A Comparison of the Provisions Affecting Investment in the Existing WTO Obligations

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ABSTRACT
The paper explores the provisions affecting investment in the existing WTO obligations as well as in most European bilateral investment treaties, the North American Free Trade Agreement, and finally in the APEC Non-Binding Investment Principles. The authors mainly focus on the investment provisions embraced in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). Nevertheless, three further WTO agreements – the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Government Procurement Agreement (GPA), and the Agreement on Subsidies and Countervailing Measures (ASCM) with their indirect effects on investment are also explored.

It could be argued that investment provisions are already embraced in several international agreements and further negotiations on investment do not represent a major progress. However, the analysis provided by this paper shows this argument is impossible to sustain in light of the limited investment provisions tackled in the explored international agreements. Indeed, the investment provisions in the compared agreements do not fully address the numerous investment issues as for example legal security, policy coherence, and the transparency of government commitments.

KEY WORDS
Investment, WTO, NAFTA, APEC Non-Binding Investment Principles, GATS, TRIMs, TRIPs, GPA, ASCM

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1. **Introduction**

Investment issues have had a long, if inconclusive, history in the General Agreement on Tariffs and Trade (GATT) as well as in its successor the World Trade Organisation (WTO). The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). Three further agreements – the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Government Procurement Agreement (GPA), and the Agreement on Subsidies and Countervailing Measures (ASCM) – have only indirect effects on investment.

The General Agreement on Trade in Services deals most with investment issues of all the existing WTO agreements once one of the four modes of the supply of services covered by GATS – the establishment of a commercial presence – relates directly to investment. One of the key principles of investment treatment – most-favoured-nation treatment – has become a general obligation for dealing with investment in the Agreement. However, market access and national treatment obligations for investment apply only to those sectors and modes of supply that have been put in the schedules of commitments submitted by the Members. Nevertheless, conditions and limitations for both market access and national treatment could be entered in the schedules of commitments, again specific to sector and mode of supply. This so called “positive list approach” of enumerating the specific sectors and modes of supply to be covered contrasts with the traditional WTO approach based on general principles.

The Agreement on Trade-Related Investment Measures bans a limited number of performance requirements as far as they are inconsistent with GATT provisions on national treatment and quantitative restrictions. All Members needed to notify and phase out contravening measures, although developing and least-developed countries were granted generous transitive periods. The Agreement has considerably enhanced the transparency of investment policies in the world. Nevertheless, the Agreement is limited to measures affecting only trade in goods.

The Agreement on Trade-Related Aspects of Intellectual Property Rights provides protection for intangible assets that form the basis of the activities of multinational corporations. The agreement stipulates the minimum standards for the protection of intellectual property rights that were already set by other international organisations, such as the World Intellectual Property Organisation. Nevertheless, it further requires that Members provide effective legal procedures and remedies for the enforcement of such rights.

The Agreement on Government Procurement deals with public procurements and services because GATS excludes public procurement services. The GPA requirements deal with investment once they apply to procurement of foreign products or services as well as to goods or services produced by locally established foreign suppliers.
The Agreement on Subsidies and Countervailing Measures deals with subsidies. Since the Agreement includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly but it does not build up any significant incompatibility between foreign and domestic investment.

Since the obligations on investment are not the primary focus of the three later mentioned agreements, this paper deals mainly with the General Agreement on Trade in Services and the Agreement on Trade-Related Investment Measures.

2. The General Agreement on Trade in Services

As we have already mentioned, the General Agreement on Trade in Services (GATS) deals most with investment issues of all the existing WTO obligations. The investment implications of GATS are largely derived from the key definition of Article I.2, which identifies modes by which services can be supplied. Several of these imply a significant presence (referred to as a “commercial presence” in the legal texts) in the country where the service is provided, and provide the basic protections of GATS to the investments that are an integral part of this presence. The supply of trade in services through “commercial presence”, which is in essence an investment activity, is covered by Mode 3. Nevertheless, Mode 4 also tackles investment issues because it deals with the temporary entry of managerial and other key personnel.

