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Protection of Domestic Investors under the WTO and International Investment Regimes

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Abstract

This paper analyses how international economic law regulates measures aimed at the protection of domestic investors against foreign investors. It evaluates the logic of investment protectionism and assesses the incentives behind foreign entry barriers. It analyses and evaluates WTO GATS cases that dealt with the issue. It then develops a framework on how the facts of the *China–Electronic Payments* Panel decision could be assessed in international investment treaties. Several provisions common to those treaties would be applicable to the situation and the recent US–China Economic Agreement explicitly deals with the issue. However, adjudication under investment treaties would only be possible if some procedural conditions were present. The paper concludes that international economic law already covers a range of situations related to entry barriers to foreign investments. It also suggests that states can carefully tailor both substantive and procedural treaty rules to allow for coverage, or not, of situations involving domestic monopolies.

1. Introduction

At first glance, foreign investments are beneficial to the host state and to its citizens: capital inflows increase productive or innovative capacity and, coupled with labour, provide income opportunities (Haskel and Westlake, 2017: 3). However, certain types of foreign investment are considered detrimental: they may affect domestic entrepreneurship, lead to social disruptions, and impact on the host state's financial stability (Pohl, 2018: 14–16). For various reasons, states choose to differentiate what is allowed, or not, in terms of investments in their territories based on the origin of the capital. In fact, the topic of restrictions on access for foreign investments has picked up momentum and foreign investment screening seems to be on the rise.

This paper deals with the legal consequences of the protective regulation of certain sectors for domestic investors. Under this umbrella, one can place regulatory measures limiting entry, aimed at insulating companies, such as national champions or well-connected domestic groups, at times to the detriment of foreign multinational corporations (MNCs).

The relationship between investment and trade regulation, which drives much of the subsequent analysis, derives from the fact that MNCs have several choices on whether to provide their products or services internationally. Locational advantages and intangible/specific assets create incentives for the MNCs to extend operations across borders into a single economic structure, through horizontal or vertical integration (Oatley, 2016: 171–172; Bonnitcha et al., 2017: 38–46). Particularly in trade in services, there are different modes of international provision: cross-border, consumption abroad, commercial presence in the country, and through the presence of individuals. These modes are subject to international regulation, most notably by World Trade Organisation (WTO) agreements, as they correspond to the modes of provision

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in the General Agreement on Trade in Services (GATS)[1] – respectively modes 1, 2, 3, and 4. While other WTO agreements touch on investments in one way or another – TRIMS[2] and ASCM[3] (e.g., in relation to local content requirements) and TRIPS[4] (e.g., in relation to intellectual property) – it is in the GATS that a major part of this regulation is found. To the extent that trade in services through commercial presence (mode 3) involves investment, one can say that the GATS also regulates investments.

Section 1 discusses the logic of investment protectionism and the incentives to favour domestic investors over foreign ones. Section 2 evaluates, as a case study, the *China–Electronic Payments* WTO decision,[5] under the scope of the GATS, together with references to other GATS cases. This case is key to understanding the topic of this paper, not only due to the economic relevance of electronic payments but also because it allows the exploration of the various ways through which protectionism in investments can be tackled. The outcome of the case is put into context with the 2020 US–China Economic Agreement.[6] Section 3 moves beyond the analysis and develops a framework on how the facts of the case could be assessed under bilateral investment treaties – BITs or investment chapters of larger preferential trade agreements, together referred as International Investment Agreements (IIAs). The conclusion is that international economic law already covers, in several ways, a wide range of situations connected to entry barriers to foreign investments. The paper also suggests that states can carefully tailor both substantive and procedural treaty rules to allow for the coverage or not of situations involving domestic monopolies.

2. Logic of Investment Protectionism

2.1 Incentives and Techniques

Rights of establishment for foreign investments in the context of liberalization treaties help to achieve the goal of equality of opportunities, which underpins international economic law (Kurtz, 2016: 84–85; Cottier and Schneller, 2014: 7, 12–14; Weiler, 2013: 443, 457). An investment liberalization treaty commitment may be negotiated as a concession to the other treaty party in exchange for reciprocal benefits. A commitment may be the international reflection of liberalizing or privatizing measures that states have taken domestically (*lock-in)* or will take in the context of domestic reforms. The liberalization treaty may serve as a signalling device also to the domestic private sector to express the host state's benign view towards private capital in general, in contrast to public capital (Salacuse, 2015: 113). Binding investment commitments make it costly for the host state to go back on the liberalization of the entry of foreign investments, which fits well with the requirements of the signalling theory (Bonnitcha et al., 2017: 175). Foreign direct investment (FDI) liberalization through international commitments also fits with theories that highlight two levels of bargaining: one in the context of investment treaties

[1]General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1B 1869 UNTS 183 (GATS).

[2]Agreement on Trade-Related Investment Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1868 UNTS 186 (TRIMS).

[3]Agreement on Subsidies and Countervailing Measures (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1A 1869 UNTS 14 (ASCM).

[4]Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 1C 1869 UNTS 299 (TRIPS).

[5]Panel Report, *China – Certain Measures Affecting Electronic Payment Services* (*China–Electronic Payments*), WT/DS413/R, 31 August 2012.

[6]Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China (signed 15 January 2020) 'US–China Economic Agreement', https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text, accessed 22 January 2020.

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involving MNCs` home countries and host countries and another one between the MNC as an investor and the host country in the context of entry (Ramamurti, 2001: 30–33).

Given the prima facie beneficial effect of most investments, one might ponder why a state would create illegitimate difficulties for a foreign investment to take place. Also, why states would impose or maintain conditions for foreign investments in a context where they compete for the attraction of capital. The discussion is important since the prevention of investment protectionism is an essential component of the goal of investment liberalization.

