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doi:10.1017/S1474745605212405

Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict by Oren Perez


Any book purporting to ‘rethink’ a topic as voluminous in the literature as the trade and environment conflict has high ambitions. In this case, Perez separates his rethinking into two projects, a novel theoretical framework for the conflict and a practical guide to managing it in five concrete cases.

Perez’s theoretical project builds off the sociological work of Niklas Luhmann on autopoietic systems (e.g., social communication networks) which are self-propagated by their internal structure. While highly regarded in sociology, the theory’s transition into legal discourse – most authoritatively by the legal scholar Gunther Teubner – has been controversial (a point to which I will return). Perez’s thesis is that autopoietic processes apply both to trade-environment discourses (like any discourse) and associated environmental impacts, which processes independently co-determine or co-evolve with one another. This realization allows one to situate the diverse discourses within their individual contexts and ultimately to manipulate them to greater environmental benefit. Perez’s careful, if dense, discussion does not add much to Luhmann’s and Teubner’s basic insights aside from the novel context and a re-emphasized understanding of ‘co-determination’. His greatest contribution may simply be introducing the theory to academics engaged in the trade-environment discussion. Those already in agreement with Teubner’s work will not be disappointed by Perez’s
contribution. For the uninitiated, it is worth noting that the density and complexity of Perez’s theoretical discussion virtually necessitates some background reading in autopoietic sociology.

One of the most persistent criticisms against this (or any) type of sociology-inspired legal analysis is its denigration of first-order appeals to normative values which are pervasive in legal discourse. Perez, in fact, explicitly rejects any value hierarchy in his system. While this undoubtedly provides a (and perhaps the only) platform from which normative and legal pluralism may be considered, it yields no normative yardstick to give traction to law’s unending normative claims. Thus, the theory appears incomplete as a theory about law (as opposed to a theory merely describing a social practice). It is also inconsistent with Perez’s own constant appeals to environmental sensitivity. It is hard to understand such appeals without opening the door to first-order normative argumentation, a move which would irretrievably compromise Perez’s framework. Reading Perez, however, virtually none of this critical debate comes to the surface, a serious gap in an otherwise tight exposition that, unchecked, threatens to overturn the theory altogether.

Perez’s five empirical chapters are more transparently useful to a legal audience. Each chapter provides a self-contained examination into the ‘culture’ and social-milieu of a legal regime where the pressures of global economic integration and environmental protection collide (WTO jurisprudence, the SPS/TBT Agreements, international construction law, transnational environmental litigation, and international financial law), focusing on the (in)sensitivity of each regime to environmental impacts. It is in these chapters that Perez’s concise, creative style is at its best. Each chapter includes pragmatic suggestions for leveraging the hidden sensitivities in each regime’s culture to afford greater environmental protection. For those regimes nearly absent from the trade–environment literature, e.g., international construction law and possibly international financial law, Perez’s exposition and suggestions are most welcome. For the rest, where the literature is replete with such expositions, the chapters add little to the flood and are most valuable in their collection into one place.

As a project in seriously rethinking the trade–environment conflict, Perez may well overstep his stated ambitions. The book remains valuable, however, to the extent the reader lessens her own expectations accordingly and takes the ideas for their own worth. The theoretical project is quite creative but derivative and fraught with problems. The empirical project is highly useful but rarely novel.

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To anyone who has experience with both sets of literature, the abiding disconnect between international law and international relations (IR) is both puzzling and frustrating. It is puzzling because the possibility of international order regulated by norms is central to various species of IR theory; it is frustrating because the sporadic engagement between the disciplines always seems to begin at first principles.

For international law, the most important consequence of this limited engagement has been a paucity of serious theory. With some notable exceptions, much of what passes for international legal theory fails to get beyond the tired sherry party question of whether or not international law is really ‘law’. Some of the more innovative approaches have involved the selective application of theoretical tools borrowed from the institutionalism and liberalism schools of IR theory, or responses to realist critiques of international law. Such an approach remains the exception, however, not the rule.

This volume, the product of a conference held at the Hebrew University of Jerusalem Faculty of Law in June 2001, seeks to make a more sustained contribution to this debate by bringing together scholars of both disciplines around the theme of international cooperation. Why do states enter into binding agreements that extend beyond the achievement of national interest narrowly defined? And why do they often comply with those obligations when they conflict with those national interests? Though the book suffers from the flaw of many edited volumes – more closely resembling a symposium edition of a journal than a coherent whole in its own right – it is partially successful in offering some novel explanations with particular regard to cooperation in the area of international environmental and trade law.