GATS uses in large part the selective liberalization approach to provide access to foreign service suppliers, i.e. foreign investors in the field of services. However, it also contains elements of both the national and most-favoured-national treatment and it relies on the use of both positive lists of commitments and negative lists of exemptions for different purposes. In accordance with most-favoured-national (MFN) obligation, parties to GATS are committed to treating services and service providers from one Member in a no less favourable way than like services and service providers from any other as concerns measures affecting trade in services. National treatment, however, is not automatically accorded across the board. It applies only scheduled sectors when parties agree to provide national treatment in the context of specific market access commitments.

The wording of MFN treatment in GATS is the same as in the North American Free Trade Agreement (NAFTA) and the US bilateral investment treaties (BITs), using the negative list approach, once it states that with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. It also states that Member may maintain a measure inconsistent with
MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

The negative list approach, however, is not used in case of the national treatment of investment once it states that in the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. It also states that a Member may meet the requirement of national treatment by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

Note that the treatment of foreign investors not only does not have to be formally identical with national treatment of domestic investors (this provision is also contained e.g. in NAFTA) but it does not have to be neither materially identical. The treatment of foreign investors itself can be modified and qualified in a country’s schedule. But as far as the admission is concerned, an obligation to admit investment (including the necessary capital movements) exists in sectors where a WTO Member has made a commitment for market access.

The advantage of the positive list approach in comparison with the top-down or negative list approach is greater flexibility of the former. In case of the NAFTA type negative list approach, some countries might feel deprived of important policy tool. The point is that in some sectors and industries it is very difficult to anticipate their future development and character at the moment of writing down the negative list. Here the combined national and most-favoured-nation treatment approach offers less flexibility to host countries in FDI flows into such sectors. In this sense, the GATS provides a realistic approach of how admission of foreign investment can be dealt with. The positive list approach would probably permit a more gradual liberalization, which some countries may be more comfortable with. In GATS, no Member of the WTO is apriori forced to make any commitments in any given sector (Gugler, 2006, p. 61-73). But the GATS type has disadvantages as well – primarily the level of investment liberalization is probably much lower than if the top-down approach were adopted. Generally it can be said that: “Experience with GATS showed that a positive list approach was preferable when a new area was for the first time the subject of liberalization at a multilateral level. However, the flexibility inherent in this approach has considerably weakened the scope of the national treatment principle. It was noted that the positive list approach needs constant updating if it is to assist to transparency and the aim of investment liberalization.” (WTO, 2002).

The treatment of investors within GATS can be subject to the balance of payments safeguards once it is stated that in the event of serious balance of payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or
transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition. Nevertheless, the balance of payments safeguards concern mostly the post-entry measures and not the pre-establishment measures.

The Agreement promotes the transparency of investment environment once it declares that each Member shall publish promptly all relevant measures of general application, which pertain to or affect the operation of trade in services. Where the publication is not practicable, the Agreement states such information shall be made otherwise publicly available.

GATS reflects an increasing participation of developing countries in the world trade and investment flows. The Agreement facilitates trade and investment in developing counties by allowing them to negotiate specific commitments relating to the strengthening of their domestic services capacity and its efficiency and competitiveness through access to technology on a commercial basis, the improvement of their access to distribution channels and information networks, and the liberalization of market access in sectors and modes of supply of export interest to them. The Agreement states that the developed country Members shall establish contact points to facilitate the access of developing country Members' service suppliers to information concerning commercial and technical aspects of the supply of services, registration, recognition and obtaining of professional qualifications, and the availability of services technology. GATS even gives a special priority to the least-developed country Members in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Not only the specific commitments for developing and least-developed countries, but also subsidies could be deemed as a special mean of investment incentives. GATS deals with the issue of subsidies in more details once it pursues a strategy avoiding trade-distortive effects of subsidies. The Agreement states that Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid trade-negative effects of subsidies and the negotiations shall also address the appropriateness of countervailing procedures. Nevertheless, the GATS says these negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of developing and least-developed country Members.