What may lie behind these measures are suspicions against private capital in general, against foreign capital as a whole, or against specific types of foreign capital. As highlighted in the Introduction, restrictive investment measures take place even in a context of shortage of foreign capital. Some suggest laudable policy reasons why restrictions make sense, among them the risk of stifling a domestic entrepreneurial class and the destruction of infant businesses – the Japanese case being an example (Sornarajah, 2017: 130; Oatley, 2016: 185, 188). MNCs that control technology, resources, or management skills and are engaged in global supply chains may drive local competitors or local suppliers out of business: organized groups of domestic investors may press for protection, as they are unable to support competition from foreign firms (Sornarajah, 2017: 115; Oatley, 2016: 175). Even in case of greenfield investments – that is, productive investments that increase labour demand – internal lobbies have the same incentives as in trade protectionism, since they are facing a potential competitor (Kurtz, 2016: 88–89).

The academic literature on political economy has highlighted that states may have incentives to raise or maintain barriers to foreign investments and investors in face of political pay-offs (Grossman and Helpman, 1996: 216, 220; Djankov et al., 2002). Depending on the domestic circumstances, this choice may constitute a rational behaviour.[7] There may be cases where states opt for the protection of national champions or well-connected domestic investors. Those restrictions may also harm less connected national investors, as will be developed later. However, this would affect, first and foremost, foreign investors, as states are denying equivalent conditions for them to make an investment or preventing them from investing. In this light, host states could assume liberalization commitments to better deal with internal pressures to favour domestic capital or to oppose proposed investment liberalization reforms; equally, commitments can operate as signals to *lock-in* pre-existing investment reforms (Echandi, 2011: 13; Bonnitcha, Poulsen, and Waibel, 2017: 177, 218).

In any case, since overtly protectionist measures affect states which adopt them, one can assume that an 'open and inclusive democratic debate will distinguish protectionist measures that impose costs on the public at large to the *benefit of entrenched interests* from programs that credibly pursue broadly *beneficial development strategies* or defend widely held *national values*' (Hoekman and Sabel, 2017: 17). Therefore, it is telling to analyse situations where this dichotomy between entrenched interests and developmental strategies is present. Constructive approaches to international political economy add a nuance: it is not always possible to determine states` interests, especially where there is no consensus on the conceptual model for investment liberalization (Bonnitcha, 2019: 630, 634). In any case, this shows how states could potentially manage to shield the interests of its powerful domestic investors by strategically choosing the language for their treaty commitments and provisions.

In the liberalization of trade in services, well-organized and politically connected (though less efficient) companies are able to voice their concerns and demand protection, which is conveyed to government representatives in negotiations (Gari, 2016: 592; Rodrik, 2018: 85–86). There is ample room for the articulation of coalitions by protectionist lobbies, which are closer to the sectoral regulators: their technical and more protective positions most likely prevail over the trade

[7]Insights of political economy are a useful illustration of the incentives behind the discussion. As this contribution takes a juridical viewpoint, it is more concerned about how this will be reflected in treaty language and how the purposes of the regulatory restrictive measures will be evaluated in adjudication.

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negotiators' will to commit (Gari, 2016: 594). The political economy of international trade provides some insights in this regard. Only when the prospective benefits exceed the costs of the concession – such as the loss of market share for domestic companies and the constraints on regulatory autonomy – will states make liberalization commitments (Broude and Moses, 2016: 388–389).

This scenario invites two observations. One is that the internal dynamics of states may generate barriers to the entry of foreign investments, even to the detriment of certain national consumers. Protectionist incentives are no less true for services in mode 3 (therefore, investments), as seen above. To illustrate, some time ago, United States (US) measures restricted the establishment of foreign Mexican investors in trucking services. In other words, the US banned Mexican companies to establish operations of trucking services in its territory and even to own and invest in domestic companies providing those services. Companies from Canada, on the other hand, were not subject to those restrictions. Hence, while US and Canadian-owned companies could apply for a permit, Mexican companies that sought to provide or invest in those services could not even consider an individual application, regardless of their qualifications.

A NAFTA tribunal decided that there was a breach of the national treatment and most-favoured-nation (MFN) clauses,[8] two key principles of international economic agreements. While national treatment ensures that a foreign investor or trader receives no less advantageous treatment than a national investor or trader, MFN treatment ensures that foreign investors or traders receive no less favourable treatment amongst themselves. In this sense, the *CANACAR* v *US* litigation, which followed the *Trucking Services* state–state case, evidences how protectionism is reflected in terms of less foreign investments. According to the claimant, the competitive advantage of Mexican carriers is what explained the opposition by the International Brotherhood of the Teamsters – the powerful American labour union – to the opening of this large market; for a small investment, Mexican trucks would carry international cargo throughout the US if the state–state award had been complied with.[9]

The second point is that measures preventing the entry of investments may in the end affect other domestic investors. This happens when there are limitations on the number of investors or the definition of exclusive suppliers in the host country. Market-access-type provisions, such as GATS art XVI, generally prohibit these quantitative measures, irrespective of a finding of discrimination. Market access is a very specific concept originated in the GATS that ensures that a trader or an investor is not subject to certain restrictions if the WTO member has commitments in a sector. Therefore, the enforcement of market access provisions can benefit those domestic investors as well. These provisions tackle not only protectionism against foreigners, but in particular protectionism benefitting incumbents, either national or foreign. Therefore, to the extent that investment chapters progressively incorporate market access provisions, as will be seen, they offer an extra tool to tackle investment restrictions in general.

