Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making

Diane A Desierto
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Dr. Diane A. Desierto

Abstract

This article uses a contextual policy-oriented approach to assess how the standing debate on a State's regulatory freedom has been treated within international investment law (e.g. case-by-case interpretation of variant treaty design in each case), in contrast with how the issue of domestic regulatory autonomy in international trade law has evolved towards coordination (e.g. attempted harmonization of the same set of instruments). The article submits a different view from many primarily trade law/investment law scholars (and other systemic integrationists who idealize a seamless shift from trade law to investment law), who have postulated that this fundamental issue of State regulatory freedom can and should be similarly blended and resolved in both treaty regimes. The article contends that there are different contextual, institutional, and policy factors that govern and influence decision-making and adjudicative reasoning in both regimes, which militate against an overreliance on the perceived substitutability between treaty regimes by tribunals and scholars, in order to justify specific interpretations of the width and nature of a State's public policy prerogatives within these treaties. Using the International Covenant on Economic, Social, and Cultural Rights (ICESCR) as a public policy heuristic, the article then reflects on the likely systemic differences in the treatment and mediation of the ICESCR to justify a State’s assertion of regulatory freedom within each treaty regime. A more careful appreciation and sober assessment of contextual differences alongside opportunities for convergence in these treaty regimes would, in the author’s view, create a more constructive and transparent dialectic for achieving public policy objectives within the international trade and investment governance systems.


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“...there is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law...It might be said that interests of individuals are chiefly economic, whereas those of States are political in character; but even if this be so, it ought not to be forgotten that, as a rule, the political activities of States in the field of international relations are primarily devoted to safeguarding collective economic interests, no matter under what disguise they happen to appear.”

- **SIR HERSCH LAUTERPACHT (1927)**

“It is a truism that all law is policy, in the sense that every legal arrangement, however humble, procedural, or ‘technical’ it may seem, has been designed in order to achieve some preferred social or economic objective, including objectives about the structure of the decision-making process itself.”

- **W.M. REISMAN (2012)**

### I. Introduction: Differences Beyond Metaphor

It is a proposition frequently asserted – sometimes argued in the tenor of self-evident truth – in contemporary international economic law scholarship that WTO law is always instructive for international investment law. The proposition seems...
intuitive when one visualizes a straightforward transactional linkage between trade and investment. Intra-firm transnational trading, for example, simultaneously involves issues of inter-State foreign market access (between the State of the parent firm and the State of the affiliate firm), as well as the establishment of an investment in the host State (through the creation of the affiliate firm responsible for direct operations).\(^5\)

Viewed from fundamental principles of economics, however, the trade-investment relationship might not seem as immediately obvious. Modern neoclassical trade theory uses the Ricardian theory of comparative advantage and the basic factor proportions model\(^6\) to show how the incentive structure (and thus, the decision to trade or exchange) depends on factor intensities and resource endowments between States (e.g. the relative capital/labor ratios in two States in relation to the bundle of commodities produced). Theories of foreign direct investment (FDI), on the other hand, attribute firms’ decisions to invest abroad to either of the following: 1) the nature of business operations in a production cycle (e.g. innovation, growth, maturity

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\(^6\) Mordechai E. Kreinin and Michael G. Plummer, *Economic Principles of International Trade*, Chapter 37, 1602-1621, at 1603-1604, in Patrick F.J. Macrory, Arthur E. Appleton, and Michael G. Plummer (Eds.), *The World Trade Organization: Legal, Economic, and Political Analysis* (Springer, 2005): “In sum, each country exports the commodities that are relatively intensive in the factor with which it is relatively well endowed. That is how it acquires a comparative advantage in these commodities….this model has considerable explanatory power. One of its implications is that each country exports the ‘factor services’ of its abundant factor, as embodied in the bundle of its export goods, and imports the ‘factor services’ of its abundant factor, as embodied in the bundle of its import goods. (Commodity trade and factor movements, therefore, are substitutes, as a country can either export its factor services or its factors.) Thus, trade raises the demands for, and the price of the abundant factor, and lowers the demand for, and the price of, the scarce factor. The effect of trade on the country’s income distribution is at the heart of the controversy over free trade versus protectionism in many countries: the scarce factor lobbies for protectionism, to minimize its losses. Likewise, factors employed in the export industries gain from trade, and those employed in import-competing industries lose.”
and decline); 2) the effect of exchange rates on imperfect capital markets (e.g. stronger currencies tend to reduce the volume of FDI); 3) the processes of internalization (e.g. FDI occurs when firm-specific advantages outweigh the costs of outsourcing operations abroad); or 4) the eclectic theory of firms’ advantages (e.g. ownership advantages, location advantages, internalization advantages) that create a sufficient incentive for foreign direct investment, as opposed to other transactional options available to such firms.7

The transactional differences between trade and investment thus translate into different sets of respective determinants for international investment (capital) flows and international trade flows. The International Monetary Fund’s key 1991 global survey and analysis of the determinants of global capital flows identified three major determinants that significantly influence firms’ decisions to invest (whether in a direct manner through the establishment of operations in the host State, or through indirect forms such as equity, securities, or other types of portfolio investment): 1) economic fundamentals (e.g. “global investment opportunities available, the covariances between expected returns on various investments, the growth of wealth in different countries, and differences across economic agents in their willingness to assume risk and in rates of time preference”); 2) relevant official policies (e.g. tax policies; official guarantees; capital controls; limitations on the entry of foreign firms into domestic markets; restrictions on the domestic activities, products, locations and interest rates charged by financial institutions; misaligned real exchange rates; restrictive trade

policies; debt-servicing arrears and reschedulings; and unstable macroeconomic policies”); and 3) market distortions (e.g. “transaction costs and asymmetric information among market participants”).

On the other hand, a World Bank report identifies different determinants of global trade flows, composed of the traditional variables of factor endowments (e.g. capital/labor ratios and resource endowments) and exchange rate spreads between States, as well as several new determinants that have been observed from cross-country data (e.g. productivity differences, consumer preferences, scale returns and technology, increase in mean incomes, improvements in information and communication technology or infrastructure, and trade intensity as affected by country size and trade barriers).

Given these conceptual differences, it is unsurprising that the separate and distinct international economic transactions of trade and investment are governed by distinct international regulatory architectures which, while sharing some early “common roots”, ultimately demonstrated “diverging evolutions”. As Nicholas Di Mascio and Joost Pauwelyn observed in 2008, “…the trade regime is about overall

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welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities – not individual rights…[while] the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.”

The regulatory content for international trade, as opposed to that which has evolved for international investment, has understandably been designed with consideration for the particularity of each subject-matter to be regulated, as well as the respective policy purposes behind each sphere of regulation.

Nonetheless, it would be quite unrealistic to deny the existence of any nexus whatsoever between trade regulation and foreign investment rules. However, as I caution in this Article, it is also dangerous to hyperbolize the influence of the former regime on the latter, or to mechanistically design public policy solutions in international investment law by mere transplant of the public policy interpretations, methodological approaches, and institutional solutions that have uniquely evolved within international trade law, and which, to date, have mostly achieved a mixed

12 Id. at footnote 11, pages 54 and 56.

13 See David P. Baron, Design of Regulatory Mechanisms and Institutions, Ch. 24, pp. 1347-1447, at 1349, in R. Schmalensee and R.D. Willig (Eds.), HANDBOOK OF INDUSTRIAL ORGANIZATION, Vol. II (Elsevier Science Publishers B.v. 1989): “Regulation involves government intervention in markets in response to some combination of normative objectives and private interests reflected through politics. Whatever objective the regulation is intended to achieve, the regulator must choose policies tailored to the particular regulatory setting and to the characteristics of the firms subject to its authority. In choosing those policies, the regulator must take into account the strategies the firm might employ in response to those policies.”

14 See Michael Trebilcock and Robert Howse, THE REGULATION OF INTERNATIONAL TRADE (3rd ed., Routledge), p. 444: “There is a complex interaction between foreign investment and trade protection. First of all, foreign investment may occur as a means of jumping tariff walls or avoiding harassment of imports under the trade remedy laws of the host country (so-called ‘cooperative protectionism’). If much of its comparative advantage is portable, consisting of know-how, processes and technology, a company may avoid border restrictions simply by manufacturing within the domestic market. Enhanced access to host-country markets generally ranks among the factors that industries cite as reasons for foreign investment.” [hereafter, “TREBILCOCK & HOWSE”]
The obstacles to the automatic transplantation of WTO law into investment law are neither imagined nor speculative. For one, investment treaty texts may not necessarily possess the same linguistic elasticity as trade treaty provisions. Investment arbitration tribunals, operating as they do under the parameters of a specific and limited mandate to resolve a particular dispute, may find that their jurisdictional competence cannot easily echo the broad judicial functions of the WTO Appellate Body, even if both types of tribunals adhere to some sense and understanding of a *jurisprudence constante*. Finally, grafting WTO law onto