The Agreement doesn’t set out any operational conditions directly. Nevertheless, there are some general obligations within GATS that certainly affect the investment operational conditions. Such obligations are as follow: domestic regulation, recognition, monopolies and exclusive service suppliers, and business practise obligations. The domestic
regulation affects the operation of investment mostly through an authorization process, qualification requirements, technical standards and licensing requirements, where these conditions and procedures are required for the supply of a service. The obligations of recognition affect investment in the supply of a service, where services suppliers need to meet standards or criteria for the authorization, licensing, or certification of their services, or they need to achieve special education or experience. The obligation on monopolies and exclusive service suppliers within the Agreement states that each Member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the most-favoured-nation treatment principle. If a supplier fulfils the condition on monopoly and exclusive service supplier, then this Agreement will certainly affect the operation of his/her investment in order not to allow such the supplier to abuse its monopoly position. Regarding the obligations on business practices, the Agreement appeals the Members to eliminate certain business practices of service suppliers that may restrain competition and thereby restrict trade in services.

The Agreement provides investors with the Dispute Settlement Understanding if any Member considers that any other Member fails to carry out its obligations or specific commitments under this Agreement.

Finally, investors should be aware of general and security exceptions to the Agreement. These exceptions are related to the protection of public morals, order, human, animal or plant life or health, privacy, safety, and security. All these exceptions could have a significant influence on an investment.

3. The Agreement on Trade-Related Investment Measures

The Agreement on Trade-Related Investment Measures (TRIMs) has constituted a significant net step forward in the investment area at the multilateral level. Governments often tend to impose trade-related investment measures (performance requirements) to achieve certain national priorities. The measures relate to trade-distorting restrictions imposed by the host country on multinational enterprises, which negatively influence trade as well as investment development. According to Dunning, performance-related measures may embrace the whole gamut of operating practice. They can include behavioural guidelines or requirements in respect of local purchases of capital goods, raw materials, intermediate goods and services, the proportion of output exported, the type of value added (e.g. RD) undertaken by affiliates, information provided on intra-firm pricing practices, conditions attached by MNEs on the use of technology transferred, and so on (Dunning, 1993, p. 559). The WTO has recognized that some of TRIMs violate the principles of the General Agreement on Tariff and Trade (GATT) and it has required countries to abandon the TRIMs that have been identified as being inconsistent with the GATT rules.

The TRIMs Agreement dealing with investment measures even prohibits performance requirements being inconsistent with the national
treatment model. The operative provisions of the TRIMs Agreement are contained in a single sentence of Article 2.1: “Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.” These are the provisions obliging states to provide national treatment for trade in goods, and the provisions prohibiting quantitative restrictions in imports or exports. Nevertheless, the TRIMs Agreement only restates the existing GATT obligations and offers a short “illustrative list” of prohibited policies. For example in contrast to this, Article 1106 of NAFTA contains an extensive list of prohibited policies concerning export percentages, domestic content percentages, domestic purchase requirements or preferences, relationships between imports and exports or foreign exchange flows, relationships of domestic sales and exports or foreign earnings, technology transfer requirements, or exclusive supplier arrangements. Thus, NAFTA represents a significant advance in attempts to limit performance requirements (Gugler, Tomsik, 2006). Moreover, the TRIMs Agreement is notable for its lack of any reference to most-favoured-nation (MFN) treatment, for the lack of a specific definition of investment, and fair and equitable treatment is also not mentioned in the Agreement.

To promote business and investment, it is very important to emphasize transparency. The TRIMs Agreement relies a great deal on transparency once it requires each Member to notify of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities.

Investment disputes pertaining to the TRIMs Agreement may have recourse to the Dispute Settlements Understanding once the Agreement states that the provisions of Articles XXII and XXIII of GATT 1994 shall apply to the settlement of disputes under the TRIMs Agreement.