2.2 SOEs and Investment Liberalization

The case is particularly acute when it comes to state-owned enterprises (SOEs). It is known that they may have different guiding objectives, decision-making procedures, and corporate forms (for an overview, see Willemyns, 2016: 659–663). Depending on the level of control of the states and the chosen corporate structure, those entities may at times be considered a creature of their own states: state's interests would prevail in the end. In that case, there is a priori no need for SOEs to

[8] *Re Cross-Border Trucking Services (Mexico* v *US)* NAFTA ch 20 arb trib Case No. USA-MEX- 98-2008-01, Panel Decision, Final Report 2 (6 February 2001) (Trucking Services) [292], www.nafta-secalena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=18355&lang=1, accessed 15 August 2019.

[9] *CANACAR* v *United States*, Notice of Arbitration, UNCITRAL (NAFTA ch 11) (2 April 2009) 16. For an account of the Mexican approach to US non-compliance with the award, see Alexander and Soukup (2010). NAFTA is to be replaced by the United States–Mexico–Canada Agreement (signed 30 November 2018, pending ratification) (USMCA).

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lobby, as well as no opportunity of capture. In turn, in other cases, states may hold equity and manage their voting rights following a market-oriented approach. Finally, in cases that are more complex, the network of interests produces a grey area where government and private goals intertwine.

To illustrate, the process of economic reform in China – focused on transforming certain Chinese state-owned enterprises into international competitive firms – was slow, experimental, and controlled, as it involved doses of 'corporatization' and 'marketization' (partial privatization) (Morris et al., 2002: 359–363). This involved certain degree of decentralization from the central to the local arena towards a model with parent companies and subsidiaries with different degrees of managerial and financial autonomy (Morris et al., 2002: 366–367).

Privileges such as rights of monopoly[10] or of exclusive service supplier[11] indeed affect competitive neutrality on the entry of investments. The case of a legal monopoly is, in essence, an exclusion to invest: SOEs influence to a large extent the entry conditions for competitors (Stephenson and Hufbauer, 2016: 310). State-owned companies have more success in preventing foreign entry, especially if they are profitable (Chari and Gupta, 2008). Moreover, subsidies in terms of financial support from the state and regulatory favouritism towards local investors may distort the equality of competition (Stephenson and Hufbauer, 2016: 309).

What interests most here is how this is translated into the language of treaty provisions and commitments concerning access and entry of other foreign investors. All those investment-restrictive measures will be scrutinized by international economic law rules, either in the WTO, in IIAs, and even in other types of treaties, such as the recent US–China Economic Agreement, as will be seen.

Although the pursuit of public goals may be bestowed on SOEs by the government, therefore, justifying the special treatment, this may be a violation of national treatment and other special provisions of trade and investment treaties (Willemyns, 2016: 660). This is the case when states make commitments in respect to certain sectors but do not include clear carve-outs for SOEs. Concerning the substantive coverage of SOEs in trade and investment agreements, some propose they should be subject to sound national treatment obligations in relation to inbound services, coupled with a non-exception policy when it comes to market access; this would ensure access and investment in facilities by competing firms (Stephenson and Hufbauer, 2016: 324). In this line of argument, host states should focus on promoting general investment reform instead of adopting selective investment attraction policies, aimed at foreign investors, at times favouring them over the 'captive audience' of local investors (Wint and Williams, 2002: 371). While those approaches (favouring domestic SOEs, neutral investment framework or favouring foreign investors) may be a deliberate and perhaps legitimate choice by polities, it is necessary to ensure that the measures that confer any protection are in conformity with international commitments.

As suggested, investment liberalization is one of the aims that states can elect when entering into international economic law agreements. Once it is clear that a treaty explicitly intends to bring about investment liberalization, this should impact on the way investment treaty rules are interpreted to ensure their effectiveness. An effective adjudication of those rules is one in which the adjudicator pays attention to this goal. For example, some provisions, such as national treatment, have to be interpreted not only with the aim of protection of foreign investors after they are established but also of investment liberalization, that is, before establishment. This may strengthen the view of national treatment as a guarantee of access and competitive opportunities to the most capable or innovative producer or service provider, regardless of its origin (Kurtz, 2016: 90).

In this light, it is important to point out that each treaty bargain will establish the level of liberalization in the context of the need for regulation of the public good. When it comes to the US,

[10] GATS art XXVIII(h).

[11] Panel Report, *China–Electronic Payments*, para. 7.587.

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foundational uncertainties about investment liberalization is the cause of the inconsistency in policy objectives: the country traditionally framed it as a 'market access' issue in its treaties, perhaps driven by corporate influence together with a worldview that sees barriers to investment as a problem (Bonnitcha, 2019: 649, 652). Investment liberalization needs to be analysed under the framework of the bargain struck and not as an overarching goal. An effective international adjudication means a system that safeguards balance when enforcing the rights and obligations. The next section provides a good illustration of such adjudicatory efforts.

3. American Investors In China: Electronic Payment Services

3.1 Context

There is no doubt that the Chinese accession to the WTO was a landmark towards the assumption of liberalization commitments for foreign investments into China. As a country with great bargaining power, derived, among other reasons, from its large and fast-growing internal market, China has always been able to use its clout to capture a large share of gains from foreign investments (Oatley, 2016: 189; Qin, 2019: 749–751).

The way in which the Chinese commitments were crafted at first sight allowed for the establishment of foreign investments to the benefit of Chinese consumers while also safeguarding Chinese interests to protect its domestic investors (for an overview of the political economy process that led to the liberalization of investments upon China's accession, see Branstetter and Feenstra, 2002). The relaxation of FDI restrictions, following the commitments, led to an inflow of investments in some industries (for an account of the effect of FDI on domestic firms after the entry of China into the WTO, see Lu et al., 2017: 89–90). China`s Ministry of Foreign Trade and Commerce placed investments in several service sectors that were previously prohibited into the restricted or permitted category (Davies, 2013: 28). The outcome of the process though was less clear and more litigated than expected.[12]

The case involving China's national champion for international payments, China Union Pay – CUP, a bankcard services corporation, headquartered in Shanghai, well typifies the scenario: it is currently the largest payment scheme in the world in terms of value of transactions.[13] CUP achieved the current position due to some extent to the fact that it had been protected by domestic measures in the Chinese market, which were later found, by a WTO Panel, to be against international commitments set in the GATS.