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17 See Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, pp. 231-240, at 235, in Karl P. Sauvant (Ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008); Asif H. Qureshi, *An Appellate System in International Investment Arbitration?*, pp. 1155-1170, at 1165, in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008). On the international judicial function of the WTO Appellate Body, see Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), at 159-164 (noting in p. 160 that, under the “principle of non ultra petita”, the WTO panels and Appellate Body “should not decide more than is covered by their jurisdiction in a particular dispute...[t]he exception to this principle in appellate review is that the Appellate Body may review the exercise of inherent powers by panels, even in the absence of a claim to that effect.”) [hereafter, “VAN DAMME 2009”].

investment law would have to reckon with how this proposal would be received within the different strategic bargaining dynamics in the investment law system’s usual triage of a host State, its constituents, and a prospective foreign investor,\textsuperscript{19} as opposed to the predominantly inter-State bargaining dynamics within the complex, “multilevel”, and constitutionalized system\textsuperscript{20} in the WTO.\textsuperscript{21}

Notwithstanding these contextual differences, it is curious that there remains an enduring scholarly purchase to the proposition that WTO law is always instructive for investment law. To some, importing trade interpretations into investment treaty standards ultimately means taking a crucial ideological position favoring the discursive unity, rather than normative fragmentation, of international law in general.\textsuperscript{22} Where one accepts this theoretical prism of unity and the coherence of


\textsuperscript{21} See Kyle Bagwell and Robert W. Staiger, \textit{The Economics of the World Trading System} (MIT, 2002).

international economic law (IEL) as a system\(^2\) (or for that matter, IEL’s unity with international law at large).\(^{24}\) it would seem that there is nothing at all unusual in the rising clamor for international investment law to increase its receptiveness to trade law.\(^{25}\) Tomer Broude has recently gone so far as to argue in favor of the pure consolidation of international trade and investment law into one system of law altogether, stressing that:

“…the regulation of trade and the law of investment have inevitably gravitated towards each other, drawing on their common genetic makeup. However, the convergence is far from true consolidation. Rather, it is piecemeal and unplanned, lacking a unifying logic….From a policy perspective, it seems difficult to justify such a continued bifurcation. [In regard to] subsidies, one wonders if it makes any sense to effectively proscribe subsidies that influence the physical movement of


goods as inefficient, while at the same time, at least by default, sanctioning subsidies that create an inefficient global allocation of investment resources. Much the same could be said about other specific areas of regulation – discriminatory treatment of goods and services compared to discriminatory treatment of investment; the treatment of intellectual property as trade-related issues when they are no less related to international investment; increased access to goods and services markets when access to capital markets remains constrained; incongruous limitations on trade and investment-related based on the same “non-economic” considerations; differences between regional trade arrangement and regional investment structures. The list goes on.”

Evidently, the tribe of enthusiasts for some kind of “systemic integration” between WTO law and investment law is increasing. The academic literature alone is rife with many innovative WTO law qua investment law proposals. On one end of the spectrum, there are those who concede a minimum of normative and ideological convergence between WTO law and investment law - at least enough to regard WTO law as having some “persuasive” effect on the interpretation and application of investment treaty norms. Some plumb the conceptual commonalities between

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substantive standards in investment treaties (such as the most favoured nation clause and the national treatment clause) with their trade law counterparts, to push for a shared normative interpretation within a broader epistemic and interpretive community of law-appliers.\textsuperscript{29} At the opposite extreme, there are those who find little or no conceptual divide at all between WTO law and investment law, such that WTO law and jurisprudence may, ought, or should be incorporated as much as possible as “authoritative” sources of law in the interpretation of investment treaties.\textsuperscript{30} Full


\textsuperscript{30} Id. at footnote 27. For the famous investment law case that directly used WTO law to interpret investment treaty norms, see \textit{Continental Casualty Company v. Argentine Republic}, ICSID Case No. ARB/03/9, Award of 5 September 2008, paras. 192-194 (using GATT Article XX exceptions to interpret Article XI of the Argentine–United States bilateral investment treaty). Other tribunals have not gone as far as the \textit{Continental Casualty} tribunal in directly incorporating WTO law and jurisprudence to interpret an investment treaty norm. For example, the interpretation of WTO law of national treatment was not deemed pertinent by the tribunal in \textit{Occidental Exploration and Production Company v. Ecuador}, LCIA Case No. UN 3467, Award of 1 July 2004, paras. 173-176 (“[T]he Tribunal is mindful of the discussion of the meaning of “like products” in respect of national treatment under the GATT/WTO. In that context it has been held that the concept has to be interpreted narrowly and that like products are related to the concept of directly competitive or substitutable products...However, those views are not specifically pertinent to the issue discussed in this case. In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.”). The tribunal in \textit{International Thunderbird Gaming Corporation v. Mexico},
convergence and cross-fertilization between WTO law and investment law, according to this view, would ostensibly cure further “fragmentation” and abate growing “dissonance” among arbitral tribunals within the international investment law regime.\textsuperscript{31}

Apart from the foregoing ideological motivations, acceptance of the WTO law \textit{qua} investment law proposition also unmasks certain methodological and institutional preferences. Some endorse the interpretive methodologies of WTO panels or the Appellate Body to investment arbitrators dealing with open-textured or ambiguous treaty clauses such as non-precluded measures or necessity.\textsuperscript{32} Others hold up the

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\textsuperscript{31} Of course, this assumes that “dissonance” among investment arbitral awards is itself a problem, in the first place, and not merely an expected phenomenon in a treaty regime governed by a universe of over 3000 international investment agreements to date. It has been argued that this dissonance is characteristically expected of the particular “system design” for investment law. See R. Doak Bishop and Margrete Stevens, \textit{A Systemic Perspective of the Foreign Investment Dispute Settlement System: Feedback, Adaptation, and Stability}, pp. 25-59 in ARTHUR W. ROVINE (ED.), \textit{CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011} (Martinus Nijhoff Publishers, 2012). It has also been proposed that dissonance in the international investment law regime can be overcome internally by adopting a public law conceptual perspective in investment treaty arbitration. See Stephan W. Schill, \textit{Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach}, 52 Virginia Journal of International Law 1 (2011), 57-102, at 78-85.

\textsuperscript{32} Id. at footnote 29, Mitchell & Henckels 2013. See also Alberto Alvarez-Jimenez, \textit{New Approaches to the State of Necessity in Customary International Law: Insights from WTO Law and Foreign Investment Law}, unpublished paper, available at
centralized system of interpretation in the WTO as the functional paradigm to be emulated by the diffuse and decentralized investment law regime. In recent years, some investment treaty-making practices have started reflecting States’ decisions to favor direct incorporation of, or specific reference to, trade law provisions within investment treaties.

It is not my intent to seek a sharp and indissoluble line of separation between WTO law and investment law for any and all cases. Where it can be shown that States’ investment treaty practices purposely and discernibly adopt GATT/WTO treaty language, the unitary system of treaty interpretation would itself require law-appliers to refer to WTO law and jurisprudence. Rather, for purposes of this Article,


33 Id. at footnote 4, Collins, at 3-4 (“…WTO principles may further some of the key public interest issues that could arise in the investment context… the inclusive and internally coherent nature of WTO dispute settlement is more responsive to public interest concerns than the private, largely inconsistent commercial arbitration of investment disputes.”); footnote 32, NEWCOMBE AND PARADELL, pp. 503-504. On the increasing resort to WTO/GATT language for new generations of investment treaty standards, see Suzanne A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements, 13 Journal of International Economic Law 4 (2010), 1037-1075.

34 See for example ASEAN Comprehensive Investment Agreement, Articles 17-18 (reproducing GATT Articles XX/GATS Article XIV and GATT Article XXI); Energy Charter Treaty, Articles 3 and 4 (explicitly referring to GATT provisions and related instruments); United States/Estonia BIT (1994), Article II (expressly stating that “[the free trade area exception in this Treaty is analogous to the exception provided for with respect to trade in the GATT”); Japan/Cambodia BIT (2007), Article 18 (providing for direct incorporation of GATT and related instruments, e.g. “For the purposes of this Agreement other than Article 13, Articles XX and XXI of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) and Articles XIV and XIV bis of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement (“the GATS”) are incorporated into and form part of this Agreement, mutatis mutandis.”); ASEAN-China Investment Agreement, footnotes 10 and 11, Arts. 16(1) and (2).

I invite scrutiny to the deployment of the WTO law *qua* investment law proposition in “public interest” narratives much in vogue now with certain quarters of international investment law scholarship, and which tacitly assume that WTO law contains the veritable and venerable public policy toolbox for solving the “legitimacy crisis” in investment law. Those doubtful of the investment law regime’s ability to enable States to continue vindicating and defending public interest would often contrast the alleged paralysis in investment law against the evolution of WTO adjudicative practices towards balancing human rights compliance with foreign market access demands of liberalization and free trade. For some, the public policy dialogue in WTO law might appear more settled, well-reasoned, and coherent in the multilateral

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and plurilateral trading system, more so than the oft-alluded current quest for “policy space” across constellations of thousands of bilateral and regional investment treaties. At this point in the ongoing public policy and regulatory freedom debate in the international investment law regime, one might be led to believe that trade law’s engagement with human rights and public policy has never looked rosier.