GATS and the TRIMs Agreement have resulted in a certain degree of the liberalization of investment, especially foreign direct investment. The TRIMs Agreement constrains the use of performance requirements by host country government and GATS provides investors with national/MNF treatment, movement of personnel and transfer rights in service sectors selected by Members. It can be concluded that both agreements could represent a “departure” from BITs because many BITs include some performance requirements, investment obligations as well as provisions on investment protection.

4. The Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) tackles investment issues indirectly by providing for national treatment and most-favoured-nation treatment for the protection of intellectual property. The protection includes matters affecting the
availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement. The categories of intellectual property rights referred in the Agreement are copyrights, trademarks, geographical indications, industrial designs, patents, layout-designs, and protection of undisclosed information. Specific exceptions are provided in the Paris Convention, the Berne Convention, the Rome Convention or in the Treaty on Intellectual Property in Respect of Integrated Circuits, but no Member reservations to this treatment are permitted.

TRIPs provides fair and equitable treatment for investment once the Agreement states that procedures concerning the enforcement of intellectual property rights shall be fair and equitable. It is also stated that the procedures shall not entail unreasonable time-limits or unwarranted delays, and all the procedures shall be applied in such a manner as to avoid the creation of barriers to trade and investment.

The Agreement implementation relies a great deal on transparency once it says that all laws, regulations, final judicial decisions and administrative rulings of general application pertaining to the availability, scope, acquisition, enforcement and prevention of the abuse of the intellectual property rights shall be published; or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.

The Agreement includes some measures affecting the operational conditions of intellectual property (investment) once it allows to the Members of the Agreement to adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Such measures may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade and investment or adversely affect the international transfer of technology.

The Agreement on TRIPs also tackles investment incentives once it states that developed country Members may provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members.

One of the most important issues influencing investment is rules and procedures pertaining to expropriation. The expropriation of intellectual property rights should be in accordance with international law requirements, which provides for detailed definitions of compensation standards.

The Agreement is also subject to the Dispute Settlement Understanding. Private rights holders are entitled, in addition, to benefit from certain standards with respect to the domestic enforcement of
intellectual property rights and their rights in terms of access to civil judicial procedures.

As GATS does, the Agreement on TRIPs also provides security exceptions to the Agreement once it states that nothing in the Agreement shall be construed to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests, etc.

5. The Agreement on Government Procurement

The Agreement on Government Procurement (GPA) deals with the procurement by entities as central government entities, sub-central government entities, all other entities that procure in accordance with the provisions of this Agreement, and also specifies services because GATS excludes public procurement services and the discussions so far to extend GATS coverage in this regard has achieved little progress. The GPA requirements deal with investment once they apply to procurement of foreign products or services as well as to goods or services produced by locally established foreign suppliers.

The requirements invoke in the Agreement are based on both transparent and non-discriminatory treatment in procurement procedures. Both national treatment and most-favoured-nation treatment providing to products, services and suppliers are granted with respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement. Regarding the foreign investment, the Agreement states that the selection procedures of government procurement shall be carried out in a fair and non-discriminatory manner: “…to ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner”. Nevertheless, the developed countries may provide a special and different treatment in government procurement for developing and least developed countries. The GPA Members shall, in the implementation and administration of this Agreement, take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to (i) safeguard their balance of payments position and ensure a level of reserves adequate for the implementation of programmes of economic development; (ii) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy; (iii) support industrial units so long as they are wholly or substantially dependent on government procurement; and (iv) encourage their economic development through regional or global arrangements. The Agreement even states that each GPA Member shall,
in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least developed countries and of those countries at low stages of economic development. In favour of developing countries, the Agreement even provides that a developing country may negotiate with other participants in negotiations under the Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case.

The Agreement continues in this special treatment for least developing countries when it says each developed country shall, upon request, provide assistance, which it may deem appropriate to potential tenderers in least developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

The Agreement requirements and procedures rely a great deal on transparency once they encourage entities to indicate and make publicly available the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers. The Agreement even ensures that procurement regulations shall not normally change during procurement and, in the event that such change proves unavoidable, it ensures the availability of a satisfactory means of redress.