Providers of electronic payments such as Mastercard, Visa, and American Express were the players behind the US challenge of Chinese measures in the WTO Dispute Settlement Body – DSB. This is not surprising given the interest of those companies to invest in the lucrative and not completely open market for electronic payments in China. This dynamic market is targeted by both traditional and new *fintech* companies, either Chinese (Tencent, Alibaba) or foreign (PayPal), which brings challenges to its regulation (Lucas, 2017).

The market for Electronic Payment Services (EPS) is composed of several actors. In rough terms, a payment card transaction involves not only a consumer (cardholder) and a merchant, but also several entities. A payment card can be a credit card, a debit card, a prepaid card, an automated teller machine (ATM) card, or similar cards.[14] Payment card companies own the brands, operate the infrastructure and network, and license them to issuers and acquirers.[15]

[12]See, for instance, Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China–Publications and Audiovisual Products*), WT/DS363/R, 12 August 2009.

[13]RBR 'UnionPay takes top spot from Visa in $22 trillion global cards market', Finextra, www.finextra.com/pressarticle/65412/unionpay-takes-top-spot-from-visa-in-22-trillion-global-cards-market---rbr, 22 July 2016, accessed 15 August 2019.

[14]*China–Electronic payments* (n 5), para. 7.12.

[15]ibid., para. 7.17.

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Issuers are banks that make cards available to card holders, authorize transactions, collect payments, and transfer funds.[16] Acquirers, often banks, connect merchants to a card company, maintain merchants' accounts, and ensure that payments are credited.[17]

Among the measures of protection, there were mandatory requirements for banks and institutions to issue cards with the CUP brand[18] and also to acquire CUP transactions.[19] There were also requirements that all ATM terminals and point-of-sale terminals accept CUP cards.[20] In addition, foreign companies had their presence severely limited in Hong Kong and Macao since CUP was the only company allowed to handle the clearing of renminbi (the official currency of China, also known as yuan) transactions for bank cards used or issued there.[21]

The reasons behind the protection of the Chinese provider may include an interest to maintain the monopoly in the provision of those services. While acquirers or merchants could accept other cards, CUP strengthened its privileged position since it '*does not have to invest in promoting* its brand to issuing institutions … and *does not have to invest in persuading* banks to acquire transactions for the CUP brand'.[22] While payment card companies from other members States had to invest time and effort to make their brand known and displayed on the cards, CUP did not encounter that.[23] Concluding that CUP could clearly manage more competition to the benefit of Chinese consumers and merchants, some suggest that the case was triggered as 'CUP was starting to eat into *the core market of the major card companies* – particularly the market leader, Visa' (Hoekman and Meagher, 2014: 441).

The obligations upon China's accession to the WTO included mode 3 commitments related to EPS. China had undertaken several commitments for foreign investments in financial services under both the national treatment and the market access entries, since there were no limitations in relation to the subsectors. The commitments meant that 'foreign financial institutions *must no longer face any limitations on national treatment*'.[24] Subject to the fulfilment of qualification requirements to engage in local currency business, '*China is obligated to give EPS suppliers of other WTO Members access to its market, through commercial presence,* so that they may engage in local currency business in China.'[25] Having set the context, the next section turns to the main legal findings of the Panel and the way it relates to investor`s access rights.

3.2 Outcome

It was not surprising that China's measures were considered to be against some of those commitments. The Panel held that electronic payment services for payment card transactions were inscribed under Subsector 7.B(d) of China`s Services Schedule and that all payment and money transmission services were included. The Panel concluded that the measures breached GATS arts XVI (market access) and XVII (national treatment), since they constituted limitations in relation to the subsectors. Concerning the market access claims, the Panel came to the conclusion that: 'the Hong Kong/Macao requirements are inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) *mode 3 market access commitments*, they maintain a limitation on the number of service suppliers in the form of a *monopoly*'. [26]

[16]ibid., para. 7.14.
[17]ibid., para. 7.15.
[18]ibid., para. 7.229.
[19]ibid., para. 7.354.
[20]ibid., para. 7.331.
[21]ibid., para. 7.383.
[22]ibid., para. 7.503 (emphasis added).
[23]ibid., para. 7.738.
[24]ibid., para. 7.674 (emphasis added, fns omitted).
[25]ibid., para. 7.575 (emphasis added, fns omitted).
[26]ibid., para. 8.1(e)(v)] (emphasis added).

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As the requirements failed to accord to services and service suppliers of other Members treatment no less favourable than China accorded to its own like services and service suppliers, the Panel decided that the issuer requirements, the terminal equipment requirements, and the acquirer requirements 'are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and *mode 3 national treatment commitments*'. [27] These requirements modified the conditions of competition between CUP and the EPS suppliers of other Members, to the detriment of the latter.

In short, one might say that the Panel correctly interpreted the rules that led to the determination of removal of barriers to entry affecting investments by foreign card companies. Had China wanted to protect the market for CUP, it should have not included those commitments in its schedules. As aptly put, 'governments *should not make full commitments on market access and national treatment if they wish to pursue policies that result in a sole supplier* of a certain type of service as was the case with CUP' (Hoekman and Meagher, 2014: 438 (emphasis added)). The inability of Chinese negotiators to include specific reservations in their lists, or the inexperience of Chinese regulators to craft compliant solutions, may also have contributed to this setback.

