of the fundamental importance of the national treatment principle in international trade law and international investment law<sup>101</sup>, the Arbitral Tribunal articulated the three elements which have to be established for a successful claim under Article 1102: (1) it must be shown that the respondent has accorded to the foreign investor or its investment “treatment” with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the relevant investments; (2) the foreign investor or investment must be in “like circumstances” to an investor or investment of the respondent (comparator); and (3) the treatment must have been “less favourable” than that accorded to the comparator.<sup>102</sup> Moreover, the Arbitral Tribunal emphasised the importance of considering the entire factual and legal context of the case, and stated that there is a close link between the three-fold test and the nature of the measures at issue, *i.e.* whether the measures reflected discriminatory intent on the grounds of nationality.<sup>103</sup>

With respect to “treatment”, the Arbitral Tribunal looked into the intent of the Mexican authorities in enacting the taxes; *i.e.* to assist the Mexican sugar industry at a time of crisis and to respond to what Mexico considered to be the United States’ violation of NAFTA; and concluded that with these objectives, the taxes necessarily would have to produce an effect, *i.e.* “treatment”, upon HFCS producers and suppliers.<sup>104</sup>

The Arbitral Tribunal then compared domestic and foreign investors operating in the same business or economic sector as *CPI*, and took into consideration the competitive relationship of their products in the eyes of customers and Mexican law.<sup>105</sup> It should be highlighted that the Arbitral Tribunal considered highly relevant the “like products” test on HFCS and cane sugar conducted by the WTO panel in *Mexico – Soft Drinks* and concluded that the fact that the measures at issue were directly concerned with HFCS and cane sugar, and designed to discriminate in favour of cane sugar and against HFCS, was a strong

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<sup>100</sup> *Id.*, at 96.

<sup>101</sup> *Id.*, at 109-114.

<sup>102</sup> *Id.*, at 116 and 117.

<sup>103</sup> *Id.*, at 118.

<sup>104</sup> *Id.*, at 119.

<sup>105</sup> *Id.*, at 120.

indication of a breach of Article 1102.<sup>106</sup> The Arbitral Tribunal pointed out at the distinction between “like” and “identical” circumstances, and said that Article 1102 requires “like circumstances”<sup>107</sup> and that given that “the products at issue are interchangeable and indistinguishable from the point of view of the end-users (...); the products, and therefore the respective investments, are in like circumstances”.<sup>108</sup> When attempting to discern if there were any factors that could differentiate *CPI* from the Mexican sugar industry, the Arbitral Tribunal established that even if: (1) HFCS and cane sugar were subject to different regulatory regimes; (2) Mexican sugar producers were denied access to the American market; and (3) *CPI* lobbied against granting such market access for Mexican sugar; *CPI* and the Mexican sugar industry were in “like circumstances”.<sup>109</sup>

Finally, the Arbitral Tribunal simply looked at the discriminatory nature of the measures and found that the treatment was “less favourable”.<sup>110</sup>

*(c) Cargill v. Mexico*

By 2004, another American investor, *Cargill*, initiated arbitration proceedings against Mexico claiming, *inter alia*, that the measures at issue placed *Cargill* in a disadvantageous position to the benefit of Mexican sugar producers in violation of Article 1102 of NAFTA.<sup>111</sup>

The Arbitral Tribunal determined that Article 1102 mandates non-discrimination in respect of both “investors” and their “investments”<sup>112</sup>, and that the two basic requirements for a successful claim under the national treatment provision are: (1) that the investor or the investment be in “like circumstances” with domestic investors or their investments; and (2) that the treatment accorded to the investor or the investment be “less favourable” than that accorded to domestic investors or their investments.<sup>113</sup> The Arbitral Tribunal also determined that the treatment must be “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or

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<sup>106</sup> *Id.*, at 122.

<sup>107</sup> *Id.*, at 129.

<sup>108</sup> *Id.*, at 126.

<sup>109</sup> *Id.*, at 125-136.

<sup>110</sup> *Id.*, at 142.

<sup>111</sup> *Id.*, at 185.

<sup>112</sup> *Id.*, at 188.