Although not explicitly organized in this way, the book’s ten substantive chapters can be considered in three groups. The first includes those chapters focused on theory as such. Anne-Marie Slaughter sketches out the theoretical approaches dominant in IR and maps out ways in which these theories can help advance the descriptive and prescriptive goals of the study and practice of international law in general. Kenneth Abbott and Duncan Snidal provide a useful taxonomy of three distinct pathways to international cooperation and legalization: ‘framework conventions’ that begin with broad participation but minimal substantive commitments; ‘plurilateral’ approaches that begin with limited participation but deep commitments; and ‘soft law’ mechanisms that begin with broad participation and substantive commitments that are significant but not enforceable. Eyal Benvenisti, one of the book’s editors, comes at international cooperation from a jurisprudential angle, with a provocative argument that customary international law gives judges significant discretion to ‘invent’ new custom in support of more efficient norms of cooperation.

A second group of chapters considers compliance in theory and practice. George Downs and Michael Jones examine the relationship between compliance and reputation, while Moshe Hirsch, the book’s other editor, draws on various rational choice
and sociological IR theories to consider the probable impact of globalization on compliance. On the empirical side, Edith Brown Weiss tests the dominant theories of compliance against the behavior of states parties to international environmental agreements, while Arie Kacowicz considers the unusually high recourse of Latin American states to arbitration in territorial disputes.

The final group of chapters focus on international trade: Helen Milner, Peter Rosendorff, and Edward Mansfield examine the impact of domestic factors on the decision to enter into trade agreements and to comply with international trade rules; Petros Mavroidis considers the relationship between participation in the WTO and domestic human rights protections; and Robert Howse considers labor and environmental linkages in the WTO in the context of a dispute between India and the European Community.

The book suffers from the lack of any real effort at synthesis – or, it must be said, much in the way of conversation between the chapters. This is a shame because the various voices included here clearly have much to add to this important and fertile area of research.

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doi:10.1017/S1474745605232408

Law, Economics and Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law
by Niva Elkin-Koren and Eli M. Salzberger

There is a vast amount of literature on law and economics. Yet, a quick catalogue search reveals that this is the first book that systematically analyses the effects of the networked environment on the economic analysis of law.1 The authors conclude that the existing law and economics (L&E) paradigm is ill-equipped to properly analyze key problems in the networked information environment. Given the central place of information goods in this new environment, and their unique characteristics, this is not necessarily a surprising conclusion.

It is the all-encompassing approach of the authors that is surprising. Part I provides the foundation and definitions. L&E developed in three generations, of which Part II examines traditional Chicago School L&E, and transaction cost analysis. Each chapter focuses respectively on the significant decline of the risk of one of the classic market failures (monopolies, public goods, imperfect information, and externalities). This would be an argument for reduced State intervention. However, the authors argue that new types of market deficiencies arise, which the current tools of analysis fail to detect. The most insightful part is Chapter 8, which focuses on transaction cost L&E.

Traditional transaction costs analysis treats the state of technological development as exogenous and fails to recognize the interdependency between technologies and legal rules. The book suggests that technology is contingent upon law. That is particularly crucial in the context of information technologies that are characterized by the high pace of technological change. The authors therefore conclude that technology should become endogenous to the analysis, and economic discourse expanded to address it. Finally, Part III focuses on the third generation (Neo-Institutional L&E), which provides a much broader framework of analysis, incorporating public choice analysis and institutional structures.

The book clearly achieves its main purpose. It is part of a series of books on L&E, and provides an excellent overview for anyone interested in this topic. Complex concepts are defined with great precision, and discussed with enlightening clarity. The arguments are well-built. The style is inviting.

The main shortcoming is perhaps the absence of a concluding chapter. The individual chapters end with brief one-paragraph conclusions, and the links between them are not elaborated on. For instance, in failing to establish more precisely the relation between the three generations of L&E, it is hard for the reader to grasp the importance of the criticism directed at each individual part of the existing L&E system of analysis. Readers are given few indications as to how L&E analysis might be amended, or whether the weaknesses of the current L&E paradigm is significant also beyond Cyberspace. Would new tools of analysis developed in the context of the networked information environment shed new light on L&E analysis for classic markets? It is believed that a general concluding chapter would have enabled the authors to close this much needed work in an even more enlightening way, by providing colleagues with a platform for the next generation of L&E.

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doi:10.1017/S1474745605242404

Curing Baumol’s Disease? A Review of Productivity in the US Services Sector: New Sources of Economic Growth
by Jack E. Triplett and Barry P. Bosworth

Gaining a better understanding of the service economy and identifying the types of policies (and the data on which sound policy decisions must ultimately rest) most likely to sustain the development of a knowledge-based economy are widely seen as holding the key to longer-term prosperity. In the OECD area, service industries generate close to three quarters of output and jobs, have become a source of major product and process innovation, and the target of increasing R&D spending. Services also rank amongst OECD countries’ most dynamic capital-exporting sectors.