This Article suggests there is need to pause and rethink the proposition that WTO law could, and indeed should, be grafted into investment law in order to resolve the latter’s current controversies on States’ regulatory freedom to vindicate the public interest and human rights. I advance three contextual policy reasons to dial back some of the current (over)enthusiasm. First, I submit that the public interest and human rights dialectics have evolved (and are evolving) within the WTO and investment treaty regimes according to unique and separate trajectories, to the point that the years of entrenched and embedded treaty texts as well as institutionalized functional decision-making practices in each regime, militate against the automatic transposition of WTO law into investment law. Part II (Texts, Appliers, and Structure: Nonlinear Interpretation of the “Public Interest” and Human Rights) lays out and synthesizes fundamental differences between treaty language, communities of law-appliers and treaty interpreters, and institutional structures in both WTO law and international investment law, which have heretofore yielded

39 See Mads Andenas and Stefan Zleptnig, Proportionality: WTO Law in Comparative Perspective, 42 Texas International Law Journal (2007) 371-423; Andrew Newcombe, General Exceptions in International Investment Agreements, pp. 355-370, at 366 in MARIE-CLAIREE CORDONIER STEGER, MARKUS W. GEHRING, AND ANDREW NEWCOMBE (EDS.), SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW (Kluwer Law International, 2011) [hereafter, “STEGER, GEHRING, & NEWCOMBE 2011”], (indicating various approaches to the interpretation of general exceptions, the first being that “general exceptions are intended to provide greater regulatory flexibility to host States in pursuing the specific legitimate objectives established in the exceptions. Since the inclusion of GATT and GATS-like exceptions in IIAs is quite exceptional, an effet utile interpretation might suggest that the parties intended to provide the host State greater regulatory flexibility and a corresponding lower level of investment protection than other IIAs without general exceptions”).
nonlinear interpretations and constructions of the “public interest” and “human rights” norms in both the dispute settlement process and the law-making processes of each treaty regime.\textsuperscript{40} As aptly observed by one scholar, the very concept of “public interest” itself remains as “ambiguous” for human rights law as for trade law.\textsuperscript{41}

Furthermore, the severance of investment law from WTO law in the aftermath of failed negotiations on a multilateral investment regime,\textsuperscript{42} I submit, is by no means

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\textsuperscript{41} SIMONE PETER, \textit{PUBLIC INTEREST AND COMMON GOOD IN INTERNATIONAL LAW} (Helbing Lichtenhahn Verlag, 2012), at p. 200.

a historical accident. The competing individual State and non-State interests that resulted in the failure to reach a multilateral investment accord in 1997, have since crystallized into different political and sociological configurations of dispersed public and private sector constituencies, each affecting numerous individual investment treaty negotiations and the eventual contours of the first to third generations of investment treaties.\textsuperscript{43} It should be of little surprise then, that in the earliest investment treaty generations, public interests through human rights had scarcely any visibility either in treaty language or institutional design.\textsuperscript{44}

After the failure of the Doha Development Round\textsuperscript{45} and the increasing proliferation of regional free trade agreements,\textsuperscript{46} however, there has been an incremental rise of new investment treaty provisions carving out State regulatory freedom to vindicate public interest and human rights in recent generations of


\textsuperscript{45} ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21\textsuperscript{ST} CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS (Hart Publishing, 2012), at pp. 419-435 (detailing the failed negotiations and lack of political support for human rights approaches to the Doha Round Agreements).

investment treaties (particularly model BITs of the United States and Canada). The current proposal of the UN Conference on Trade and Development (UNCTAD), entitled “Investment Policy Framework for Sustainable Development”, puts forward various policy options and recommendations for host States to design various elements in their international investment agreements that would contribute to the achievement of development objectives. Some of these recommendations are drawn from experiences in WTO law and adjudication, and, in my view, requires careful analysis of their ultimate applicability to investment law. In an UNCTAD investment policy hub exchange I recently had with Andrew Mitchell and Caroline Henckels on their proposed adoption of “necessity tests” in WTO jurisprudence on GATT Article XX exceptions for investment law, I expressed some reservations primarily due to the lingering contextual and textual differences between WTO law and investment law. WTO Counsellor for Legal Affairs Gabrielle Marceau concurred, acknowledging that “[o]ne should be prudent about pursuing this route. The ‘necessity’ provisions under WTO, those in investment treaties, and the necessity principle in general international law in general international law respond to different wordings, objectives, purposes and contexts…investment tribunals may gain from the WTO experience in the necessity test, but a mere transposition of the WTO’s approach to the necessity


analysis with the view of guiding investment tribunals should take into account the specificity [of] investment treaties concerned."

Understandably, more than a decade of the legal, adjudicative, and policy dialogue on human rights in WTO law and jurisprudence have engineered sufficient practical, as well as theoretical, sedimentation of “trade and human rights” approaches – at least enough to attract interest in the possibility of transplanting these public policy interpretations and methodologies in WTO law into the supposedly beleaguered international investment law regime. However, one must also deal with a counterpart reality in the investment treaty regime. Years of entrenchment of diverse treaty texts and institutional dynamics in separate “investor-home State-host State” configurations across the globe have also resulted in unique law-making processes and institutional practices, along with an investor-host State dispute settlement mechanism that emerged as a fully distinct enforcement process from that of the inter-State extended litigation process in the WTO Dispute Settlement Understanding (DSU). As I explain further in Part II, disparate treaty texts, functional practices, and institutional structures, pose some substantive and


50 On the counter-narrative showing how the history of international trade has always contained certain ideas related to the protection and promotion of human rights, albeit reflecting different ideological compromises over time at each stage of political actors’ engagement with neoliberalism, see ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER (Oxford University Press, 2011), at pp. 23-60 [hereafter, “LANG”].

procedural hurdles for law-appliers and authoritative decision-makers to accept a priori the WTO law qua investment law proposition.

Part III (Two Visions of Regulatory Freedom to Achieve Public Policy and Human Rights Objectives) then proceeds to develop my second argument – namely, that while the issue of domestic policy space appears common to both WTO law and investment law (or for that matter, mirrors the perennial tension in the interplay of international law and the domaine réservé 52), they are addressed to different operational questions. WTO interpretations and dialectical conceptions of States’ regulatory freedom have been framed according to the interacting ratione materiae of market access issues, non-discrimination issues, standards regulation, and extensive exceptions, 53 and as such are not so analogous or easily transplantable to issues of regulatory freedom that States confront in international investment law, particularly in matters of expropriation, legitimate expectations in the fair and equitable treatment standard, national treatment, and non-precluded measures. 54


54 Id. at footnote 33, Spears; Jürgen Kurtz, Balancing Investor Protection and Regulatory Freedom in Investor-State Arbitration: The Complex Search for State Purpose in a National Treatment Inquiry, 19 January 2012 unpublished draft, available at
Moreover, one can expect that the respective institutional understandings of State regulatory freedom within WTO law and investment law would accordingly cycle back to future treaty-drafting and rule-making processes in each treaty regime. State regulatory freedom in WTO law, for example, is not simply a matter of interpretation for the DSU Panels and the Appellate Body, but rather, is also manifested as a continuing legislative issue to be politically mediated and coordinated between States, non-State actors, and the WTO in processes such as the Trade Policy Review Mechanism, the negotiation of special and differential treatment (SDT) rules in various trade agreements, the authentic interpretations of the General Council and the Ministerial Conference, the use of the waiver power in the WTO, among other internal procedures and functions. By contrast, international investment law remains devoid of any centralized mechanism for States to periodically and


58 See Barnali Choudhury, Katja Gehne, Simone Heri, Franzihska Humbert, Christine Kaufmann and Krista Nadakovukaren Schefer, A Call for a WTO ministerial decision on trade and human rights, pp. 323-358, at p. 343 in COTTIER & DELIMATSIS.

transparently review, renegotiate, or authentically interpret investment treaty provisions that involve the issue of States’ regulatory freedom to vindicate the public interest and human rights.\textsuperscript{60}

The immediate consequence of the interpretive/legislative gap, is that the concept of State regulatory freedom in WTO law might not have as much traction or utility to the design of States’ regulatory freedom in international investment law. (As I also show briefly in \textbf{Part III}, they generate some interpretive complications already for a few new investment treaties that expressly adopt GATT Article XX or GATS Article XIV.) It is more than likely that parallel, rather than identical, visions of State regulatory freedom are emerging in both treaty regimes. Thus, while WTO law might present a convenient template for investment treaty language, one has to carefully assess whether the former’s treaty design assumptions and drafting history would indeed apply – and truly benefit – the latter.

Thirdly, I submit in \textbf{Part IV (Human Rights as a Work in Progress: the Uncertain Success of WTO Law’s Post-Neoliberal Public Policy Paradigm)} that WTO law and jurisprudence itself does not possess an unvarnished record in successfully vindicating the public interest through human rights.\textsuperscript{61} Despite some

\textsuperscript{60} Note, however, some recent investment treaties have started providing for joint decision mechanisms, a standing treaty monitoring and/or interpretative inter-State body, or consultation mechanisms. Diane Desierto, \emph{Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?}, Kluwer Arbitration Blog, 8 June 2012, available at http://kluwerarbitrationblog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretations/ (last accessed 10 January 2013) (on inter-State joint decision and consultation mechanisms within investment treaties). \textit{See also NEWCOMBE AND PARADELL}, p. 61 (on renegotiation and new model international investment agreements); Meg Kinnear and Robin Hansen, \emph{The Influence of NAFTA Chapter 11 in the BIT Landscape}, 12 University of California Davis Journal of International Law and Policy (2005), 101-119, at 112 (on procedural mechanisms from NAFTA such as binding notes of interpretation).