<sup>113</sup> *Id.*, at 189.

other disposition of investments”; but this final requirement was not contested by the parties.<sup>114</sup>

With respect to “like circumstances” and after an interpretation in light of Article 31(1) of the VCLT, the Arbitral Tribunal considered that the fact that an investor is producing a good that is “like” a domestically produced good, does not necessarily mean that the investor is in “like circumstances” with the domestic producer of that good; that something more than the “likeness” of the goods produced has to be shown in order to establish that the investor and domestic producer are in “like circumstances”; and that the tests on HFCS and cane sugar conducted by the WTO panel in *Mexico – Soft Drinks* was relevant but not determinant in an analysis of Article 1102.<sup>115</sup>

This is in contradistinction with the Arbitral Tribunal in *Corn Products v. Mexico* that, as described above, placed more weight on the finding of the WTO panel. In addition to the elements considered in *Corn Products v. Mexico* and just like the adjudicators did in *Archer Daniels v. Mexico*, the Arbitral Tribunal considered the dire economic situation of the Mexican sugar industry and the rationale behind the measures at issue. The Arbitral Tribunal concluded that considering that the measures were taken to bring pressure on the United States government to live up to its NAFTA obligations, and not to allow sugar producers to capture the sweeteners market for soft drinks; the dire economic situation of the Mexican cane sugar industry as compared to the healthy state of the HFCS industry was not relevant in determining whether suppliers of HFCS and suppliers of cane sugar were in “like circumstances”.<sup>116</sup> There was no link between the alleged difference (the economic situation) and the rationale and objective of the measure.<sup>117</sup> The Arbitral Tribunal went on to state that if a reliance on a difference of economic circumstances could be “used to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor, the national treatment protection in Article 1102 would be meaningless”.<sup>118</sup>

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<sup>114</sup> *Id.*, at 222.

<sup>115</sup> *Id.*, at 194 and 195.

<sup>116</sup> *Id.*, at 201-209.

<sup>117</sup> *Id.*, at 209.

<sup>118</sup> *Id.*, at 210.

With respect to “treatment no less favourable”, the Arbitral Tribunal looked into the design of the measures, and found that the measures were discriminatory in both their intent and effect.<sup>119</sup>

Thus, three Arbitral Tribunals interpreted NAFTA 1102 using a broad “likeness” analysis that resembled the “directly competitive or substitutable” and “likeness” analyses conducted by the WTO panel under the second sentence of Article III:2 and Article III:4 of GATT. These analyses took into consideration a wide array of elements to determine the degree of “likeness” between the comparators, *i.e.* the investors and their investments under NAFTA and the products under GATT; and finally focused on the competitive relationship between the comparators and on the impact of the measures at issue on this relationship.

### *3. Convergence of “Likeness”*

The jurisprudence of the sugar disputes have converged following remarkably similar tests focused on the “likeness” of the comparators and their “treatment” when interpreting the national treatment provisions contained in Article III of GATT and Article 1102 of NAFTA: (1) on the analysis of “likeness”, they have focused mainly on the extent of the competitive relationship between the comparators; and (2) on the analysis of “treatment”, on the distortive effect that the measures had in this competitive relationship. Indeed, two of the Arbitral Tribunals took into consideration the determination of the “likeness of the products” under GATT as part of their analysis of the “likeness of the circumstances” under Chapter 11.

It is suggested that some caution must be exercised in order not to import the trade concept of “like products” into the investment regime. In applying a “like circumstances” test under Chapter 11 of NAFTA, it is probably reasonable for an investment panel to take account of a previous WTO “like products” analysis, especially if the factual backgrounds and the measures at issue are the same. However, it must be emphasised that the “likeness of the products” is only one aspect to consider in establishing whether two investors or their investments are in “like circumstances”. Yet, when one reads the awards of the Arbitral Tribunals in the three sugar cases, it would seem that the WTO analysis of “like products” outweighed the “other

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<sup>119</sup> *Id.*, at 219-221.

circumstances” that were considered as they attempted to determine the “likeness” of the “circumstances”.

The strict “likeness” test enunciated by the panel in *Mexico – Soft Drinks* which reiterates the four considerations of the Appellate Body in *Japan – Alcoholic Beverages*<sup>120</sup> – physical characteristics, products’ end-uses, consumer perception and behaviour and tariff classification of the products – is not particularly helpful in determining “like circumstances”. An investor may produce a “like product” and still not be in “like circumstances”. For example, this could occur when the production process method of the product is environmentally damaging and regulation prohibiting that method of production is enacted to prevent future environmental damage.