Yet for all the importance that services play in advanced economies, the sector has tended to receive far less attention than manufacturing or even agriculture in public
policy debates and in policy research priorities. The intangible and heterogeneous nature of tertiary activities also means that services tend to receive scant attention in graduate training in economics. This is particularly true in the trade field, the goods (i.e. manufacturing) bias of which continues to dominate much academic output.

The direction of recent change has, however, been in the right direction. The last decade has witnessed a healthy revival in productivity analysis, with economists searching for new answers to age-old problems in an economic environment characterized by far-reaching changes in technology, market structures and approaches to regulation and by marked improvements (at least in North America) in how the profession goes about the task of measuring productivity growth and in the statistical means available to do so.

Nowhere have the changes described been more visible than in the US services sector, a development that Jack Triplett and Barry Bosworth chronicle in their impressive and timely study. Their work, the product of a series of workshops on the measurement of output and productivity in services held at the Brookings Institution between 1998 and 2003, challenges (indeed discards) the long-held belief – encapsulated in Baumol’s ‘disease’ – that services are somehow immune from labor productivity growth and innovation.

Triplett and Bosworth document how rapid employment growth in the US services sector has resulted primarily from the strong (if strongly differing) performance of market services, notably telecommunications, transport, retail trade, finance, insurance and business services. Over the past decade, these services accounted for virtually all jobs created in the US economy. Moreover, they are characterized by a growing use of productivity-enhancing technologies, notably information and communication technologies, and accounted for the bulk of aggregate labour productivity growth over the past decade. Some of these services, notably telecommunications and business services, have also been characterized by a high level of business dynamics, as demonstrated by high rates of new firm creation, rapid growth of successful new firms, and reallocation of resources from declining to growing firms. Results in transportation point to the longer-term payoff from sustained efforts at pro-competitive regulatory reform. An important derivative finding from the analysis is that the strong performance of these market services is not only important for their own sake, it also helps underpin growth in those sectors, including manufacturing, that use these services as key inputs.

Beyond the quality of the sectoral analyses contained in their study, Triplett and Bosworth’s study is also very useful in pointing out both the important advances made recently in measuring service sector outputs and productivity growth in key sectors as well as the data and measurement challenges that continue to bedevil informed empirical research on the service economy. Their discussion of productivity measurement difficulties in health and education services is particularly informative in this regard.

It seems a safe bet that this study will be seen as truly pioneering in scope, wading with gusto and intelligence into what were recently largely uncharted waters. One can hope that Triplett and Bosworth will encourage the economics profession (including policy makers) to deepen their understanding of the service economy. This would be particularly important in Europe and Japan, where service sector reforms are still at an early stage and confront much resistance from politically powerful constituencies.
The study should also act as a call for governments to equip national (and international) statistical agencies with the resources needed to provide decision makers with a more accurate reading of today’s service-centric economic landscape.

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doi:10.1017/S1474745605252400

Transnational Governance and Constitutionalism
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This collection of essays by legal academics and political scientists provides a rich dialectic on the legal and more particularly the constitutional status of transnational governance. The sic et non are posed at the outset. Gunther Teubner argues that the many functionally differentiated public/private systems of global lawmaking have the potential to develop distinct constitutions of their own without the state. As an example he posits a digital constitution for the lex electronica. Inger-Johanne Sand denies that these diverse subsystems for governance of the global economy can be normatized through strong constitutional structures analogous to the hierarchical, territorially bounded constitutions of nation states that successfully couple law and politics. Instead, she argues, we must explore diverse approaches to contextualized legitimation of transnational regimes through techniques, such as deliberative supranationalism and democratic experimentalism, that supplement but cannot supplant state-based constitutionalism.

Subsequent chapters address these questions in essays from the perspective of international relations theory, jurisprudence, and the constitution of Europe, and in case studies of specific areas of global regulatory governance. The case studies include the treatment by US courts of standards adopted by private organizations; the governance of agricultural biotechnology by the WTO and the Codex Alimentarius; the many facets of the trade–environment conflict, with the IMF as a case in point; ICANN’s performance as a transnational Internet regulatory body; and the use of human rights norms in transnational litigation against multinational corporations. A recurrent issue, paralleling the opening debate, is the possibility of self-regulatory legitimation without politics. Thus, Jens Steffak argues that transnational governance may be legitimated through a combination of good functional performance and deliberation, both based on rational communicative and decision-making procedures. But Alexia Herwig and Jochen von Bernstoff disagree that such a legitimation strategy can succeed without political structures to guarantee equitable access and representation. Each of the chapters is accompanied by a short comment. Christoph Möller and Christian Joerges provide concluding reflections.