The Agreement also tackles measures affecting operational conditions. The Agreement generally says that entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider any measures to encourage local development or improve the balance of payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of the above mentioned measures, such as requirements for the incorporation of domestic content. Such requirements might be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory.

Disputes arising under the Agreement are handled through the WTO Dispute Settlement Understanding.

Finally, investors should be aware of exceptions to the Agreement. These exceptions are related to disclosure with any information which is considered necessary for the protection of a country security, to interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes. At the same time, investors should be noticed that the
Agreement prevents a Member from imposing or enforcing measures, which would negatively affect public morals, order or safety, human, animal or plant life, and health or intellectual property. All these exceptions could have a significant influence on an investment and each investor should take them into account before starting doing business.

6. A Comparison of the Main Provisions Affecting Investment in Key International Agreements

Before comparing the main provisions affecting investment in key international agreements, especially within the existing WTO agreements, we shall look very briefly at the Agreement on Subsidies and Countervailing Measures (ASCM) as well as at the APEC Non-Binding Investment Principles because both of them belong among the key international agreements dealing with investment.

While the Agreement on Subsidies and Countervailing Measures includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly but it does not build up any significant incompatibility between foreign and domestic investment.

The Agreement on the APEC (Asia-Pacific Economic Cooperation) Non-Binding Investment Principles are reminiscent of the North American approach to investment represented by the US bilateral investment treaty model as well as by NAFTA as the APEC investment principles advocates rights of establishment based on both the national and most-favoured-nation treatment principles. However, the principles are not binding and their provisions represent “best efforts” only. Also, the national treatment provision is more restrictive than it can be seen in the North American approach that is makes non-discrimination subject to domestic law exceptions (Somarajah, 1995). Nevertheless these principles are still very conducive to attracting foreign investment and the flow of technology in the Asia-Pacific region.

Economic policy makers often ask, if these principles are not legally binding, of what value are they? It is true that in a legalistic sense, the principles indeed provide no protection. However, Graham shows that the APEC investment principles could be of value if governments and policy makers in the APEC region felt inclined to bring national law and policy into conformity with the principles, or even simply felt that in de facto exercise of law and policy they observe the spirit of the principles. It is in accordance with the East Asian legal tradition that the letter of the law is somewhat loosely or even ambiguously stated but it is clearly interpreted according to rule of reason. Also, the East Asian approach to the settlement of disputes is to attempt to the maximum extent for these to be settled informally and in a fashion where neither party wins or loses but where both parties accept an outcome that is fair to both. Such
principles might thus help establish such an understanding in the domain of national policy towards foreign investment (Graham, 2000).

The APEC investment principles could aspire to commit to ongoing efforts towards the improvement and further liberalization of investment regimes, that is why we include these principles in our comparison presented in Figure 1.

Figure 1 provides us with the comparison of the main provisions affecting investment in the European investment approach represented by most European bilateral investment treaties, the North American approach represented by the North American Free Trade Agreement, the APEC Non-Binding Investment Principles, the General Agreement on Trade in Services, the Agreement on Trade-Related Investment Measures, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and finally the Government Procurement Agreement.
Figure 1: Main Provisions Affecting Investment in Key International Agreements