As highlighted before, unlike GATT, Chapter 11 of NAFTA does not have an equivalent general exceptions provision as that found in Article XX of GATT that could permit such environmental regulations. The ostensible “environmental exception” found in Article 1114 of NAFTA requires that the measure must be “consistent with” Chapter 11 and is thus not an exception clause. To rely too heavily on a finding of a “like product” would unduly limit the policy space for host states to regulate such externalities.

Of course, it would remain open for a tribunal to find that such environmental regulations are not “treatment no less favourable” if those regulations apply to all producers of the product, but in the case where no other producer was producing in that way, it could be seen as specifically targeting that foreign producer, especially since most production processes have some environmental impact. It would therefore be more elegant to consider the issue of discrimination from a “like circumstances” perspective. Indeed, the Appellate Body in *EC – Asbestos*<sup>121</sup> stated that the carcinogenic nature of the product could also be taken into consideration when determining whether products were “like”.<sup>122</sup> It may be that the Appellate Body took the position that the carcinogenic nature of asbestos should have been considered by the panel as a factor in comparing the likeness of the physical characteristics of the product and that the panel should have been cognisant of the possible effect the carcinogenic properties would have on consumer perception and behaviour<sup>123</sup>, but in doing so, the

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<sup>120</sup> Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 43.

<sup>121</sup> Appellate Body Report, *EC – Asbestos*, *supra* note 44, at 114.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*, at 122.

Appellate Body was perhaps implicitly incorporating factors beyond the *Japan – Alcoholic Beverages* criteria.

It is suggested instead, that an analysis of “like circumstance” should involve an analysis of the measure and the appropriateness of the comparator in relation to the objective of the measure. In this regard, the Arbitral Tribunal in *Archer Daniels Midlands v. Mexico* got too tied up in a “like product” type analysis and attempted to essentially determine whether the claimants were “like investors”. The Arbitral Tribunal in *Corn Products v. Mexico* was even clearer in equating “like circumstances” to “like investors” and relied even more on the WTO findings of “like products”, even if the Tribunal specifically noted that this was only an element in its analysis and not conclusive.

Only the Arbitral Tribunal in *Cargill v. Mexico* really attempted to get to grips with “like circumstances” by using what was for all intents and purposes the hoary “aims and effects” test avoided by WTO jurisprudence. Unfortunately, while the Tribunal found that the measures aimed to bring pressure on the United States government to live up to its NAFTA obligations, and not to allow sugar producers to capture the sweeteners market for soft drinks, the Tribunal somewhat confused the analysis by saying that the dire economic situation of the Mexican cane sugar industry as compared to the healthy state of the HFCS industry was not relevant in determining whether suppliers of HFCS and suppliers of cane sugar were in “like circumstances”. This was after the Tribunal discussed with somewhat approval the case of *GAMI v. Mexico*<sup>124</sup>, which involved Mexico’s nationalisation of some sugar mills and not others on the basis of the direr economic situation of those particular sugar mills that were the subject of the expropriation. The *GAMI* Tribunal found that this difference in economic circumstances was sufficient for the measure to avoid a violation of Article 1102 of NAFTA because it was not in “like circumstances”. The *Cargill* Tribunal then said that the *GAMI* principle could not be used to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor, as this would undermine completely the national treatment protection in Article 1102 of NAFTA. This sort of begs the question since the interpretation of “like circumstances” defines the scope of the national treatment protection in Article 1102 of NAFTA and there well may be valid circumstances where that may happen – such as the environmental protection situation described

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<sup>124</sup> *GAMI Investments Inc. v. Mexico* (2004), 44 ILM 545.

above – albeit that it may be less clear that the measure was taken “in order to benefit a domestic competitor”.

Thus, one would suggest that this convergence of the jurisprudence of national treatment in Article 1102 of NAFTA and the WTO case should perhaps instead diverge from the “like product” analysis and instead focus on an alternative analysis. In this regard, the Horn-Weiler suggestion of a refined “aims and effects” test, one that they label as the “alternative comparators” approach, where an effort is made to find an implicit or explicit comparator for the different treatment and then determining if the measure affects the competitive relationship between the “like products” (as defined by the appropriate comparator). The problem with the *Cargill* Tribunal’s unrefined “aims and effects” test is that while the objectives of the measures in the case were clear due to the heated discussion in the Mexican Parliament, not all cases would have such explicit aims attached to every measure. While the Horn-Weiler “alternative comparators” approach<sup>125</sup> was developed mainly for the “like product” analysis, it lends itself rather well (unlike the *Japan – Alcoholic Beverages* test) to a determination of “like circumstances”. Again the example of an investor who is the sole producer employing an environmentally damaging production process method will serve to illustrate the value of this approach. While a regulation prohibiting that process may have a disparate effect on a foreign investor who is the sole producer employing that method compared with local investors producing the same product through more environmentally friendly processes, the focus is not on the disparate effect or the “like products”, but instead on whether the measure affected investors in “like circumstances” as understood from the perspective of the appropriate comparator – in this case a putative domestic producer using the environmentally damaging production method.