Most of the contributions espouse or tend to support Sand’s position in the debate with Teubner. This imbalance contributes to the book’s failure to fully live up to the promise of its title. The question of what constitutionalism might amount to for
disaggregated, functionally specialized private/public regimes of transnational governance is not sufficiently specified or systematically developed. There is also a good deal of repetition; many of the various essays cover the same ground in summarizing the phenomena of transnational governance and the issues of legitimation that they pose in relation to state-based constitutionalism. More progress might have been made in shorter compass had the editors begun by laying out this common ground at the outset, posing a set of specific questions on constitutionalism and transnational governance, and challenging the other authors to answer them. The book nonetheless provides a wealth of thoughtful, informative, state-of-the-art examination of the most important issues of accountability and legitimation posed by the diverse transnational mechanisms for regulation of the global economy. The contributions dissect the problématique of transnational governance in an insightful fashion and, overall, make a substantial contribution. Inevitably, the problématique remains unresolved.

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doi:10.1017/S1474745605262407

The International Law on Foreign Investment
by M. Sornarajah
Cambridge University Press, 2nd edn 2004, pp. vii, 525

The last decade has witnessed exponential growth in various forms of international rule making on foreign investment. Long the poor cousin to trade law, the 1990s saw continued passage of bilateral investment treaties (BITs) as well as detailed regional (such as Chapter 11 of NAFTA) and sectoral (the Energy Charter Treaty) investment treaties. The completion of the Uruguay Round negotiations in 1993 even saw limited reengagement with foreign investment under the aegis of the World Trade Organization1 in the form of the Agreement on Trade-Related Investment Measures and perhaps more notably, the General Agreement on Trade in Services.2

Released in 1994, the first edition of M. Sornarajah’s The International Law on Foreign Investment was perhaps the first truly comprehensive text to tackle the dispersed and often confusing sources of the international law on foreign investment. It soon became a primary resource for any researcher or student interested in the field. Sornarajah’s organizing thematic concern within that first edition was quite properly the manner in which the tension between developed and developing countries had shaped the evolution of international law on investment. That thematic concern reflected the marked historical sensitivity of foreign investment in the messy aftermath of decolonization following the Second World War. The countries that emerged from this process demanded not only political but also economic independence. Foreign

1 Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, 33 ILM 1144 (1994) [hereinafter the WTO Agreement].
2 Ibid., Annex 1B (General Agreement on Trade in Services), 33 ILM 1167 (1994) [hereinafter GATS].
investment especially came to be seen as a proxy for colonialism leading to waves of expropriation of foreign-owned assets throughout much of the developing world throughout the 1960 and 1970s.\(^3\)

The spectacular spread of expropriatory behaviour had an enormous impact on the normative development of international economic law governing foreign investment. Investment protection in the form of guarantees of compensation against expropriation acquired through BITs became the core objective of developed states rather than the liberalization of investment restrictions. This was in part prompted by a concern that customary international law was moving in a direction contrary to the interests of foreign investors and their home states. The strong guarantees on investment protection in most post-war BITs operated in stark contrast to the early directions in international trade law. The normative principle infusing the creation of the General Agreement on Tariffs and Trade (GATT) has been memorably described as ‘embedded liberalism’ where the economic order is a function of the social.\(^4\) This most notably manifested itself in the GATT in the form of Article XX, which permits departure from GATT disciplines to pursue a list of regulatory objectives, including health and environmental measures. The GATT framers prophetically understood the sensitivity of drawing a balance between liberalization of discriminatory trade barriers and the necessity to retain core components of regulatory autonomy. In stark contrast, the drafters of post-war BIT programs largely ignored this ever-present tension in their desire to discipline extremist expropriatory behaviour. The end-result is that most BITs typically contain strong seemingly unqualified guarantees of investment protection without a regulatory ‘out’ in the form of GATT Article XX-type exception. Sornarajah’s first edition exhaustively charts these developments, with insightful focus on the various substantive standards of investment protection.