\textsuperscript{61} For some skeptical findings showing human rights failures under the WTO system, \textit{see} Sandrine Dawar, \emph{Trade and Human Rights; Exploring the Impact of WTO Law on State Capacity to Protect, Promote and Fulfill the Human Right to Health}, unpublished May 2004 Master of Arts in Law and Diplomacy Thesis for Fletcher School of Diplomacy, Tufts University (on file with author); Allison
well-known victories (such as the TRIPS waiver on compulsory licensing to make essential drugs available to developing countries,\(^{62}\) and the Kimberley Process Certification waiver to prevent the further proliferation of conflict diamonds\(^{63}\)), full acceptance of States’ regulatory freedom to enact policies that vindicate public interest or human rights concerns remains very much a work-in-progress throughout the WTO system.\(^{64}\) Human rights obligations are, to date, still thinly incorporated in the WTO commitments.\(^{65}\) Interpretations of trade law exceptions in WTO jurisprudence still struggle for full consistency with human rights.\(^{66}\) Clearly, the jury

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\(^{62}\) See TRIPS waiver for the exportation of essential drugs under compulsory licensing (Decision of 30 August 2003, WT/MIN(01)DEC/2).

\(^{63}\) Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds (Decision of 15 May 2003, WT/L/518 of 27 May 2003).


is still out on whether WTO law has indeed succeeded in facilitating human rights compliance in a post-Doha era.\textsuperscript{67} This casts some doubts for inducing investment law authoritative decision-makers to follow where WTO law has not even clearly or certainly succeeded.

Pending the full convergence of treaty language and epistemic interpretive communities between WTO law and investment law, therefore, I submit that questions of public policy and human rights will continue to filter through different channels, albeit with some occasional normative and experiential resemblances that could inform future treaty and institutional design developments in each regime. In \textbf{Part V (Mediating the ICESCR: A Heuristic for Functional Decision-Making in WTO Law and Investment Law)}, I explore how each treaty regime would likely regard and accommodate State defenses anchored on competing obligations under the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and why this next dialogue will take place on different terms within each regime.

By way of \textbf{Conclusion}, I offer some further reflections on the broader theme of systemic integration and the chimera of attaining a fully “closed system” for governing different forms of international economic relations. Fragmentation becomes a “problem” only as a matter of perspective – one wrestles with it only if we persist in regarding international law through a kind of “gestalt”, always preferring to see an elegant and integral whole much greater than the sum of its parts. The realities of political deadlocks, institutional rigidities, and international negotiations that define the processes of authoritative decision-making in our modern international economic law, policies, and institutions, however, impel us to reject such a utopian view.

\textsuperscript{67} On the imminent failures of abandoning the Doha Round, \textit{see} Petros C. Mavroidis, \textit{Doha, Dohalf or Dohaha? The WTO Licks Its Wounds}, 3 Trade Law & Development 2 (2011), 367-381.
II. Texts, Appliers and Structure: Nonlinear Interpretation of the “Public Interest” and Human Rights

As will be seen in the following subsections, the legal universes in WTO law and international investment law are fundamentally comprised of different bases of obligation, authoritative decision-makers, and constitutive decision-making processes. The following subsections show how plural understandings of the “public interest” and human rights abound in each of those different constitutive elements.

A. Hard and Soft Texts: Bases of Obligation in WTO Law vis-à-vis International Investment Law

1. WTO Law

As the WTO itself states, its core rules are contained in around sixty agreements, annexes, decisions, and understandings, mostly concluded during the 1986-1994 Uruguay Round, spanning the Marrakesh Agreement Establishing the WTO, and agreements in trade in goods, trade in services, intellectual property, dispute settlement, and government trade policy review.68 The WTO categorizes these agreements into three: 1) “broad principles” (e.g. the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights); 2) “extra agreements and annexes dealing with the special requirements of specific sectors or issues”; and 3) “detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service providers access to their markets”.69 While it is usually observed that individual rights are nowhere found in

69 Id. at footnote 68.
most of the WTO agreements, Steve Charnovitz famously showed that “individuals secure rights indirectly from the WTO”, (e.g. from individual property rights guaranteed in the TRIPS agreement, rights to standard of treatment under the MFN and national treatment clauses, to transparency and due process rights and remedial procedures that could be asserted by individuals against their own governments), as well as certain direct procedural rights (e.g. rights under the grievance procedure for exporters under the Agreement on Preshipment Inspection). Apart from the WTO agreements, other sources of WTO law (alternatively dubbed as soft law in the WTO) that may “clarify or define the law applicable between WTO Members” include: the WTO dispute settlement reports, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles

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70 Breining-Kaufmann, at footnote 52, p. 102 in COTTIER, PAUWELYN, & BURGI (“…WTO law grants specific rights and obligations to the member states. Nowhere – except for in the TRIPS agreement – are individuals or non-governmental organizations mentioned in the agreements.”)


72 Id. at footnote 71.

73 Mary Footer identifies soft law instruments in the WTO as “the resolutions adopted by the organisation’s institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman’s statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect and may prove legally relevant…[soft law in the WTO] has proven to be particularly useful where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts.” See Mary E. Footer, The (Re)turn to ‘Soft Law’ in Reconciling the Antinomies in WTO Law, 11 Melbourne Journal of International Law (2010), 241-276, at 247-248.

of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists, and the negotiating history.\textsuperscript{75}

The WTO Agreements usually do not explicitly contain any references to international human rights law. At best, the general exceptions clauses in GATT Article XX and GATS Article XIV justify States to adopt trade-restrictive measures necessary for protecting various public interest concerns, such as the protection of public morals; human, animal or plant life or health; ensuring compliance with domestic laws and regulations on fraud, deceits, data protection, and safety; labour; cultural heritage; and national resource conservation.\textsuperscript{76} There is now a substantial body of jurisprudence authoritatively interpreting these provisions, following a two-tier test adopted by the WTO dispute settlement panels and the Appellate Body: a challenged trade-restrictive measure must first be provisionally evaluated or justified according to any of the specific enumerated exceptions [e.g. ten exceptions in GATT Article XX (a) to (j), or five exceptions in GATS Article XIV (a) to (e)]. If this first tier test is met, then the second tier of analysis requires examining the measure’s compliance with the provision’s chapeau.\textsuperscript{77} The chapeau imposes the requirement

\textsuperscript{75} Id. at footnote 74. \textit{See also} JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (Cambridge University Press, 2003), at pp. 40-52 [hereafter, “PAUWELYN 2003”].

\textsuperscript{76} \textit{See} Thomas Cottier, Panagiotis Delimatis, Nicolas F. Diebold, \textit{Article XIV GATS: General Exceptions}, in RUDIGER WOLFRUM, PETER-TOBIAS STOLL, CLEMENS FEINAUGLE (EDS.), MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO – TRADE IN SERVICES, Volume 6, pp. 287-328 (Martinus Nijhoff Publishers, 2008); TREBILCOCK & HOWSE, pp. 507-587; CASSIMATIS 2007, at pp. 334-398 (dubbing GATT Article XX as “potentially the most significant GATT provision for addressing human rights related trade measures”).

\textsuperscript{77} \textit{RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE} (Sweet & Maxwell, 2005), at pp. 531-533; VAN DEN BOSSCHE, at 620 and 653; \textit{United States – Standards for Reformulated and Conventional Gasoline}, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, p. 22 (“The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX. The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the
that the challenged measure should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”\(^\text{78}\)

The chapeau has been evolutively linked to the principle of good faith in international law.\(^\text{79}\)

Notwithstanding the established nature of the two-tiered test for general exceptions, it cannot be lightly assumed that the Appellate Body (and/or the dispute settlement panels in the WTO) has consistently applied the test uniformly and consistently in actual disputes brought before them. The “public morals” exception...

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\(^{78}\) GATT Article XX chapeau, GATS Article XIV chapeau. See United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998, para. 150 [reiterating that the chapeau, broken down, requires an analysis of three elements: 1) whether the measure results in discrimination; 2) whether the discrimination is unjustifiable in character; and 3) whether the discrimination occurs between countries where the same conditions prevail.].

\(^{79}\) United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998, para. 158. See also Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, Report of the Appellate Body, 3 December 2007, para. 224 (“...the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX... the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement." The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."); China – Measures Affecting Trading Rights and Distribution Services for Certain Products and Audiovisual Entertainment Products, WT/DS363/AB/R, Report of the Appellate Body, 21 December 2009, para. 306 (clarifying that the chapeau element of “disguised restriction on international trade” must “be applied in the light of the specific obligation of the covered agreements that the measure infringes. The assessment of the restrictive effect to be taken into account in a particular dispute may, in appropriate cases, extend beyond an assessment of the restrictive effect on imported products, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked.”).
under GATT Article XX(a) and GATS Article XIV(a) presents a classic example of how the Appellate Body can purposely choose to develop or flesh out its pre-existing interpretations or methodologies.