Applying this to the *GAMI* case, the appropriate comparator would be the sugar mills close to insolvency, and the measures taken to nationalise the less solvent sugar mills would be consistent with a rescue attempt and therefore not in breach of the national treatment obligation as the investors would not be in “like circumstances”. Conversely, in the *Cargill* case, the measures were aimed at HFCS not because of any environmental or health concerns but really to target the HFCS industry so as to placate and protect the domestic cane sugar farmers. This would result in a finding that the comparator applied by

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<sup>125</sup> H. Horn and J. H. H. Weiler, *EC Measures Affecting Asbestos and Asbestos-Containing Products*, 3 *World Trade Review* 01, 129-151 (2004).

the measure was simply that of the foreign origin of the sweetener producer and thus, would result in a breach of the national treatment obligation found in Article 1102 of NAFTA since that foreign HFCS investor would be in “like circumstance” with the local cane sugar investor.

The sugar war cases illustrate how a measure or a set of measures could result in multiple claims that the measures violated different obligations, and that these claims could be adjudicated in different fora. It would be tempting therefore to suggest that convergence in the interpretation of the obligations by the different adjudicative fora should be welcomed. However, as highlighted above, a superficial convergence should be avoided and instead what should be attempted is an understanding of how these different regimes and DSMs fit together perhaps not with complete convergence of the rules, but at least with some coherence with respect to the effects they would have on the system of international economic law.

## B. COUNTERMEASURES

The main point of divergence in the sugar war cases involved the legitimacy of countermeasures. Not only did the WTO Appellate Body report diverge from the panel report in this regard, but each of the investor-to-state cases also differed from analysis of the WTO reports and even with each other.

### *1. The WTO Case: Mexico – Soft Drinks*

The WTO panel, after rejecting Mexico’s request for the panel to decline to exercise its jurisdiction in favour of a NAFTA panel, focused its inquiry on Mexico’s argument that the measures were necessary to secure compliance with laws or regulations (*i.e.* by the United States with the United States’ obligations under NAFTA) as permitted by Article XX(d) of GATT.<sup>126</sup> The panel noted that while Mexico “characterized its actions as an exercise of countermeasures, as recognized under international law”, the panel was of the opinion that Mexico was not suggesting that international law rules governing

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<sup>126</sup> Panel Report, *Mexico – Soft Drinks*, *supra* note 17, at 8.162.

such actions should affect the interpretation of Article XX(d).<sup>127</sup> This is indeed the orthodox understanding of the WTO regime relying on Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)<sup>128</sup>:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.* [Emphasis added]

This provision has often been cited as the reason why the WTO DSM is hermetically sealed off from other international laws since only interpretative rules (as opposed to substantive ones) are directly incorporated, and the Dispute Settlement Body (DSB) cannot add or diminish the rights and obligations under the WTO agreements. This is probably the correct approach of an adjudicative body that derives its mandate from the WTO DSU since to do otherwise would be to act outside its mandate. It is, however, not the position in international law where the WTO agreements are only part of a *corpus* of complex rules and regulations affecting international trade and the global commons. Regardless, the debate is rather moot since Article 1.1 of the DSU provides that:

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of [the covered agreements]. The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.

Thus, Article 1.1 of the DSU provides both compulsory jurisdiction for disputes arising from the WTO agreements and a mandate for a panel to have “competence-competence” to rule even on the DSU.

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<sup>127</sup> *Id.*

<sup>128</sup> DSU, *supra* note 28.