The dense growth of rule making in the last decade clearly necessitated the updating of this important text. Most notably, a significant body of arbitral case law has arisen in the decade following NAFTA’s inception. The explosion in investment disputes is amply evidenced by the number of cases submitted to the best-known institution specializing in investment disputes – the International Centre for Settlement of Investment Disputes (ICSID). Established in 1965 under the auspices of the World Bank, ICSID handled a rough average of only one case per year. Since 1995, up to 30 cases have been filed in a year, with the number of new filings increasing rapidly. Sornarajah’s second edition released in 2004 was thus a welcome update to this increasingly active area of international law. The second edition essentially retains the dominant thematic concern of the tension between developed and developing countries in this area. This might on first view seem at odds with the fact that, since the 1980s, developing countries have shifted away from an attitude of hostility towards foreign investment towards the need to attract and retain especially foreign direct investment.\(^5\)

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Sornarajah is quite rightly suspicious that the shift by developing countries towards pro-investment policies is a somehow natural recognition of the inherent benefits of foreign investment in the developmental process. Foreign investment has lost none of its character as an especially sensitive topic for developing countries in the broader genus of international economic law. The spurt and style of investment treaty making in the early to mid 1990s might with hindsight be seen as a narrow window reflecting the historical specificities of that time. Many developing countries had reoriented their domestic policies away from an inward-focused approach towards policies based on export growth and economic openness as part of their developmental strategies. This reorientation has oft been linked to the demonstrable successes of open economic policies of the newly industrializing countries of East Asia. Yet, that account alone ignores the significant external pressures on developing countries at the time to liberalize trade and investment restrictions linked to the now infamous structural adjustment policies of the International Monetary Fund (IMF).

The blunt and rapid shift towards investment liberalization has proven problematic in recent years. This became especially apparent for many of the developing countries in South East Asia following the 1997–1998 Asian debt crisis. The rapid outflow of portfolio investment during that crisis highlighted the speculative nature of certain forms of capital flow. Malaysia’s imposition of restrictions on short-term capital outflows in the aftermath of the crisis was roundly criticized by the IMF, yet few of those dire predictions seem to have eventuated. A broader systemic issue focused on the relatively limited institutional framework possessed by these countries governing capital and currency flows. Recent developmental theory has emphasized the role of institutional capacity as a necessary condition in the developmental process. Sornarajah’s implicit approach based on the developmental implications of foreign investment never really seems to engage in this important debate. Whilst there is exhaustive analysis of the typical regulatory tools used by host states to try and extract developmental benefits from foreign investors, the role of institutional capacity seems somewhat to fall by the wayside.

The strength of this text is in its continued focus and detailed analysis of the various substantive standards of investment protection found in investment treaties. Investment protection in the form of absolute guarantees against expropriation or regulatory measures having equivalent effect has been the traditional focus of most writers in the field. Indeed, the contested nature of the debate on compensation for expropriation has starkly highlighted differences in views between developed and developing countries. Sornarajah’s text devotes a full three out of ten chapters to the

10 Sornarajah, supra note 6, ch. 3 (Controls by the Host State) and especially 97–135.
various strands of investment protection.\textsuperscript{11} In somewhat stark contrast, the contents of relative standards of treatment such as national and most-favored-nation treatment are dealt with somewhat summarily in less than a full chapter.\textsuperscript{12}

This imbalance of coverage in the second edition may prove problematic considering the likely doctrinal evolution in this field. The risk of traditional, large-scale expropriation of foreign assets has significantly diminished in recent years. This does not mean in itself that other forms of possibly expropriatory conduct will disappear from the toolkit of host states. The way in which regulatory measures might cumulatively constitute a creeping expropriation remains a hot topic, especially in the regulated, welfare NAFTA states. Indeed, the investment Chapter 11 of NAFTA has highlighted that foreign investment liberalization is as politically sensitive even amongst developed states. This was starkly reinforced by the failure in 1998 of the OECD negotiations towards the Multilateral Agreement on Investment that evidenced the fallacy that it is somehow easier to forge deep levels of liberalization amongst developed countries.

The on-going debate within Canada and the US on the calculus of benefits and burdens of NAFTA has shifted beyond sterile, populist notions of loss of sovereignty to a more nuanced understanding of NAFTA’s implications for regulatory autonomy in a host of seemingly legitimate areas of government intervention. It does seem that this debate has largely focused on the broad guarantees of investment protection within NAFTA Chapter 11. Thus, the NAFTA Free Trade Commission in 31 July, 2001 released an interpretation to clarify the operation of some of the broader provisions of NAFTA Chapter 11 especially the minimum standard of treatment in Article 1105. Similarly, the US in the most recent revision of its Model BIT\textsuperscript{13} included an interpretative Annex to ensure that investor protection obligations, including the minimum standard of treatment\textsuperscript{14} and guarantees of expropriation,\textsuperscript{15} not be interpreted so broadly as to impinge upon core components of regulatory autonomy.