<table>
<thead>
<tr>
<th>Legally binding</th>
<th>European approach represented by European BITs</th>
<th>North American approach represented by NAFTA</th>
<th>APEC Non-Binding Investment Principles</th>
<th>GATS</th>
<th>TRIMS</th>
<th>TRIPS</th>
<th>GPA</th>
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<tr>
<td>Binding</td>
<td>Binding</td>
<td>Voluntary</td>
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<td>Binding</td>
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<td>Definition of foreign direct investment</td>
<td>Covers all types of FDI assets</td>
<td>Broad; covers all types of investment (including portfolio) and investment assets; exceptions include debt securities of or loans to a State enterprise</td>
<td>Acceptance of foreign investment is facilitated when foreign investors abide by the host economy’s laws, regulation, administrative guidelines and policies</td>
<td>Broad definition of commercial presence (any service in any sector except services supplied in the exercise of governmental authority)</td>
<td>All categories of intellectual property referred in the Agreement (copyrights, trademarks, geographical indications, industrial designs, patents, layout-designs, and protection of undisclosed information)</td>
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<td>Definition of foreign direct investor</td>
<td>Individuals and companies having the nationality of</td>
<td>Individuals and companies having the nationality of</td>
<td>Individuals and companies having the nationality of</td>
<td>Service supplier (an individual or a company)</td>
<td>Natural or legal persons</td>
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<tr>
<td>Measures affecting entry and establishment</td>
<td>One of the parties</td>
<td>One of the parties</td>
<td>One of the parties</td>
<td>Having the nationality of one of the parties</td>
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<td>Admission according to national laws (FDI is often encouraged; in some BITs admission on the basis of national and MFN treatment)</td>
<td>Measures affecting operational conditions</td>
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<tr>
<td>Establishment in accordance with national and MFN treatment (exceptions and various schedules including in Annexes)</td>
<td>Regulatory and institutional barriers shall be minimized</td>
<td>Commercial presence is permitted in accordance with country specific schedules of commitments</td>
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<tr>
<th>Measures affecting operational conditions</th>
<th>Some BITs require entry and residence of key foreign personnel should be permitted; some BITs prohibit performance requirements</th>
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<tr>
<td>Prohibits mandatory restrictions (no matter whether they are linked to incentives)</td>
<td>The use of performance requirements should be minimized; entry and residence of key personnel to be permitted</td>
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<tr>
<td>Agreement doesn’t set any operational conditions; nevertheless domestic regulation, recognition, monopolies and exclusive service suppliers, and business practise</td>
<td>Prohibits requirements either mandatory or linked to incentives (i.e., those inconsistent with GATT Articles III and XI)</td>
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<tr>
<td>Members may adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological</td>
<td>Entities shall not impose, seek or consider any measures to encourage local development or improve the balance of payments accounts; nevertheless, having regard to general</td>
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<td>National Treatment</td>
<td>obligations affect investment operational conditions</td>
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<tr>
<td>Most, but not all provide no less favourable treatment than national enterprises after establishment (exceptions include national)</td>
<td>National treatment covers establishment and all types of operations (excepted industries and activities included in negative lists) With the exceptions in domestic laws, regulations and policies, national treatment granted only regarding establishment, expansion,</td>
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<tr>
<td>National treatment provided to products, services and suppliers are granted with respect to all laws, regulations, procedures and</td>
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<tr>
<td>Most-Favoured-Nation Treatment</td>
<td>MFN treatment to post-investment activities (exceptions to protect national security); some BITs grant MFN treatment upon entry</td>
</tr>
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</table>