The panel concluded that Article XX(d) of GATT did not apply to NAFTA since the phrase “laws or regulations” did not include international agreements whether they have direct effect or not.<sup>129</sup>

The Appellate Body report is perhaps more nuanced. There the Appellate Body stated that “laws or regulations” refer to rules that form part of the domestic legal system of the WTO member.<sup>130</sup> It did, however, footnote the third party submission of the European Communities that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked against individuals and if so, that international agreement could be regarded as having become part of the domestic legal order and thus “laws or regulations” within the meaning of Article XX(d) of GATT.<sup>131</sup>

The critical finding of the Appellate Body was that even if “international countermeasures” could be described as intended “to secure compliance”, the “laws or regulations” within the meaning of Article XX(d) of GATT refers to rules that form part of the domestic legal order of the WTO member invoking the provision and do not include the international obligations of another WTO member.<sup>132</sup> To find otherwise, the Appellate Body suggested, would be to allow unilateral and WTO unsanctioned countermeasures by a WTO member against other WTO members if that WTO member is of the opinion that those other WTO members are in breach of their WTO obligations, and that this would be in contradiction with Articles 22 and 23 of the DSU, which require DSB approval for retaliation.<sup>133</sup> The Appellate Body further added that if “laws or regulations” do not include the WTO agreements, the other problem that the countermeasure argument raises is that future WTO adjudicative bodies would have to decide on whether there was a violation of the relevant extra-WTO international obligation, and thus would have to become adjudicators of non-WTO disputes which would be beyond the mandate provided by the DSU.<sup>134</sup>

These are persuasive arguments and consistent with the approach that the WTO adjudicative bodies are only mandated and empowered by the limited text of the DSU.

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<sup>129</sup> Panel Report, *Mexico – Soft Drinks*, *supra* note 17, at 8.194-8.196.

<sup>130</sup> *Id.*, at 69.

<sup>131</sup> *Id.*, at footnote 149.

<sup>132</sup> *Id.*, at 75.

<sup>133</sup> *Id.*, at 77.

<sup>134</sup> *Id.*, at 78.

## 2. The NAFTA Chapter 11 Cases

This is not the case with NAFTA Chapter 11 Arbitral Tribunals. NAFTA Article 1131: Governing Law paragraph 1 provides:

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*. [Emphasis added]

This is in contradistinction with Article 3.2 of the DSU since it incorporates not just the interpretative rules of customary international law, but possibly all other applicable rules of international law. Arbitral Tribunals established under Chapter 11 of NAFTA are mandated not just to apply the NAFTA text but to incorporate other rules of international law where applicable. Thus, the three tribunals did indeed respond to the issue of countermeasures unfettered by the restrictive mandate of the WTO panel and Appellate Body. It is likely that the arguments made by Mexico at the WTO proceedings were part of a strategy to anticipate and prepare the ground for this line of inquiry.

### (a) *Archer Daniels Midland v. Mexico*

The Arbitral Tribunal in *Archer Daniels Midland v. Mexico* began its analysis with the International Law Commission's Articles on State Responsibility<sup>135</sup> (ILC Articles) and the decision of the International Court of Justice in the *Gabcikovo-Nagymaros Project*<sup>136</sup> case (ICJ Case). The Tribunal, based on the submissions of the parties, held that for the Mexican tax measures – the alleged countermeasures – to be valid: (1) there must be a breach of NAFTA by the United States; (2) the tax must have been enacted in response to the alleged breaches by the United States and intended to induce the United States to comply with its NAFTA obligations; (3) the tax must be proportional; and (4) the tax cannot impair the individual substantive rights of the claimant investors.<sup>137</sup> This last point (4) is puzzling since it is not specifically reflected in either the ILC Articles or the ICJ Case. We shall discuss this further below.

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<sup>135</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc. A/56/10.

<sup>136</sup> *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) (1997), ICJ Rep. 7.

<sup>137</sup> *Archer Daniels Midland v. Mexico*, *supra* note 18, at 125-127.

With regard to the first element, the Arbitral Tribunal found that it did not have the jurisdiction to find that the United States had breached its NAFTA obligations, as those obligations did not relate to obligations under Chapter 11 but instead to obligations under Chapter Three or Chapter Twenty of NAFTA.<sup>138</sup> However, as the parties agreed that the Tribunal had the jurisdiction to decide any defence under Chapter 11 – including a countermeasure defence – the Tribunal went on to do so, and if the other three elements were made out, Mexico’s request for a stay of the proceedings would be considered.<sup>139</sup>

The Tribunal then went on to determine whether the tax was enacted in response to the alleged breaches by the United States of its NAFTA obligations. Relying on the evidence provided by the claimants and a decision of the Mexican Supreme Court that characterised the objective of the measures as primarily related to the protection of the domestic sugar industry, the Tribunal held that the tax was not enacted in response to the breaches, nor was it intended to induce compliance with the United States with its NAFTA obligations.<sup>140</sup> It should be noted that in finding so, the Tribunal emphasised that this was a finding of fact and not a determination of law.