The type of ex post amendment of investor protection obligations that has occurred in NAFTA stands in stark contrast to the lack of attention given to the operation of substantive liberalization standards in most investment treaties. Yet, investment disputes may increasingly turn on relative standards of treatment such as national and most-favored-nation treatment. This is especially the case for investment disputes that confront the modern regulatory state, especially within the NAFTA context. Here there are a host of fundamental normative issues that go to the very heart of the sensitive interface between liberalization conditions and regulatory autonomy. A particularly prominent example is that of the ongoing NAFTA litigation in Methanex v. US In Methanex, a Canadian producer of methanol has claimed a Californian ban on the use of methanol as a gasoline additive ostensibly passed for environmental reasons breaches the US’ NAFTA obligation to accord foreign investors national treatment. The thrust of the investor’s claim is that purpose of the Californian environmental

\textsuperscript{11} Ibid., chs 8 ‘The Taking of Foreign Property’; 9 ‘Takings in Violation of Foreign Investment Agreements’; 10 ‘Compensation for Nationalization of Foreign Investment’.

\textsuperscript{12} Ibid., ch. 7 (‘Causes of Action: Breach of Treatment Standards’).


\textsuperscript{14} Ibid., Annex A.

\textsuperscript{15} Ibid., Annex B.
ban was essentially protectionist and designed to benefit US producers of ethanol. Methanex is by no means the only contentious NAFTA case involving the application of relative standards such as national and most-favored-nation treatment. United Postal Services (UPS) has brought action against Canada, claiming that its regulation of the courier postal system operates to discriminate against UPS, as a foreign participant in the market. One is hard pressed to deny (as in fact Canada has claimed) that the broad objective of maintaining a given level of public access to its postal system is, given its public good component, a legitimate objective. Yet, it is doubtful that the legitimacy of the overall regulatory objective should of itself be sufficient as a shield to a NAFTA national treatment claim. The specifics of the manner in which that objective is implemented will require investigation by the NAFTA arbitral tribunal.

The increasing sensitivity of the challenges faced by arbitral tribunals is by no means limited to the NAFTA countries or somehow only reflective of the specifics of the regulatory, welfare state. Developing countries too are increasingly subject to claims of breach of relative standards. In Occidental v. Ecuador, a US investor in the Ecuadorian oil industry argued that the failure of the Ecuadorian tax authority to provide it with VAT refunds breached the national treatment obligation in the US–Ecuadorian BIT, as domestic participants in other industries such as flower exporters were provided such refunds. Surprisingly, the arbitral tribunal decided that the US investor and the domestic companies operating in other, non oil-related sectors were ‘in like situations’, despite the absence of any competitive relationship. The end-result was an award of over US$ 71 million against the Ecuadorian government.

This sensitive task of sorting protectionism from legitimate regulatory measures has a longer pedigree in the WTO in the form of GATT Article III jurisprudence on national treatment than in cases to date in international investment law. Yet, as noted earlier, the substantive provisions of the GATT offer the regulating government an important alternative mechanism through which to manage this sensitive sorting process. GATT Article XX provides for substantive exceptions to allow a regulating government to take, say, an environmental measure (within certain conditions) that otherwise would be in breach of the GATT national treatment obligation. No such equivalent exists in NAFTA Chapter 11 or in most BITs. One might speculate that the US and Canadian negotiators of NAFTA mistook the way in which the strong Chapter 11 provisions might operate. The multilateralization of the typical US BIT provision into the NAFTA seems to have been done on an assumption that they would largely operate to protect US and Canadian investors in Mexico. Not surprisingly, the fact that Chapter 11 provides for direct investor-state dispute resolution has led to

17 There is a limited exception for regulatory measures on environmental and health reasons in Article 1106(6) yet this only applies to the obligation to refrain from imposing performance requirements on investors. Article 1114(1) deals with environmental measures yet its language is decidedly non-binding. It provides that Chapter 11 should not be construed to stop a NAFTA state adopting an environmental measure ‘otherwise consistent with this Chapter’. Article 1114(2) is more substantive as it obliges a party not to waive or otherwise reduce its ‘health, safety or environmental measures’ as an ‘encouragement’ for the entry or retention of an investment. This deals with potential risk of a race to the bottom where countries engage in competitive lowering of environmental standards as a mechanism to attract investors. See North American Free Trade Agreement, 17 December 1992, Chapters 1–22, 32 ILM 289, 289–605 (1992), Ch. 11.
enterprising and well-advised investors using the NAFTA provisions to challenge seemingly nondiscriminatory regulatory measures in both the US and Canada.