In China – Publications and Audiovisual Products, the WTO Appellate Body affirmed that – similar to other jurisprudence on GATT Article XX and GATS Article XIV – the method of interpreting the “public morals” exception under GATT Article XX(a) would be through “a sequential process of weighing and balancing factors involved”. The 2009 Appellate Body ruling in China – Publications and Audiovisual Products was the first case to interpret the “public morals” exception under GATT Article XX(a). Before then, the only comparable interpretation of the “public morals” exception was that issued by the Appellate Body in 2005, in relation to GATS Article XIV(a) in United States – Gambling Services.

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81 Id. at footnote 80, para. 239, citing Korea – Various Measures on Beef (in the context of Article XX(d) of the GATT 1994); US – Gambling (in the context of Article XIV(a) of the GATS); and in Brazil – Retreaded Tyres (in the context of Article XX(b) of the GATT 1994).

82 Id. at footnote 80, at paras. 239-242.


“306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".

308. The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available", WTO-consistent alternative—reflects the shared understanding of Members that
In *China – Publications and Audiovisual Products*, China had invoked GATT Article XX(a) to justify a range of measures that regulated the entry of foreign publications, audiovisuals and other media forms, under a content review mechanism and system for the selection of import entities, in order to protect public morals in China.\(^{84}\) China had essentially argued that the public policy function behind the regulations (particularly the cultural nuances of Chinese public morals), made it inevitable that content review for such media could only be conducted by State-owned entities.\(^{85}\) In its analysis of the public morals defense under GATT Article XX(a), the Appellate Body declared the following:

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\(^{85}\) Id. at footnote 80, paras. 255-268.
1) “China did not establish a connection between the exclusive ownership of the State in the equity of an import entity and that entity’s contribution to public morals in China”. The same reasoning was likewise extended to the prohibition against foreign-invested enterprises from engaging in importing:  

2) China had not met its burden of proof to show that a certain (unsubstantiated) State plan that would supposedly indicate the total number, structure, and distribution of publication import entities, would indeed contribute to the protection of public morals in China by feasibly enabling content review;  

3) The “less restrictive means” element as part of the sequential weighing and balancing test of ‘necessity’ in GATT Article XX(a), for this particular case, “must be applied in the light of the specific obligation of the covered agreements that the respective measures infringes…[and that] the assessment of the restrictive effect to be taken into account in a particular case, may, in appropriate cases, extend beyond an assessment of the restrictive effect on imported products, as this assessment must be undertaken in the light of the measure at issue, the specific obligation of the covered agreements that the measure infringes, and the defence being invoked”, and thus, who could engage in such trading was part of determining the least restrictive means. The Panel had rightly identified a less restrictive means than the State-ownership requirement and the import prohibition on foreign-invested entities, e.g. the State plan previously mentioned, had China sufficiently presented evidence to develop the actual contours of this alternative; and  

4) China had failed to show that there were no other reasonably available means before it, such as for the Chinese government to itself uniformly conduct the content review. China had failed to show that this reasonably available means would cause such an “undue burden” (e.g. financial, administrative burden, technical difficulties, etc.) upon it given the evidence submitted.  

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86 Id. at footnote 80, para. 268.  
87 Id. at footnote 80, paras. 276-277 (“…the mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities. In fact, those carrying out these functions could be the same individuals, with the same qualifications and capabilities, irrespective of the ownership of the equity of the import entity. Thus, China did not establish that the exclusion of foreign-invested enterprises from engaging in the importation of the relevant products contributes to the protection of public morals in China.”).  
88 Id. at footnote 80, paras. 294-297.  
89 Id. at footnote 80, para. 306. Italics added.  
90 Id. at footnote 80, para. 308.  
91 Id. at footnote 80, para. 310.  
92 Id. at footnote 80, paras. 327-332. See also para. 335 (“Finally, it may be useful to indicate what we are not saying in reaching the above conclusion. We are not holding that China is under an obligation
Two matters stand out in *China – Publications and Audiovisual Products* from the interpretive practices of the Appellate Body, that did not feature in the Body’s interpretation of the identically-worded “public morals exception” in GATS Article XIV(a) in *United States – Gambling Services*. First, the Appellate Body in *China – Publications and Audiovisual Products* acknowledged that, while GATT Article XX(a) did not provide any explicit guidance “on the question of whether, in assessing ‘necessity’, a panel may take into account only the restrictive effect the measures have on imports of relevant products, or whether a panel may also consider the restrictive effect of the measures on importers or potential importers”, there may be cases where it would be appropriate to further differentiate restrictive impacts on international commerce. In *China – Publications and Audiovisual Products* the Panel had applied the “less restrictive means” test in the sequential weighing and balancing test of necessity for GATT Article XX(a) to consider two types of restrictive impact – first, a restrictive impact on the actual importation of the subject goods, and second, the restrictive impact of the measures on the right to trade of those who wish to ensure that the Chinese Government assumes sole responsibility for conducting content review. Rather, we are agreeing with the Panel that the United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China’s desired level of protection of public morals. China, in turn, has not demonstrated that this alternative is not reasonably available. This does not mean that having the Chinese Government assume sole responsibility for conducting content review is the *only* alternative available to China, nor that China *must* adopt such a scheme. It does mean that China has not successfully justified under Article XX(a) of the GATT 1994 the provisions and requirements found to be inconsistent with China’s trading rights commitments under its Accession Protocol and Working Party Report. It follows, therefore, that China is under an obligation to bring those measures into conformity with its obligations under the covered agreements, including its trading rights commitments. Like all WTO Members, China retains the prerogative to select its preferred method of implementing the rulings and recommendations of the DSB for measures found to be inconsistent with its obligations under the covered agreements.”)

93 Id. at footnote 80, para. 306.
engage in such importation in the future.\textsuperscript{94} This was a nuance not found in United States – Gambling Services, where the Appellate Body simply identified, and did not elaborate on, two factors “that, in most cases, will be relevant to a panel’s determination of the ‘necessity’ of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.”\textsuperscript{95} The Appellate Body in China – Publications and Audiovisual Products deemed it valid to consider both the restrictive impact on imports as well as the rights to trade of enterprises, due to the particular content of China’s obligations to grant the right to trade under its Accession Protocol to the WTO.\textsuperscript{96}

Second, the Appellate Body in China – Publications and Audiovisual Products appeared somewhat unclear as to how it allocated the evidentiary burdens with respect to other “reasonably available means” or alternatives. It may be recalled that in United States – Gambling Services, the Appellate Body clearly stated that it was not the burden of the responding party to show that there were no reasonably

\textsuperscript{94} Id. at footnote 80, para. 300.

\textsuperscript{95} Id. at footnote 83, para. 306. Italics added.

\textsuperscript{96} Id. at footnote 80, para. 307 (“In the present case, the Panel found China's measures to be inconsistent with, \textit{inter alia}, China's obligation in paragraph 5.1 of its Accession Protocol to grant the right to trade to all enterprises with respect to goods. This obligation is not only concerned with the question of \textit{what} can be traded, but more directly with the question of \textit{who} is entitled to engage in trading. In view of, on the one hand, China's measures, which impose a restriction on \textit{who} can engage in importing the relevant products, and, on the other hand, the nature of the specific obligation in paragraph 5.1, which stipulates \textit{who} China must permit to engage in importing, we see no error in the Panel's tailoring its assessment of the restrictive effect of the provisions of China's measures to take into account the restrictive effect on beneficiaries of the right to trade. Indeed, this approach seems all the more appropriate in the light of our finding above that, by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, China may, in this case, invoke Article XX(a) of the GATT 1994 to justify the provisions found to be inconsistent with its trading rights commitments under its Accession Protocol and Working Party Report.”)
available alternatives whatsoever.\textsuperscript{97} Rather, it is only when the complaining party “raises a WTO-consistent alternative measure that, in its view, the responding party should have taken”, that the “the responding party will [then] be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not, in fact, ‘reasonably available’.”\textsuperscript{98}

Among its proposals for other “reasonably available alternatives” in \textit{China – Publications and Audiovisual Products}, the United States proposed that the Chinese Government assume sole responsibility for conducting content review.\textsuperscript{99} While the Panel found this proposal to be a reasonably available alternative, it is not entirely clear from the Panel’s discussion that the burden of proof had at least been placed first on the United States to prove the feasibility of its proposal – in several instances it almost seems as if the Panel indulged in (unverified) assumptions about the efficiency and quality of China’s administrative, institutional, and bureaucratic capabilities, as well as the supposed sufficiency of its domestic laws,\textsuperscript{100} and that what proved decisive for the Panel was that China had failed to present sufficient evidence in

\textsuperscript{97} Id. at footnote 80, para. 309.

\textsuperscript{98} Id. at footnote 80, para. 311.

\textsuperscript{99} Id. at footnote 80, para. 312.