While there are not enough normative elements to assess whether a monopoly would be in China's long-term interest, one certainly sees in the Panel decision the warning that there is no way around the clear language of liberalization commitments. The case was not appealed perhaps for fear that WTO members could take retaliatory measures to prevent CUP's internationalization and growth (Hoekman and Meagher, 2014). Retaliation is always hard to conciliate when both countries host foreign firms and, at the same time, are home countries of MNCs (Oatley, 2016: 193). The possibility of states imposing barriers to investments by companies which provide innovative types of electronic payments is not detached from reality. Protectionist trends and retaliatory purposes may intertwine with prudential reasons and consumer protection issues and lead to the imposition of restrictive regulations in this area. This may take the form of restrictions on the acquisition of companies by established players of a certain origin, through foreign investment screening mechanisms, such as those in place in several jurisdictions.

In fact, the imposition of such measures is a credible scenario, the level of political and economic friction between US and China providing the perfect illustration. The trade frictions of the last five years reached a peak stage of tit-for-tat retaliation, partially alleviated by the US–China Economic Agreement. The frictions involved all the repertoire of trade relations and sanctions (trade in goods, trade in services, investment, and intellectual property) and has an important digital component. Given China's restrictions for cloud computing services from US firms (Amazon, Microsoft), the US has considered retaliating, e.g., prohibiting Alibaba from offering cloud-computing in the US or blocking the company's expansion in the country (Davis, 2018; Qin, 2019: 747). When it comes to the conformity of these measures with the GATS market access and national treatment provisions, the first step is to figure out whether these new digital payment services are already included in the schedules, as a technology neutrality argument would suggest.[28] If they are classified as something else, they would be outside the scope of the commitments. On the other hand, the GATS MFN provision would naturally apply if there were discrimination *between* foreign investors. In any case, this discussion goes beyond the scope of this inquiry and has been partially addressed elsewhere (Aaronson, 2018).

While foreign firms in China still face countless administrative hurdles, from licencing to specific approvals as well as ownership limitations and joint venture requirements, internal changes in Chinese Investment Law, from 2020, state that foreign investment will no longer require government approval (Qin, 2019: 745–747, 750). This is in line with the 2020 US–China Agreement,

[27] ibid., paras. 8.1(f)(i)], [8.1(f)(ii)], [8.1(f)(iii)] (emphasis added).

[28] Panel Report, *US – Measures Affecting the Cross–Border Supply of Gambling and Betting Services*, WT/DS285/R [6.285], 10 November 2004.

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which addresses a few of the concerns raised in the 'trade wars' deeply linked to investment liberalization.[29] Although the Agreement did not include new commitments for investments in China, it established at least the prohibition of forced transfer of technology and due process requirements for procedures related to investments involving technology. When it comes to electronic payments, the specific provision is the following:

Article 4.4: Electronic Payment Services

1. China shall accept any applications from a U.S. electronic payment services supplier, including an application of *a supplier seeking to operate as a wholly foreign-owned entity, to begin preparatory work to become a bankcard clearing institution* within five working days of submission, and may make a one-time request within those five working days for any corrections or supplementary information. If such a request is made, China shall accept the application within five working days after the applicant has responded to that request. China *shall make a determination with respect to the application, including an explanation of any adverse determination*, within 90 working days of its acceptance.
2. No later than one month after a U.S. service supplier notifies China that it has completed its preparatory work, *China shall accept the license application of such U.S. supplier, including any license application of Mastercard, Visa, or American Express,* and shall make a determination with respect to the application, including an explanation of any adverse determination.
3. The United States affirms it accords *non-discriminatory treatment to Chinese electronic payment service suppliers*, including UnionPay. *(emphasis added)*

It is evident that the actual entry by those foreign EPS providers depends on further actions by the host state, such as domestic regulations and authorizations. Even in face of the WTO decision, only much later did China authorize the first foreign credit card company – American Express – to operate in the country, provided that this is done through a joint venture with a local company – LianLian (Wei and Deng, 2018). It has been also reported that digital platforms in China (Ant Financial and Alipay) will support Visa, Mastercard, Japan's JCB, and Singapore's Diners Club cards (Kharpal, 2019). What matters is that, despite the WTO decision, there was a need to have a specific bilateral provision to enforce it. Art. 4.4 mentioned above definitely helps in this regard by setting an obligation to accept applications for wholly foreign-owned entities, a timeframe for the analysis, and a requirement to explain refusal.

3.3 Access and Competition

A key point to be noted is that market access restrictions (GATS art XVI) may also affect potential domestic investors. In the context of *China–Electronic Payments*, quantitative measures that limited the number of investors would also affect CUP potential domestic competitors, if any. In this light, some express concern over the fact that the 'aspect' of the measure that affects the domestic suppliers is regulated by the GATS. There is an implicit risk, the argument runs, that measures that only relate to nationals (investors) of the host country will be scrutinized (Zang, 2015: 23). One should not deny the possibility that an international treaty deals with non-discriminatory market access restrictions which happen to affect primarily only domestic investors, e.g. quota for licenses only for domestic companies. While a normative objection could be made against an international treaty regulating access for the domestic investors of the host country, there are arguments that justify such a regulation based on the effect on international trade and investments.

[29]See arts. 2.1, 2.2, 2.3, and 2.4 of the US–China Agreement.