On the issue of proportionality, the Tribunal referred to Article 51 of the ILC Articles and its Commentary (7) stating: “a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures”.<sup>141</sup> The Tribunal then went on to find that since none of the obligations alleged breached by the United States involved investment protection standards, but only involved inter-state obligations concerning international trade and state-to-state disputes, the adoption of the tax by Mexico which affected investors was disproportionate.<sup>142</sup>

This is indeed a strange finding since the tax measures were not aimed against investors as perhaps an expropriation measure could have been. Any measure taken to affect international trade and state-to-state relationships could and probably would have an effect on foreign and domestic investors. That a measure indeed had such an effect

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<sup>138</sup> *Id.*, at 128.

<sup>139</sup> *Id.*, at 132 and 133.

<sup>140</sup> *Id.*, at 145-151.

<sup>141</sup> *Id.*, at 152.

<sup>142</sup> *Id.*, at 157-159.

does not indicate by itself that the measure was a disproportionate countermeasure. In the WTO, retaliations are often sanctioned by the DSB pursuant to Article 22 of the DSU, and often these sanctioned countermeasures include suspension of concessions and raised tariffs. It is entirely conceivable that even if this was a WTO-sanctioned retaliation, innocent investors could be affected; and to suggest that this could lead to state liability under an investor-to-state claim would precipitate a real clash of international legal regimes.

This brings us to the fourth element in the Tribunal's criteria for a valid countermeasure – the question of independent rights. The claimants argued that qualified investors under Chapter 11 of NAFTA were vested with direct independent rights and immune from the legal relationship between the member states. However, after referring to the stated prior positions of the NAFTA parties in other cases, the Tribunal found that the only individual right that investors enjoy under Chapter 11 is the procedural right to invoke the responsibility of the host state.<sup>143</sup> Thus, since the Mexican tax measures did not affect that procedural right, this did not undermine its validity as a countermeasure.<sup>144</sup>

As highlighted above, this concern about whether the countermeasures affected independent rights is not found in the ILC Articles or the ICJ Case. It would seem to be a reasonable concern as countermeasures should be limited to actions against the party which first violated international law and not on innocent bystanders. It is, however, very difficult to imagine any trade related countermeasure that does not have an impact on investors and if this was a requirement, it is likely that no trade countermeasures could be seen as legitimate under international investment law.

*(b) Corn Products v. Mexico*

Again the Arbitral Tribunal (made up of three different arbitrators) started with references to the ICJ Case and the ILC Articles.<sup>145</sup> The Tribunal then listed instead of four elements, a longer list of six criteria for legitimate countermeasures – that they should: (1) be taken in response to a prior breach of international law by another state; (2) be directed against that wrongdoing state; (3) be taken for the purpose

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<sup>143</sup> *Id.*, at 179.

<sup>144</sup> *Id.*

<sup>145</sup> *Corn Products v. Mexico*, *supra* note 18, at 145.

of inducing that state to comply with its international obligations; (4) be limited in time and, so far as possible, be taken so as to permit resumption of the performance of the obligations in question; (5) be proportional; and (6) be accompanied by a call on the state responsible for the initial wrongful act to fulfil its obligations, and a good faith attempt to negotiate or resolve the dispute through other forms of dispute settlement.<sup>146</sup> While (1), (2) and (3) above correspond with the first two of the four criteria set out in the Award in *Archer Daniels Midland v. Mexico* and the requirement of proportionality is consistent with it, the Tribunal added (4) and (6) without mentioning the requirement to avoid the impairment of individual substantive rights of the investors. This is in our view perhaps a more refined formulation of the criteria for legitimate countermeasures since it incorporates in a more nuanced way how states actually interact with each other.