\textsuperscript{100} \textit{China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, Report of the Panel}, 12 August 2009, para. 7.888 (“By requiring that products to be imported must be submitted to the Chinese Government for review, and specifically to qualified governmental content reviewers, China could have adequate confidence that the content review is carried out in accordance with the applicable rules. The Government could also easily ensure the consistent application of the rules on content review.”); para. 7.890 (“It is arguable, however, that the Government could also maintain offices with qualified content reviewers in a large number of customs areas and close to the entry points. In this way, it could achieve a geographical coverage comparable to that which China currently seeks to achieve through its State plans for the number and distribution of publication import entities.”); para. 7.891 (“…it is not clear to us that implementing the US proposal would inevitably result in additional delays…”).
extenso of the infeasibility or unreasonableness of the proposal. 101 The United States had mainly argued that the Panel already had ample evidence before it that China was capable of conducting some form of content review, such as those China was already conducting for films imported for theatrical release, electronic publications, and audiovisual products. 102 The Appellate Body endorsed the method taken by the Panel as the “appropriate” one for determining whether reasonably available means existed, but appeared quite silent on the quantum (and specificity) of proof that it ultimately required the United States to establish as the complaining party making the proposal, vis-à-vis China, as the responding party who supposedly was not obligated to furnish proof until the complaining party had been able to establish a WTO-consistent measure was a reasonably available alternative. 103 At a minimum, these differences in China – Publications and Audiovisual Products and United States – Gambling Services provides some telling insight as to the scope and breadth of the Appellate Body’s discretion over the methodology it would adopt to interpret the “public morals” exception in GATT Article XX(a) and its identical counterpart, GATS Article XIV(a).

Beyond the development of legal tests of ‘necessity’ in relation to the public morals exception in GATT Article XX(a), however, it is also significant that there was hardly any discussion in China – Publications and Audiovisual Products on the State’s regulatory freedom in relation to GATT Article XX(a). Rather, the Appellate


102 Id. at footnote 80, para. 323.

103 Id. at footnote 80, paras. 327-332.
Body dealt with the right to regulate in the context of interpreting the introductory paragraph 5.1 in China’s Accession Protocol to the WTO (e.g. “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”).\textsuperscript{104} The Appellate Body held in \textit{China – Publications and Audiovisual Products} that the Panel erred in omitting to resolve the issue of whether GATT Article XX applies to other agreements apart from the GATT such as paragraph 5.1 of China’s Accession Protocol to the WTO, and determined to resolve the issue itself.\textsuperscript{105} The Appellate Body then interpreted the phrase “right to regulate trade in a manner consistent with the WTO Agreement” to refer to two types of rights: 1) “rights that the covered agreements affirmatively recognize as accruing to WTO members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods when those measures satisfy prescribed WTO disciplines and meet specified criteria” (e.g. WTO-consistent import licensing, SPS and TBT measures); and 2) “certain rights to take regulatory action that derogates from obligations under the WTO Agreement – that is, to relevant exceptions.”\textsuperscript{106} The Appellate Body ultimately interpreted China’s right to regulate as that which is “protected under the introductory clause of paragraph 5.1. only if it is consistent with the WTO Agreement.”\textsuperscript{107}

This interpretation of the right to regulate would spur another attempt to export GATT Article XX to agreements not covered by GATT. In \textit{China – Raw

\textsuperscript{104} Id. at footnote 80, para. 205.

\textsuperscript{105} Id. at footnote 80, para. 215.

\textsuperscript{106} Id. at footnote 80, para. 223.

\textsuperscript{107} Id. at footnote 80, para. 230. Italics added.
Materials, China unsuccessfully attempted to invoke GATT Article XX as a defense to its export duties found inconsistent with paragraph 11.3 of its Accession Protocol, contending that its right to regulate trade to promote conservation and health is an individual “inherent right” not dependent on the terms of its Accession Protocol. While the Appellate Body acknowledged that the Preamble to the WTO Agreement lists various objectives, “including ‘raising standards of living’, ‘seeking both to protect and preserve the environment’, and ‘expanding the production of and trade in goods and services, while allowing trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objectives of sustainable development’”, such that the WTO Agreement “reflect(s) the balance struck by WTO Members between trade and non-trade-related concerns”, the Appellate Body nevertheless declined to find that the Preamble to the WTO Agreement provided any guidance on the issue of the applicability of GATT Article XX to other agreements not covered. The Appellate Body thus delimited the possible scope of using GATT Article XX as public policy and public interest defenses, since, following this 2012 ruling in China – Raw Materials, GATT Article XX exceptions would not apply as legal bases for States to invoke their rights to regulate and spaces of regulatory freedom under non-GATT agreements.


109 Paragraph 11.3 of China’s Accession Protocol reads: “China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.”

110 Id. at footnote 108, para. 300.

111 Id. at footnote 108, para. 306.

There are a myriad of other examples from the Appellate Body’s jurisprudence, which demonstrate the breadth of its methodological and evidentiary discretion when it comes to developing legal and evidentiary tests for the application of health exceptions under GATT Article XX(b),\textsuperscript{113} domestic policy exceptions under GATT Article XX(d),\textsuperscript{114} and environmental conservation exceptions under GATT

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\textsuperscript{113} See among others \textit{European Communities – Measures Affecting Asbestos and Asbestos Containing Products}, WT/DS135/AB/R, Report of the Appellate Body, 12 March 2001, para. 161 (“The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.”); \textit{China – Measures Related to the Exportation of Various Raw Materials}, WT/DS394/R, WT/DS395/R, WT/DS398/R, Report of the Panel, 5 July 2011, paras. 7.479-7.480 (observing deference towards Member States’ design and structure of policies to protect human, animal, or plant life or health, including the chosen level or degree of protection); \textit{Brazil – Measures Affecting Imports of Retreaded Tyres}, WT/DS332/R, Report of the Panel, 12 June 2007, paras. 7.98 [measures “specifically designed to avoid the generation of further risk” also fall within the contemplation of measures covered in GATT Article XX(b)]; \textit{United States – Certain Measures Affecting Imports of Poultry from China}, WT/DS392/R, Report of the Panel, 29 September 2010, paras. 7.67-7.69 [where the Panel decided to commence its analysis by determining first, whether the challenged regulation is an SPS measure within the scope of the SPS Agreement, and only if the latter is found inconsistent would the Panel consider the separate defence under GATT Article XX(b)]; \textit{United States – Measures Affecting the Production and Sale of Clove Cigarettes}, WT/DS406/R, Report of the Panel, 2 September 2011, paras. 7.306 – 7.309 [where the Panel refrained from examining the United States’ assertion of the GATT Article XX(b) exception, since, by already finding that the challenged measure was inconsistent with Art. 2.1 of the TBT Agreement, the Panel did not find it necessary to examine Indonesia’s alternative argument on the violation of GATT Art. III:4]; \textit{Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes}, DS10/R – 37S/200, Report of the Panel 7 November 1990, para. 75 [holding that ‘necessity’ under GATT Article XX(b), just as with GATT Article XX(d), is established if it is shown that “there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”]; \textit{European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries}, WT/DS246/R, Report of the Panel, 1 December 2003, paras. 7.209 – 7.210 [stressing that “tariff preferences should not be lightly assumed to be an appropriate means to achieve health objectives under Article XX(b) because any tariff preferences deviating from obligations assumed in the multilateral framework would necessarily have a direct and negative impact on the multilateral system...the Panel finds that the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities, and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994.”]; \textit{United States – Restrictions on Imports of Tuna}, DS21/R-39S/155, Report of the Panel, 3 September 1991, paras. 5.26 – 5.27 [tracing the history of GATT Article XX(b) to the drafting of the ITO Charter, reflecting concerns focused on the “use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country”].

\textsuperscript{114} See among others \textit{Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef}, WT/DS161/AB/R, WT/DS169/AB/R, Report of the Appellate Body, 11 December 2000, para. 157 [laying down the two-element test of provisional justification under GATT Article XX(d); first, determining if the measure is designed to “secure compliance” with laws or regulations that are in themselves not inconsistent with GATT; and second, determining the “necessity” of such measure to achieve the objective of securing compliance] and para. 161 [declaring that “the reach of the word
Article XX(g).\textsuperscript{115} Neither may it be said that the jurisprudence of the WTO Appellate Body and the dispute settlement panels demonstrate full unanimity in their conceptions of “public interest” in the GATT Article XX or GATS Article XIV exceptions, the spaces of regulatory freedom acceptable under each exception, as well as in their methods for determining the ‘necessity’ of a State’s trade-restrictive measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to.”; \textit{Mexico – Tax Measures on Soft Drinks and Other Beverages,} WT/DS308/AB/R, Report of the Appellate Body, 6 March 2006, para. 69 [interpreting “laws or regulations” in GATT Article XX(d) as the “rules that form part of the domestic legal system of a WTO Member…[they] do not include obligations of another WTO Member under an international agreement]; \textit{United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties,} WT/DS345/R, Report of the Panel, 29 February 2008, at para. 6.13 [holding that a respondent in a WTO dispute may “simultaneously respond to claims presented by the claimant while also raising an affirmative defence under a relevant provision in Article XX of GATT 1994”]; \textit{Japan – Restrictions on Imports of Certain Agricultural Products,} L/6253-35S/163, Report of the Panel, 2 February 1988, para. 5.2.2.3 (clarifying that while Article XX(d) permits measures necessary to the enforcement of monopolies, it does not permit contracting parties to operate monopolies inconsistently with other provisions of the GATT).