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In *Mexico–Telecoms*, the Panel decided that Mexico had breached its mode 3 commitments by not issuing laws or regulations to guarantee access and use of facilities by foreign-established providers from the US.[30] Furthermore, the Panel considered that Mexico failed to maintain suitable measures to prevent anti-competitive practices by its major telecom supplier (Telmex), which excluded foreign supply.[31] As Mexico's regulations prohibited foreign suppliers to undercut the fixed high prices for international calls, they could not compete effectively for domestic customers as foreign investors in Mexican firms, since Telmex would engage in cross-subsidization (Fox, 2006: 281–282). In any case, it was clearly a case of hybrid public/private restraints: a former state-owned incumbent, which kept barriers supported by the governments to restrict access of foreign competitors.

Most importantly, the government measures required that even the smaller domestic competitors to Telmex adopted certain market-sharing conducts and higher prices (Fox, 2006: 283–284). Thus, even if there are no government measures limiting foreign investments per se, practices such as the above can indeed hinder market access and affect foreign investors. The idea behind this is when domestic providers are also subject to investment restrictions, there is less integration in global value chains and less FDI spillovers. This effect would eventually fulfil the requirement of application of GATS art I:1.[32] In any case, the most common situation are measures of market access restrictions that affect both domestic and foreign groups, so one should expect that international trade in services is affected.

The Panel approach in *China–Electronic Payments* has not been free from criticism, especially regarding the relation between national treatment and market access. As mentioned above, market access allows for the entry of investors with none of the listed restrictions of GATS art XVI, if there are commitments in the sectors. This concept appeared in the GATS and investment treaties have progressively incorporated them. Zang argues that the Panel could have done more than 'simply affirming the existence of overlap; it should have continued to demonstrate there is a complete overlap of measures to which both GATS arts XVI and XVII apply' (Zang, 2015: 25–26). The exact scope of the overlap between the provisions include both discriminatory quantitative measures applying to post-establishment and discriminatory quantitative measures *affecting the ability to establish*, as sustained by Mattoo (1997: 115). This reaffirms the conclusion that discriminatory quantitative restrictions affecting the entry of investments and investors are to be evaluated under both articles.

An important statement of the Panel affects the way that states interpret commitments, in the light of GATS art XX:2.[33] According to that provision, inscriptions in the market access column also provide a qualification to the respective national treatment entry. If the market access column is 'unbound', this is equivalent to inscribing all the six types of prohibited measures of GATS art XVI.[34] The consequence of this reading is that the discriminatory aspect of those measures will not be in breach of the national treatment obligation of GATS art XVII, even when the national treatment column grants full commitment ('none').[35] Bringing this conclusion to the context of the entry of investments, the inscription 'unbound' in market access means that there is guarantee of non-discrimination only concerning discriminatory measures affecting the ability to establish that which do not fall under GATS art XVI (Mattoo, 1997: 115–116, fn 18). For example, if a numerical quota for the establishment of foreign investors in, let us say, the hotel sector, is

[30]Panel Report, *Mexico – Measures Affecting Telecommunications Services* (*Mexico–Telecoms*), WT/DS363/R, 2 April 2004, para. 7.381.

[31]ibid., paras. 7.265–7.269.

[32]GATS art I:1 provides, 'This agreement applies to measures *affecting trade in services*'. (emphasis added).

[33]GATS art XX:2 provides: 'Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. *In this case the inscription will be considered to provide a condition or qualification to Article XVII as well*' (emphasis added).

[34]*China–Electronic Payments* (n 11), para. 7.660.

[35]*China–Electronic Payments* (n 11), paras. 7.661–7.665.

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discriminatory, it would not be a violation of national treatment if the market access column is 'unbound'.

What is worth highlighting here are the legal consequences of the inclusion of market access provisions as part of investment chapters in larger economic agreements. Since the restrictions are neutral in relation to the origin of the capital, this means that investment treaties become valuable not only to foreign investors, but also, at least indirectly, to certain domestic investors. Domestic investors would benefit from rules that prohibit the imposition of non-discriminatory measures affecting *any* investor.

One ponders to what extent panel and AB interpretations of GATS art XVI would be resorted to in the interpretation of these similar investment provisions. Moreover, it is uncertain how the market access provisions will interact with national treatment obligations inscribed in negative lists. However, as highlighted in Lubambo (2020), since market access provisions are being excluded from investor–state arbitration mechanisms, there will be less opportunities for adjudicators to clarify the scope of those commitments.

4. Inter-Regime Shifting: International Investment Law

Having set the main aspects and repercussions of the GATS case, it is now time to analyse alternative mechanisms through which the dispute could have been brought. The possibility of enforcing an equivalent obligation in another regime of international economic law has been described as inter-regime shifting, whereby parties experiment with cross-enforcement between trade and investment (Puig, 2014: 503).

The strategy can involve either party-shifting or relief-shifting: the first one refers to the attempt to change the traditional subject of the enforcement whereas the second relates to the experimentation on the type of relief one is willing to obtain (Puig, 2014: 503–505). While the very existence of a 'traditional' or 'preferable' enforcement actor is debatable, this framework is a compelling way to think about the issues. The NAFTA *Trucking Services* cases, referred to above, can be considered an effort to engage in such strategy.

The question is whether the entry issues discussed in *China–Electronic Payments* could have been a breach of investment treaty obligations and challenged under investment treaty mechanisms. There have been cases of overlap that were actually brought in both trade and investment forums, but they have particularities which go beyond the scope of the paper.[36] In any case, while there is no definitive mechanism of coordination inherent in international law, treaty-making can certainly address situations where a claim is brought under state–state trade dispute settlement mechanisms and also under investor–state arbitrations as breaches of investment agreements. CETA[37] art 29.3 is an example of a provision that regulates parallelism.