While the Tribunal held that Mexico was not precluded from raising the defence of countermeasures because of the rulings against it in the WTO case, as those reports turned on the language of GATT and not NAFTA, the Tribunal then startlingly found (contrary to the Award in *Archer Daniels Midland v. Mexico*) that NAFTA conferred upon investors substantive rights (as opposed to only procedural) separate and distinct from those of the state of which they are nationals.<sup>147</sup> The Tribunal was of the view that individuals and corporations may possess rights under international law derived from a treaty. The question then was whether on the construction of the treaty, there was any intention to confer rights on the investors, and in this case, NAFTA intended so because it granted the investors a right to institute proceedings in their own name and for their own benefit.<sup>148</sup> Thus, when it came to determining whether the Mexican tax were lawful countermeasures, the Tribunal held that since the rights of the investor was separate from that of the United States, the defence of countermeasures could not operate to preclude the wrongfulness of the tax when applied to the investor.<sup>149</sup>

As submitted above in the discussion about the Award in *Archer Daniels Midland v. Mexico*, for perhaps a somewhat different legal reason, this makes it very difficult to imagine how WTO-sanctioned retaliation will avoid liability to foreign investors if those retaliatory measures impact their investments.

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<sup>146</sup> *Id.*, at 146.

<sup>147</sup> *Id.*, at 167.

<sup>148</sup> *Id.*, at 168.

<sup>149</sup> *Id.*, at 176.

*(c) Cargill v Mexico*

After noting that that countermeasures are allowed under customary international law and that the ILC Articles provide an important point of departure in ascertaining the law on countermeasures, the Tribunal to its credit recognised that countermeasures “directed at an offending State will in many, if not most, circumstances have its intended effect on the offending State through its impact on nationals of that offending State”.<sup>150</sup> However, the Tribunal then found that just as countermeasures cannot preclude the wrongfulness of an act in breach of obligations owed to third states, countermeasures could not be a defence for breaches of obligations owed to nationals of the offending state.<sup>151</sup> In so doing, it must have been within the contemplation of the Tribunal that most economic countermeasures taken against the home state of foreign investors present in the state enacting the countermeasures would leave that state vulnerable to investor-to-state claims. In fact, this was effectively the submission of Mexico: that if countermeasures were permitted in NAFTA, then those countermeasures would be “nullified” by the fact that they would not be a defence against investor claims. To this, the Tribunal suggested that a range of countermeasures could always be taken though the Tribunal did not discuss what types of legitimate countermeasures would be available against states that would also avoid any impact on foreign investors from those states.<sup>152</sup>

The Arbitral Tribunal also found that even if the rights of the investors may originate from the act of states, this did not affect the existence of the rights conferred. Since it is the investor that institutes the claim, calls the tribunal into existence and is the named party, the Tribunal was of the view that regardless of what it referred to as the “not fruitful” characterisation of procedural and substantive rights, this was a right of the investor separate from that of the home state.<sup>153</sup>

*3. Divergence on Countermeasures*

Thus, all the adjudicative bodies involved in the cases above came to different conclusions using different lines of inquiries albeit that they all decided in the end (for different reasons) that the Mexican taxes

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<sup>150</sup> *Cargill v. Mexico*, *supra* note 18, at 420 and 421.

<sup>151</sup> *Id.*, at 422.

<sup>152</sup> *Id.*, at 428.

<sup>153</sup> *Id.*, at 426.

could not be justified as countermeasures. At first glance, it would appear to be obvious that since the cases involved different parties, adjudicators and texts (GATT and NAFTA), we should not be surprised by this divergence in views.

However, as illustrated above, the same cases came to fairly similar conclusions about the interpretation of the national treatment obligation even when it involved different texts – Article III of GATT and Article 1102 of NAFTA. Yet, when it came to an analysis not of the texts but of how the customary international law on countermeasures affects the system of international economic law, none of the cases approached the question in the same way.

This is problematic. As suggested above, it is appropriate for the national treatment obligation to be treated differently because the obligation contained in GATT focuses on “like products” and has a general exception provision found in Article XX of GATT as part of its architecture. This is absent in the NAFTA text that uses the phrase “like circumstances” instead. Thus, the analysis should be different.

Conversely, it is a systemic concern when the legitimacy of unilateral countermeasures remains uncertain. Instead of divergence, this is one area where convergence or at least coherence in the jurisprudence is probably most needed. As pointed out above, you cannot have a WTO system that allows and authorises retaliations to encourage compliance and at the same time have an investor-to-state regime that requires states taking such measures for economic retaliation, such as tariff increases, to avoid affecting foreign investors. By definition, such measures would inevitably affect the foreign investor.