\textsuperscript{115} \textit{China – Measures Related to the Exportation of Various Raw Materials,} WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, Report of the Appellate Body, 30 January 2012, paras. 355 – 356 (declaring that Article XX(g) “permits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource….[it] does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.”); \textit{United States – Import Prohibition of Certain Shrimp and Shrimp Products,} WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998, paras. 128 – 129 (clarifying that Article XX(g) extends as well to the conservation of living or renewable resources, not just mineral resources); \textit{United States – Standards for Reformulated and Conventional Gasoline,} WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, p. 18 (“…Article XX(g) and its phrase, “relating to the conservation of exhaustible natural resources,” need to be read in context and in such a manner as to give effect to the purposes and objects of the General Agreement. The context of Article XX(g) includes the provisions of the rest of the General Agreement, including in particular Articles I, III and XI; conversely, the context of Articles I and III and XI includes Article XX. Accordingly, the phrase "relating to the conservation of exhaustible natural resources” may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies. The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the "General Exceptions” listed in Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.”)
measure in relation to the asserted ‘public interest’ objective. Rather, what stands clearly from both the WTO legal texts themselves, as well as the “soft” sources of WTO law (as seen in the Appellate Body decisions and reports of dispute settlement Panels), is that they are pliable on the question of States’ trade-restrictive measures taken in the exercise of regulatory freedom to vindicate the public interest. This question was purposely anticipated in the drafting of GATT Article XX and GATS Article XIV exceptions. Arguably, the issue of a State’s regulatory freedom to vindicate the public interest, which could also result in non-conformity with trade liberalization obligations, was part of the shaping of WTO law since its inception.

Thus, even without direct incorporation of international human rights instruments, WTO law possesses an inherent suppleness to accommodate and reconcile a State’s right to regulate for human rights. It is also acknowledged to have greater structural and institutional potential than bilateral and regional trade agreements to achieve the aims of human rights protection. From this standpoint, it

116 Note that while there is a “trend generally favourable to the pursuit of sustainable development goals” in the Panel and Appellate Body reports, such jurisprudence also often requires “a clear nexus” between the trade restrictive measure and the benefit (environmental, public policy, etc.) established under the GATT Article XX exceptions. See Temu Avafia, Does the WTO’s Dispute Settlement Understanding Promote Sustainable Development, pp. 259-271, in MARKUS W. GEHRING AND MARIE-CLAIRE CORDONIER SEGGER (EDS.), SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW (Kluwer Law International, 2005).

117 See STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS, (Martinus Nijhoff Publishers, 2010), Chapter 4; DESIERTO 2012, Chapter 5.

118 Id. at footnote 15, Marceau, at 779-788 (pointing out possible consideration of human rights law in WTO interpretations of GATT Article XX).

119 HARRISON 2007, at 180-181 (“...although there are almost 300 bilateral and regional trade agreements which contain some kind of explicit human rights clause, this does not mean that the clauses within those agreements ensure a holistic human rights approach to the agreements in question, based on acceptable international norms and standards. There is a big difference between a trade agreement that contains a human rights clause, and agreements that systematically ensures the protection and promotion of human rights in all aspects of the obligations created by those agreements...A world trading system helps to ensure that trading rules are not decided by power politics or ‘aggressive unilateralism’. Rules help to bind all governments, including the most powerful, to act according to established and agreed principles and regulations. Adherence to such a rule-based
is conceivable that the interaction between WTO law and human rights law has been described as one anchored on “coordination”, rather than conflict, tending towards the “accommodation of human rights interests by the WTO”. Most importantly, in achieving such coordination, one cannot deny the central role of WTO organs – especially the WTO dispute settlement system – which enables such interpretive “cooperation” in the first place. (As I show later in Part II.B.1., the particular mandates and functional competences of the WTO political and legal organs afford them much latitude to purposely develop WTO law with consideration for a State’s regulatory freedom to pursue and defend public interests and human rights concerns.)

But first, the following section discusses the contrast of the “sunburst” scattered law-making trajectory of the international investment treaty regime.

2. Investment Law

Unlike WTO law, the investment treaty system is comprised of a dense and “atomized” network of thousands of bilateral and regional international investment agreements (IIAs). While a few IIAs are negotiated within the context of broader system is generally beneficial from a human rights perspective, as it benefits smaller and more vulnerable States (whose populations human rights are most likely to be violated) as opposed to power-based diplomacy where more powerful States dominate.


121 Joost Pauwelyn, Cooperation in Dispute Settlement: Human Rights in WTO Dispute Settlement, pp. 205-231 in COTTIER, PAUWELYN, & BURGI.

122 Stephan Schill has been the foremost proponent of viewing the network of international investment agreements as leading towards a genuine multilateral system. See STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (Cambridge University Press, 2009), at 65-117.

inter-State trade negotiations,\textsuperscript{124} for the most part many of the current investment treaties were separately concluded by States according to their own foreign policy agendas, economic priorities, and political programmes.\textsuperscript{125} Long before the controversial collapse of multilateral negotiations in 1997 in regard to the proposed Multilateral Agreement on Investment (MAI),\textsuperscript{126} States had already been concluding

\textsuperscript{124} See Diane A. Desierto, Development as an International Right: Investment in the new Trade-Based IIAs, 3 Trade Law & Development 2 (2011).

\textsuperscript{125} Kenneth J. Vandevelde, A Brief History of International Investment Agreements, 12 UC Davis Journal of International Law & Policy (2005), 157-194.

\textsuperscript{126} See Eric Neumayer, Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD negotiations, 46 Wirtschaftspolitische Blätter 6 (1999), at pp. 618-628; Kenneth C. Shadlen, Resources, rules and international political economy: the politics of development in the WTO, pp. 109-132, at 124-128 (viewing developing countries’ ability to block the MAI as somewhat of a favorable outcome), in SARAH JOSEPH, DAVID KINLEY, AND JEFF WAINCYMER (EDS.), THE WORLD TRADE ORGANIZATION AND HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES (Edward Elgar Publishing, 2009) [hereafter, “JOSEPH, KINLEY, & WAINCYMER 2009”]. Michael Trebilcock and Robert Howse have also described the political dynamics that took over the MAI negotiations and ultimately led to their breakdown. See TREBILCOCK AND HOWSE, pp. 458-460:

“By May 1997, agreement had been reached between the negotiators on many elements of the basic architecture of the MAI [Multilateral Agreement on Investment], including MFN and National Treatment. However, important differences of view between countries were surfacing with respect to the relationship of the MAI to environmental and labour standards and cultural policies. As well, considerable disagreement existed concerning whether and how investment incentives should be disciplined, the result being that incentives were simply not dealt with in the draft. At the same time, however, a vigorous public debate was beginning in OECD countries such as Canada, the United States and Australia concerning the impact of the MAI on the democratic regulatory state in general, and on environment, labour rights and cultural protection more specifically. Canadian activist groups were at the forefront of bringing the MAI negotiations into public view. In January 1997, when no public version of the negotiating text was available, Canadian activists obtained a confidential version, and began circulating it to like-minded groups, using the internet as an effective dissemination tool. In April 1997, accounts of the MAI began to appear in the popular press, and governments were placed on the defensive to justify their negotiating positions to the public at large. Some of the groups in question had unsuccessfully challenged the Canada-US FTA and the NAFTA, often making grossly exaggerated and hypothetical claims about the damage likely to flow from these agreements to the welfare state. With the MAI, their approach was shrewder and more careful. They linked a more general critique of globalization driven by corporate interests with a highly plausible analysis of specific provisions of the draft MAI or omissions from it, as well as a critique of the way it was negotiated. While many groups took different and overlapping positions, the thrust of the overall attack is well expressed by Tony Clarke and Maude Barlow:

We do not wish to leave the impression that we reject the idea of a global investment treaty. We are well aware that transnational investment flows have been accelerating at a rapid pace and that there is a need to establish some global rules. But the basic premise on which the draft versions of the MAI have been crafted is, in our view, largely flawed and one-sided. It expands the rights and powers of transnational corporations without imposing any corresponding obligations. Instead, the draft treaty places obligations squarely on the shoulders of governments… Meanwhile the MAI says nothing about the rules that transnational corporations must follow to respect the economic, social, cultural, and environmental rights of citizens.

The secrecy surrounding the negotiations and the usual cloak-and-dagger behavior by foreign ministries when faced by early enquiries about the course of the negotiations gave prima facie credence to a conspiratorial view of the whole undertaking. The fact, noted above, that the draft MAI did not contain an environmental or health and safety exception even comparable to that existing in the 1947 GATT lent credibility to the notion that only the interests of capital were reflected in the Agreement.”
IIAs on a bilateral basis, beginning with the first bilateral investment treaty (BIT) concluded by Germany and Pakistan in 1959 and entering into force in 1962.127

The progressive march of investment treaty texts (and their underlying bargaining histories) gives tangible evidence of the ideological shifts that accompanied the evolving global economic order – from the postcolonial emergence of new capital-importing States and the initial dominance of capital-exporting States in North-South treaty negotiations, to the recent rise of emerging market players and developing countries as new capital-exporters in more complex South-South and South-North configurations.128 Ernst-Ulrich Petersmann describes the “first generation” of BITs as those that were concluded from 1959 until around 1969, between countries of the capital-exporting and developed North and the capital-importing and developing South, and whose standards of protection were minimally designed to reduce “the legal insecurity resulting from the postcolonial disagreements on the customary international minimum standard for the protection of foreign property and the payment of full, prompt, and effective compensation in case of expropriation of foreign property.”129 He describes the “second generation” of BITs (treaties concluded from 1969 until about 2003) as reflecting a “more ‘common form’…based on uniform objectives, structures and standard clauses providing also for investor-state arbitration…[t]he increasingly comprehensive legal and judicial


129 PETERSMANN 2012, at 289.
protection of foreign investments was also due to increasing recognition that FDI-led industrialization tended to promote more competitive industries than the widespread policies of infant industry protection since the 1960s.”