As to *China–Electronic Payments*, could the same set of facts provide the grounds for a claim brought by the affected investor through investor–state dispute settlement? If yes, which type of relief could be granted? It is noted that several WTO cases on services were brought by WTO members backed by the interests of large MNCs in the financial, distribution and telecommunication sectors owing to a restriction on mode 3, therefore on investments (Gari, 2016: 605). In this case, the most immediate answer would be negative, since there is no investment treaty

[36]Panel Reports, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005 and Appellate Body Report, WT/DS308/AB/R, 6 March 2006; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc* v *United Mexican States* ICSID Case No. ARB(AF)/04/5, Award (21 November 2007); *Cargill, Incorporated* v *United Mexican States*, ICSID Case No. ARB(AF)/05/2 Award (18 September 2009). See also WTO, Panel Report, *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WT/DS435/R WT/DS441/R WT/DS458/R WT/DS467/R, 28 June 2018. *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA* v *Uruguay*, ICSID Case No ARB/10/7, Final Award (8 July 2016). *Philip Morris Asia Ltd* v *Australia*, UNCITRAL, PCA Case No 2012-12 Award on Jurisdiction and Admissibility (17 December 2015).

[37]Comprehensive Economic Trade Partnership between Canada and the European Union (signed 30 October 2016).

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between the US and China, let alone one providing for arbitration. The US–China Economic Agreement does not offer arbitration but a bilateral evaluation and dispute resolution mechanism in its Chapter 7.

Therefore, it is perhaps useful to think in terms of model investment obligations contained in a hypothetical BIT. The construction of hypotheticals may help to cast further light on the complex dynamics between WTO services regulation and investment agreements. Some have analysed whether the factual matrix of certain cases brought to the WTO could provide the grounds for a claim by private parties under a hypothetical model BIT (Afilalo, 2013). When it comes to the GATS, for example, in relation to *China–Publications and Audiovisual Products*, Afilalo concluded that the case had reasonable potential of success in an investor–state arbitration (Afilalo, 2013: 137, 139). The measure at issue in *China–Publications and Audiovisual Products* prohibited foreign-invested enterprises from engaging in the wholesale distribution of imported reading materials while at the same time allowing Chinese enterprises to engage in that activity,[38] similarly to *China–Electronic Payments*. Therefore, those foreign enterprises might have a valid claim under investor–state arbitration, in the presence of a BIT.

Let us then suppose the following scenario. Imagine that the US and China had a traditional BIT in force which allowed for investors or their subsidiaries incorporated elsewhere to bring an investor–state claim against their host state. This hypothetical treaty would require some specific features. First of all, it would require a broad definition of investor, including investors who seek or attempt to make an investment. This would allow prospective investors – for instance Visa, Mastercard, and American Express – to put forward claims against China. If the definition of investor contained a clarification similar to the CPTPP,[39] then those companies would have to show that they had taken concrete actions to make an investment – in this case, by applying for a permit to operate.

Second, this hypothetical treaty should cover the moment of establishment or admission into its standards of protection – national treatment or MFN. The way in which the national treatment obligation was interpreted in the *China–Electronic Payments* Panel is illustrative of how it could be interpreted under the BIT standards. The definition of like services and services suppliers (or like circumstances), the comparability standard, and discrimination come into play. One can note that the Chinese practice in the past has been to confer establishment coverage only in relation to the MFN treatment (Bonnitcha, Poulsen, and Waibel, 2017: 174).[40] In this case, the investor would need to compare its treatment to other foreign investors, with all the qualifications and observations. However, from the facts of the case, an MFN claim would not be viable, as there are no other foreign investors that have the same advantages as CUP.

Third, market access provisions inside investment or establishment chapters are a feature in some European treaties, such as the CETA, the EU–Singapore FTA,[41] and the newly concluded EU–Japan FTA.[42] Therefore, if the model BIT contained market access provisions, another possible avenue for a claim would arise. For this hypothetical to make sense, the list of non-conforming measures, that is, the list that excludes certain sectors from the scope of the treaty, must not carve-out measures in the sector of electronic payments. Likewise, if the BIT follows a positive list model in relation to establishment or market access, which is the model followed

[38]Panal Report, *China–Publications and Audiovisual Products* (n 12), para. 7.975.

[39]Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018). Art. 9.1 fn 12, which provides: 'an investor 'attempts to make' an investment when that investor has *taken concrete action or actions to make an investment*, such as channelling resources or capital in order to set up a business, or applying for permits or licenses'.

[40]See e.g. China–Finland BIT (signed 15 November 2004), art. 3.3.

[41]EU–Singapore Free Trade Agreement (authentic text as of 18 April 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=961, accessed 15 August 2019, arts. 8.8(d) and 8.10.

[42]EU–Japan Agreement (signed 17 July 2018), art. 8.7.

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by the GATS, China must have added market access or national treatment commitments similar to those in the GATS schedules.

Consider then that the same violations of the GATS have been found in respect to this treaty. For instance, the issuer, terminal equipment, and acquirer requirements are found to be against the national treatment for the investor and the Hong Kong/Macao requirements are considered a violation of market access as they establish a monopoly by CUP. The next key aspect to be discussed is the relief sought by the investors. In general, two options are available in the light of the international law principle of full reparation.[43] The first one takes the form of juridical restitution, that is, the immediate repeal of the restrictive measures, which are slightly similar to what is available under the framework of the WTO DSB.[44] The second one takes the form of compensation, in other words, monetary relief for the breach of the international obligations.

For juridical restitution to be available, the hypothetical BIT must not have provisions limiting investor–state claims to monetary relief or to material restitution. The primary objective would be the repeal of the conflicting regulation that either favours CUP or prevents investments in certain regions. It appears that Visa, Mastercard, American Express, and others are mostly interested in getting more access to the lucrative Chinese market rather than having compensation for lost opportunities. As seen above, only recently have they started to have access to the Chinese market and the new US–China Economic Agreement arguably makes it easier.