- security and vital interests of the country)
- operation and protection of investment
- acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement
<table>
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<tr>
<th>Fair and equitable treatment</th>
<th>It is granted</th>
<th>It is granted</th>
<th>It is granted</th>
<th>It is granted (procedures concerning the enforcement of intellectual property rights shall be fair and equitable, and they shall not entail unreasonable time-limits or unwarranted delays)</th>
<th>It is granted (the selection procedures of government procurement shall be carried out in a fair and non-discriminatory manner)</th>
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<td>Incentives</td>
<td>Prohibits incentives</td>
<td>Environmental, health and</td>
<td>Agreement facilitates trade</td>
<td>Prohibits TRIMs linked</td>
<td>Developed country</td>
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<tr>
<td>linked to certain performance requirements</td>
<td>safety regulations should not be relaxed as an incentive to encourage investment</td>
<td>and investment in developing and least-developed countries by allowing them to negotiate some specific commitments and by establishing contact points to facilitate the access of these country Members' service suppliers to specific information; Agreement deals with subsidies and pursues a strategy avoiding trade-distortive effects of subsidies</td>
<td>to incentives; Some temporary provisions for developing and least-developed countries Members</td>
<td>Members may provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members</td>
<td>treatment in government procurement can be provided for developing and least developed countries</td>
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<td>Transfer of funds</td>
<td>Free transfer of funds and repatriation of the investment (exceptions to balance of payments safeguards)</td>
<td>Members should further liberalize towards the goal of free transfer of funds related to foreign investment (e.g., profits, dividends, royalties, loan payments and liquidations) in freely convertible currency</td>
<td>Except under the circumstances of the balance of payments safeguard, a country shall not apply restrictions on international transfers and payments</td>
<td>Patent owners have the right to assign or transfer the patent (i.e., investment) and to conclude licensing contracts</td>
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<tr>
<td>Protection standards regarding expropriation</td>
<td>In accordance with international law requirements; provide specific compensation standards</td>
<td>In accordance with international law requirements; provide specific compensation standards</td>
<td>FDI should not be expropriated except for a public purpose and on a non-discriminatory basis, according to law, and against prompt payment of adequate and</td>
<td>Expropriation should be in accordance with international law requirements; provides for detailed definitions of compensation standards</td>
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<td>Dispute settlement</td>
<td>effective compensation</td>
<td>Transparency</td>
<td>Entities shall indicate and make publicly available the terms and conditions under which</td>
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<tr>
<td>Recourse to international means for investor-state dispute settlement accepted (e.g., ICSID, UNCITRAL)</td>
<td>Members accept investor-state disputes will be settled promptly through arbitration procedures acceptable to both parties.</td>
<td>Reporting of relevant measures to monitor negative lists</td>
<td>All investment laws, regulations, administrative guidelines and policies are to be made</td>
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<tr>
<td>Recourse to international means for investor-state dispute settlement accepted (e.g., ICSID, UNCITRAL)</td>
<td>Recourse to the Dispute Settlement Understanding, if any Member fails to carry out its obligations or specific commitments</td>
<td>All relevant measures of general application which pertain to trade in services must</td>
<td>Member notifies of the publications in which TRIMs may be found, including those applied by</td>
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<td>The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to the settlement of disputes under the TRIMs Agreement</td>
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<td>Laws, regulations, judicial decisions and administrative rulings of general</td>
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<td></td>
<td>Recourse to the Dispute Settlement Understanding; private rights holders are entitled, in addition, to benefit from certain standards with respect to the domestic enforcement of intellectual property rights in terms of access to civil judicial procedures</td>
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<td>Source: Authors’ own creation based on the comparison of the authentic agreements and also based on the survey carried out by UNCTAD presented in the World Investment Report 1996 (UNCTAD 1996). Abbreviations: APEC – Asia-Pacific Economic Cooperation; BITs – Bilateral investment treaties; FDI – Foreign direct investment; GATS – General Agreement on Trade in Services; GATT – General Agreement on Tariff and Trade; GPA – Government Procurement Agreement; ICSID – International Centre for the Settlement of Investment Disputes; MFN – Most-favoured-nation treatment; NAFTA – North American Free Trade Agreement; TRIMS – Agreement on Trade-Related Investment Measures; TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights; UNCITRAL – United Nations Commission on International Trade Law</td>
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7. Conclusions

Based on the carried out analysis of the existing WTO obligations on investment, as well as on most European bilateral investment treaties, the North American Free Trade Agreement, and finally on the APEC Non-Binding Investment Principles, it could be argued that investment provisions are already embraced in several international agreements and further negotiations on investment do not represent a major progress. However, this argument is impossible to sustain in light of the limited investment provisions tackled in these agreements. Indeed, the investment provisions in the compared agreements do not fully address the numerous investment issues as for example legal security, policy coherence or the transparency of government commitments, and etc. There should be no doubt that addressing these issues in more details would improve conditions for business and facilitate investment. This current state of arts challenges all countries and their economic policies to commit themselves to ongoing efforts towards the improvement and further liberalization of investment regimes.

8. References


A Comparison of the Provisions Affecting Investment in the Existing WTO Obligations