Sornarajah contests whether a GATT Article XX-type exception in an investment treaty would offer a workable solution to some of the tensions rising from on-going investment disputes. He seems to base this view by claiming that GATT tribunals have not interpreted Article XX so as to enable environmental or health measures to trump the interests of free trade. Unfortunately, there is regrettable looseness in methodology in Sornarajah’s analysis of WTO jurisprudence. He bases this very broad view on the citation of only one, pre-WTO case which notably ignores contrary directions in the Article XX jurisprudence such as the Appellate Body’s careful reasoning (rather than end-result) in the famous Shrimp-Turtle case. Sornarajah offers a broad solution to this contested area by advocating a more careful delineation of the coverage of individual investment treaties. This is a possible response in terms of future investment treaties but offers little guidance in terms of the operation of the over 2000 existing investment treaties.

If treaty amendment were an unlikely solution in the area, it would seem that much more is needed of the arbitrators in ongoing and future investment disputes. At a minimum, arbitrators will need to understand that legitimation of the broad and undefined treaty provisions will increasingly be linked to the quality and coherence of arbitral decision-making. There appears little likelihood of this shift in the near future. For one thing, there is the obvious overlap in practice and institutional culture between commercial and treaty arbitration. Arbitrators in a BIT case will often be drawn from the ranks of arbitrators of private disputes. This seems logical given that the dispute settlement rules of most investment treaties will often refer to arbitration rules such as that of UNCITRAL were developed to primarily deal with commercial or contractual disputes. Yet, it also leads to what even one prominent arbitrator has described as a certain type of “clubbiness” amongst the arbitration community.

The ever-present danger is whether that club is in reality an epistemic community in which its members share a set of given values and causal beliefs. Underlying many recent arbitral awards is an oft-unstated and uncritical assumption of the value of investment liberalization and protection in itself. To some degree, such an assumption is inevitable given that the text of a typical investment treaty will normally as a whole only reflect such directions. Yet, it is clear that the strategic issues involved in an investment treaty dispute will increasingly involve matters of profound public interest, requiring a delicate balance between the investor’s rights and the values of the regulatory issue at stake. At a minimum, adjudication in this balancing process requires a meaningful dialogue of the underlying legal issues to be decided in the arbitration.

18 Sornarajah, supra note 6, at 261.
19 Ibid. (citing the 1991 GATT Panel decision in Thailand–Tobacco).
21 Sornarajah, supra note 6, at 266.
The likelihood of such a meaningful dialogue is not only at risk given the relatively narrow ranks from which the arbitration community is drawn, there is also the mode of analysis employed in most commercial arbitrations. This is notable for its almost ‘lawless’ character. The dominant emphasis in private arbitral actions is – aside from the ever-present desire to maintain confidentiality – usually to undertake lengthy analysis of the facts concerned, whilst issues of legal principle or coherence are largely ignored. The mode of analysis seems to have been carried over to many arbitral actions in BIT disputes where large recitations of facts occur with little or perfunctory analysis of the legal issues concerned. This model of dispute settlement will be increasingly untenable as arbitral decisions will not only be cited by counsel in future cases but may even influence the decision of future tribunals.

This problem may be rectified to some extent by structural amendment to the arbitral dispute settlement process. The fact-based judgments of ad hoc arbitral panels may only be disciplined into a form of coherent and legal jurisprudence with the censoring function of some form of appellate body. One need only look to the dramatic change in quality and coherence in jurisprudence following the inception of the WTO Appellate Body mechanism in the WTO since 1994 as a possible useful precedent. Surprisingly, Sornarajah fails to tackle directly this very topical issue within the second edition. The importance of this issue within the field of international investment law cannot be understated. Although the GATT and WTO dispute settlement processes obviously affect private economic interests, the initiation of the dispute remains a prerogative of the country whose domestic interests are most affected. Whilst the decision to commence an action may have been influenced by the lobbying efforts of the domestic interest group concerned, the state remains a fundamental filter on the types of disputes brought before dispute settlement. Most states are less likely to bring a dispute to challenge a regulatory measure under the WTO if that would prompt a similar challenge in the future against their own regulatory behavior. Self-interest alone acts as a filter to the types of disputes litigated in the inter-state forum of the WTO. In stark contrast, most BITs as well as NAFTA Chapter 11 allow private parties to bring direct arbitral proceedings against a state. The end-result is the potential for far greater initiation of actions against seemingly legitimate and non-discriminatory regulatory action.