However, if compensation is sought, the basis for the calculation of the damages needs to be assessed. The but-for-the-breach scenario – the counterfactual analysis of what the situation would be if a violation had not occurred – would depend on the international obligation in question. Concerning the national treatment breach, the scenario would be one in which Visa, Mastercard, and American Express would not have borne the extra costs to convince issuers to put their brand in the cards, for instance. This amount of compensation could be equivalent perhaps to the investment needed for '*promoting* its brand to issuing institutions' and '*persuading* banks to acquire transactions for the CUP brand', as described by the Panel.[45]

Regarding the market access breach, the scenario would be one in which the investments in Hong Kong and Macao would not have been restricted. Therefore, Visa, Mastercard, and American Express, for example, would have been able to handle the clearing of renminbi (yuan) transactions in bankcards used or issued in those places. The companies would have thus entered the market unfettered and would have had a certain market share and earned profits during the period of the breach. The same rationale has been suggested in the context of a hypothetical BIT litigation involving a trade law infringement of intellectual property rights affecting the establishment and operation of an enterprise (Afilalo, 2013: 136–137). On the other hand, this type of assessment of damages is far from settled and the degree of speculation is high.

It has been shown that the exclusion or limitation of recourse to investor–state dispute settlement in cases related to entry is relatively common (Lubambo, 2020). In this light, another basis for the damages – related to both the national treatment and the market access breaches – would be damages that were sustained during the attempt to make the investment. This would be the only grounds for damages if there were a limitation in the hypothetical BIT such as the one in the new CPTPP.[46] To recall, only damages sustained in the attempt to make the investment can be awarded. That could perhaps involve, for example, the cost of lawyers, the cost of the preparation of proposals, and the cost of paperwork in the application for the licences. In the new

[43]*Case Concerning the Factory at Chorzów* (Germany v Poland) (Merits), 1928] PCIJ Rep Series A No. 17. 47].

[44]Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) Marrakesh Agreement Establishing the WTO Annex 2 1869 UNTS 401 (DSU) arts. 19.1 and 22.1.

[45]*China–Electronic Payments* (n 11), para. 7.503.

[46]CPTPP art. 9.29(4) provides that 'Only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment provided that the claimant also proves that the breach was the proximate cause of those damages.'

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USMCA, which replaced NAFTA, breaches of MFN and national treatment related to establishment and acquisition are not subject to investor–state disputes.[47]

Another way the same set of facts discussed in *China–Electronic Payments* could be challenged under investment treaty mechanisms is through a claim in a state–state context. As rightly emphasized, 'provisions aimed at protecting investments can be enforced at *an inter-state level*, as part of larger liberalization commitments' (Puig, 2014: 503 (emphasis added, fns omitted)). Nothing prevents the BIT or regional trade and investment agreement from having their own state–state form of enforcement, in addition to or in lieu of the investor–state mechanism. In fact, most BITs have state–state jurisdiction clauses (Lubambo, 2016).

The state–state alternative can be particularly convenient to enforce rules on the pre-establishment of investments 'since the question of direct damages to an unestablished investor could be otherwise difficult to determine' (Puig, 2014: 503). State–state arbitration in a BIT may be an adequate avenue for home states to ask for declaratory decisions which affect entry rights.[48] Also, broad remedies generally implicit in state–state arbitration appear to adequately address market access concerns of investors, as for those faced by the investors in electronic payments in China. This is especially evident when there is no basis to calculate damages, given that entry has not occurred and future profits are too speculative. In these cases, investors and their home states will be generally more focussed on the withdrawal of measures or on the declaration that a specific internal measure is a violation of treaty provisions.

5. Conclusion

All in all, this paper invites a reflection on both substantive and procedural rules of international economic law. The case study shone a spotlight on situations that are clearly an aspect of the interaction between the regimes of trade and investments. Investment protectionism may take the form of several measures and result in the protection of domestic investors and the creation of monopolies for national champions. Prospective investments of Visa, Mastercard, and American Express in China were apparently behind the successful WTO claim that the US brought for the breach of China's GATS commitments in electronic payments, as presented. Several provisions common to international investment treaties would be applicable to the situation. The US–China Economic Agreement explicitly deals with the matter. However, adjudication under those treaties would only be possible if some procedural conditions were present.

The paper showed that international economic law covers, in several ways, a wide range of situations connected to entry barriers for foreign investments. It suggested that states can carefully tailor both substantive and procedural treaty rules to allow for the coverage or not of specific situations favouring domestic monopolies. This involves defining the scope of the standards and commitments and the incorporation of general exceptions and justifications or clear carve-outs and exemptions in the search for the effective balance.

Therefore, the precise interpretation of the treaty standards, including the definition of the exact scope of commitments, is the issue on which adjudication will be focussed. An alignment of entry commitments between trade in services and investment treaties is what is expected from the new treaties. Procedurally, the reduced ability to challenge barriers or delays in entry by investor–state mechanisms in the form of lost profits shows that the balance is tilted in favour of potential host states. In a state–state context, host states found in breach of their entry

[47]In the new USMCA framework, a claim similar to CANACAR`s claim (n 9) will not be possible, according to Annex 14-D, art 3(1)(a)(i)(A).

[48]An example of a clarification that the state–state investment arbitration clause applies to entry rights is a provision in the Australia–China trade agreement: 'For greater certainty, the State to State Dispute Settlement mechanism in Chapter 15 (Dispute Settlement) of this Agreement applies to this Chapter *including pre-establishment obligations* under Article 9.3'. Australia–China FTA (signed 17 June 2015) Investment Chapter, art 9.12(1) fn 5 (emphasis added).

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commitments will only have to bring measures into conformity. As the regulatory space is protected, the question would be how those mechanisms may still effectively further investment liberalization goals.

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