Perhaps this pathology was created by the attempt to classify the rights of investors under Chapter 11 of NAFTA as being either rights dependent on the diplomatic protection of their home state or completely separate rights. This “either-or” analysis fails to recognise that these investor rights are perhaps hybrid rights owned by investors and inextricably connected with NAFTA. Article 1131(2) provides that the NAFTA Free Trade Commission (FTC) may issue an authoritative interpretation of those rights. Indeed, the FTC did so after *Metalclad v. Mexico*<sup>154</sup> to limit the definition of “fair and equitable treatment” under Article 1105 of NAFTA. If the state parties collectively can limit these rights through an authoritative interpretation<sup>155</sup>, then arguably these

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<sup>154</sup> *Metalclad Corp. v. United Mexican States* (2001), ICSID ARB(AF)/97/1.

<sup>155</sup> Some have even suggested that the limitation of those rights were effectively amendments of the rights. See, e.g. C. H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 JIL 347 (2006).

investor rights are dependent to some extent on the rights of the state parties and are not completely separate rights.

The Tribunal in *Corn Products v. Mexico* argued that since the Tribunal in *GAMI* held that it had jurisdiction even in the face of a United States submission that the Tribunal lacked jurisdiction, this meant that the investor's right was more than asserting the substantive rights of the United States.<sup>156</sup> Presumably this was done by the United States under Article 1128 of NAFTA which allows all NAFTA parties to make submissions about interpretation, though it should be noted that unlike Article 1131(2) of NAFTA, this does not mandate that the Tribunal would be bound by that submission. This would suggest that another way to understand *GAMI* is that NAFTA did create individual rights for investors but those rights are hybrid rights that not only originate but continue to be tied up with the right of the home state, however, those rights may only be varied by the NAFTA parties acting collectively rather than unilaterally. As one of the objectives of NAFTA was to increase investment opportunities, the unilateral removal of rights by a NAFTA party – even if it was the home state – could undermine this objective. Thus, the architecture of NAFTA was geared to prevent any action by NAFTA parties to unilaterally backtrack on their agreements in order to limit cross-border economic activity. This blueprint may have failed to institute automaticity in the establishment of NAFTA Chapter 20 panels, but that is more a flaw in the execution of NAFTA than evidence against this objective.

Regardless of whether the rights are tied up with that of the states or separate rights, the fundamental problem remains – What do we do about WTO authorised retaliation? If the rights are found to be separate or, if as the Tribunal in *Archer Daniels Midland v. Mexico* suggested, that if you affect investors rather than states, such countermeasures would be disproportionate, we are still left with states like Mexico now stuck between the WTO and NAFTA.

## VI. CONCLUSIONS

The objectives, scope and DSMs of trade and investment regimes have developed in different ways. However, they have common elements that serve as testament of shared foundations and an unrelenting complementary relationship. In essence, the WTO and Chapter 11 of

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<sup>156</sup> *Corn Products v. Mexico*, *supra* note 18, at 173.

NAFTA have liberalising and protective roles that complement each other: (1) in order to expand the production of and trade in goods and services, resources are needed; while increasing and protecting investment opportunities, generate resources; and (2) in order to increase investment opportunities, resources are needed; while expanding trade in goods and services, generate resources.

The principle of national treatment is at the core of the multilateral trading system and the investment component of NAFTA, but taking into consideration the differences in the trade and investment regimes, it is no surprise that the objectives, scope and application of their national treatment provisions differ. In Chapter 11 of NAFTA, the provision is broader in scope as it confers both pre-entry and post-entry rights, and is silent as to its purpose; while in GATT, the provision only confers post-entry rights and has an explicit purpose, *i.e.* to preserve the competitive relationship between and among comparators.

We have analysed WTO and NAFTA disputes with similar factual backgrounds and causes of action. It may be intuitive to think that there is room for an overlap leading to conflicting results. However, from our analysis of the DSMs established under the WTO and Chapter 11 of NAFTA, it is clear that this is not possible, as there could never be a complete overlap in the identity of the parties or the legal claims in cases brought before these trade and investment systems: (1) with respect to the parties, only governments have standing and can bring a dispute before the WTO, while under NAFTA, private investors may invoke protection directly against the foreign government; and (2) with respect to the legal claims, while the WTO panels and Appellate Body have exclusive jurisdiction over claims of violations of WTO law, NAFTA Arbitral Tribunals can only examine claims of breaches of NAFTA law.

With that said, while we can live with different results in the interpretation of national treatment, the NAFTA Chapter 11 cases in the sugar war may have created a serious pathology that could result in a clash between the WTO regime and the investor-to-state system. With the proliferation of cases involving measures that could result in claims both at the WTO and the investor-to-state level – such as the tobacco cases – this will require future refinement and coherence.