The WTO might offer some guide not only in its procedural evolution but also, at times, in its interpretation of substantive components of constituent agreements. Indeed, it is almost commonplace to see counsel citing WTO jurisprudence in NAFTA and BIT cases. Thus, in Methanex, UPS, and Occidental, GATT Article III jurisprudence on the interpretation of “like products” is cited extensively in arguments as

24 Lowenfeld, supra note 22, at 4.
25 Indeed, some aspects of the WTO compact, expressly contemplate the involvement of the domestic industry affected. This is most notable in the area of anti-dumping duties. Thus, Article 5.1 of the WTO Anti-Dumping Agreement provides that the regulator’s investigation into whether dumping has occurred is initiated upon a written application by the affected domestic industry. WTO Agreement, supra note 1, annex 1A (Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade) 1868 UNTS 201.
26 NAFTA, supra note 17, Ch. 11, sub-ch. B (Settlement of Disputes Between a Party and an Investor of another Party).
to how likeness should be applied in the investment context. Sornarajah again seems very resistant to this trend with an overt suspicion as to the transplant of WTO jurisprudence to the investment context. Consider the following:

The inclusion of national treatment will also mean that the existence of an economically valid reason for the discrimination between nationals and foreign investors may not provide a justification for the discrimination. The trade-related term ‘in like circumstances’ is used to limit the effect of the national treatment requirement. It is difficult to understand the nature of such a limitation in the context of investment. A large multinational corporation as an investor is never in ‘like circumstances’ because of its size and vertically integrated global organization. If this is a basis for discrimination, then the granting of national treatment becomes useless. But, it is the precise reason why the foreign multinational corporation should be discriminated against. There is a dilemma presented by the unthinking extension of notions of trade law into the area of investment. The two areas do not mix that easily.27

If the attempt is merely to transplant such jurisprudence, Sornarajah is quite right in his resistance to this tendency. Yet, it seems that WTO jurisprudence offers a much more nuanced ability to act as an illuminator in investment disputes.28 Thus, in a Methanex or a UPS, an arbitral tribunal might be invited to consider both similarities and, crucially, differences to the way in which national treatment is formulated in, say, the GATT. This would extend not only to a consideration of likeness but also the absence of a GATT Article III.1 ‘guide’ to interpretation in most investment treaties. That provision has largely been responsible for the tortured debate within GATT Article III jurisprudence on whether to consider the aim as well as the effect of the regulatory measure in the decision-making calculus.29 The absence of such an interpretative guide in most investment treaties as well as on-going work on national treatment in the OECD30 might offer an arbitral tribunal in an investment dispute the chance to develop a more coherent theory based on regulatory purpose.

Sornarajah’s tendency to discount or reject the WTO experience is most evidenced in his relatively cursory treatment of the GATS. The GATS is in essence a type of investment agreement. ‘Commercial presence’ – that is, foreign direct investment – is defined in Article I.2 as mode of delivery of trade in services. This reflects the fact that, for many services such as in the banking and finance industries, the only way of serving foreign markets is by setting up local operations through FDI. Sornarajah’s treatment of GATS spans a sparse two pages.31 This seems at odds with the likely increasing

27 Sornarajah, supra note 6, at 235.
30 See generally OECD, National Treatment for Foreign-Controlled Enterprises 22 (1993).
31 Sornarajah, supra note 6, at 299–301.
importance of services FDI in the global economy. Consider the bare statistics. The share of services FDI in the world’s total inward FDI stock rose to some 60% in 2002 compared with less than half in 1990 and only one-quarter in the early 1970s.\textsuperscript{32} On average, services accounted for about two-thirds of total FDI inflows over 2001–2002.\textsuperscript{33} These statistics challenge the often trade assumption within investment law circles that the GATS is somehow less relevant as an investment agreement. Critical analysis of the peculiar structure of the GATS, and especially the obligations of national and most-favored-nation treatment should feature prominently in any generalist text on investment law.

The international law on investment clearly remains in a state of flux. The “moving target” nature of the field only increases the difficulty of capturing often-contrary directions within an over-arching text. Sornarajah’s second edition has retained the organizing thematic concern of tension between developed and developing countries in this field. This remains an important methodology despite the often post-modern predictions of an unquestioning acceptance by poorer countries of the inherent benefits of entry of foreign capital. That paradigm though has also translated into a regrettable tendency in the second edition largely to focus on investment protection to the exclusion of liberal concepts such as most-favored-nation and national treatment. It is precisely those liberal, relative standards of treatment that lie at the heart of some of the most contentious on-going investment disputes. This raises more broadly the extent to which both the procedural and jurisprudential evolution of related concepts within the WTO might offer some guidance in the increasingly active arena of investment arbitration. Ultimately, the second edition of this important text offers little real guidance or even interest in what will inevitably become an important doctrinal connection within the broader genus of international economic law.

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\textsuperscript{33} Ibid., at 98.