It is the third, or the “new” generation of BITs (concluded from 2003 onwards) that, in Petersmann’s view, already acknowledges “the need for ‘rebalancing’ [of] the private and public interest involved in foreign investments…clarifying the state’s rights and duties to regulate and protect public interests.”

Given the tremendous diversity of IIA texts, it would be impossible to identify all the treaty provisions that trigger the issue of a State’s regulatory freedom to pursue public interest or human rights concerns. What is clear, thus far, is that host State defenses anchored on regulatory freedom to ensure compliance with human rights have not made much headway yet in investment arbitral jurisprudence, usually due to the lack of development of the argument by the State concerned, or the fact that

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130 Petersmann 2012, at 290.

131 Petersmann 2012, at 290.


134 See Siemens AG v. Argentina, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007, para. 79 (“…the Tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and substantiation by the parties, it is not an argument that, prima facie, bears any relationship to the merits of this case.”) For similar observations, see also Clara Reiner and Christoph Schreuer, Human Rights and International Investment Arbitration, pp. 82-96, at 89-90, in Pierre-Marie Dupuy, Francesco Francioni, and Erns-Ulrich Petersmann (eds.), Human Rights in International Investment Law and Arbitration (Oxford University Press, 2009).
amicus submissions have not yet succeeded in speaking directly and in depth to the precise legal and factual issues of an investment arbitration when they put forward arguments based on human rights and the public interest.\textsuperscript{135} In \textit{Suez v. Argentina}, for example, after a thirty-page amicus submission that generally discussed the significance of the rights to water and to health in the arbitration, the arbitral tribunal simply observed that Argentina “was subject to both international obligations, i.e. human rights obligations and treaty obligations, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.”\textsuperscript{136} While host States have generally raised the issue of State regulatory freedom to pursue public interest or human rights concerns as a defense in numerous investment treaty arbitrations\textsuperscript{137} involving alleged breaches of different


\textsuperscript{136} \textit{Suez and others v. Argentina}, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, para. 262.

treaty standards, such as indirect expropriation,\textsuperscript{138} or the fair and equitable treatment standard,\textsuperscript{139} ultimately the success (or failure) of these defenses turned on the arbitral tribunals’ interpretation of the IIA standards involved.\textsuperscript{140} This has spurred newer IIAs to include substantive standards that could facilitate a host State’s policy flexibility, such as: 1) “in accordance with host State law” clauses;\textsuperscript{141} 2) stabilization clauses;\textsuperscript{142} 3) exceptions clauses or “measures not precluded” clauses;\textsuperscript{143} 4) the


\textsuperscript{140}For a more optimistic assessment of human rights-inclusive interpretation of IIA standards, see Susan L. Karamanian, Human Rights Dimensions of Investment Law, Ch. 9 in Erika de Wet and Jure Vidmar (Eds.), Hierarchy in International Law: the Place of Human Rights (Oxford University Press, 2012).


\textsuperscript{142}On the argument that foreign investors and host States effectively contract around the risk of changes in the applicable regulatory framework to the investment, see Sam Foster Halabi, Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses, 31 Northwestern Journal of International Law and Business 261 (Spring 2011). Note that an arbitral tribunal has ruled that stabilization clauses “do not ‘cap’ damages for the purposes of valuing the Claimants’ rights, nor do they establish a ceiling of compensation beyond which the Claimants could not have legitimately expected to recover in the event of an expropriation.” Kardassopoulos v. Georgia and joined case, Award, ICSID Case Nos. ARB/05/18, ARB/07/15, 28 February 2010, at para. 485.

investment definition clause or similar treaty applicability provisions;\textsuperscript{144} and 5) balance of payments provisions and other financial crises provisions.\textsuperscript{145}

The “in accordance with host State law” clauses in IIAs (e.g. treaty provisions that require that an investment be made “in accordance with host State law”) have been put forward as possible gateways for international human rights treaties when the latter is incorporated in host State law.\textsuperscript{146} However, this theory has not yet been tested in actual investment jurisprudence. Thus far, arbitral tribunals have tended to interpret these kinds of clauses in a circumscribed manner. For one, the “in

\textsuperscript{144} See Diane A. Desierto, Development as an International Right: Investment in the new Trade-Based IIAs, 3 Trade, Law and Development 2 (2011) 296-333. See also Diane A. Desierto, Deciding IIA Applicability: The Development Argument in Investment, forthcoming chapter in FREYA BAETENS (ED.), INVESTMENT LAW WITHIN INTERNATIONAL LAW: AN INTEGRATIONIST PERSPECTIVE (Cambridge University Press, 2013); Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction, paras. 82, 83, 94, 96 (May 29, 2009); Pantechniki SA Contractors and Engineers v. Albania, ICSID Case No. ARB/07/21, Award, paras. 36, 43, 38, (July 28, 2009); Fakes v. Turkey, ICSID Case No. ARB/07/20, Award, para. 111 (July 12, 2010); Alpha Projektholding GMBH v. Ukraine, ICSID Case No. ARB/07/16, Award, paras. 312-313 (October 20, 2010); Consorzio Groupement LESI and ASTALDI v. Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, paras. 72-73 (July 12, 2006); Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, paras. 114-115 (April 9, 2009); Malicorp Ltd. v. Egypt, ICSID Case No. ARB/08/18, Award, para. 113 (January 31, 2011); Global Trading Resource Corp. and Globex International Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award (November 23, 2010); RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award, paras. 244, 264 (March 11, 2009); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 273 (January 14, 2010).

\textsuperscript{145} 2009 ASEAN Comprehensive Investment Agreement, Article 16 (Measures to Safeguard Balance of Payments); 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations, Article 21 (Measures to Safeguard Balance of Payments); 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 11 (Temporary Safeguard Measures); 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China, Article 11 (Measures to Safeguard the Balance of Payments).

\textsuperscript{146} Christoph Schreuer and Ursula Kriebaum, From Individual to Community Interest in International Investment Law, pp. 1079-1096, at 1095, in ULRICH FASTENRATH, RUDOLF GEIGER, DANIEL-ERASMUS KHAN, ANDREAS PAULUS, SABINE VON SCHORLEMER, CHRISTOPH VEDDER (EDS.), FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA (Oxford University Press, 2011); Pierre-Marie Dupuy, Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law, pp. 45-62, at 59-60 in PIERRE-MARIE DUPUY, FRANCESCO FRANCIONI, AND ERNST-ULRICH PETERSMANN (EDS.), HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Oxford University Press, 2009) [hereafter, “DUPUY, FRANCIONI, & PETERSMANN”].
accordance with host State law” clause does not require an investment’s compliance with every host State regulation, administrative issuance, or law – it generally refers to those species of host State law that are of such fundamental importance that they must be included in the due diligence to be conducted by the investor and the host State. While there is a line of arbitral awards that narrowly identifies host State’s corporate registration requirements as the only “law” contemplated by this clause, there are also other arbitral awards that suggest that the clause applies to other sources of law that are consistent with the teleological purposes of an IIA, such as anti-dummy legislation, bribery laws, and contractual fraud, and central bank regulations. In order to avail of this clause to justify its exercise of regulatory freedom to pursue public interest or human rights concerns, therefore, the host State would have to show that its ongoing compliance with the mass of its international

147 Fraport AG Frankfurt Airport Services Worldwide v. Philippines, Award, ICSID Case No. ARB/03/25, 16 August 2007, at para. 396 (“[w]hen the question is whether the investment is in accordance with the law of the host State, considerable arguments may be made in favour of construing jurisdiction ratione materiae in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent legal counsel’s legal due diligence report to flag that issue.”) On the other hand, a host State unsuccessfully attempted to argue the “non-resident” character of tax treatment in order to deny that an investment met the territorial requirement “in accordance with its laws and regulations”, in SGS Societe Generale de Surveillance SA v. Philippines, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, at paras. 99-112.

148 Veteran Petroleum Ltd. v. Russian Federation, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, at paras. 20-21; Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar, ASEAN Case No. ARB/01/1, 31 March 2003, at para. 62; Siag and Vecchi v. Egypt, Decision on jurisdiction and partial dissenting opinion, ICSID Case No. ARB/05/15, 11 April 2007, at paras. 198-201; Middle East Cement Shipping and Handling Co SA v. Egypt, Award, ICSID Case No. ARB/99/6, 12 April 2002, paras. 131-138.

149 Salini Costruttori SpA and Italstrade SpA v. Morocco, Decision on Jurisdiction, ICSID case No. ARB/00/4, 23 July 2001, at para. 46. This standard was expressly adopted by the arbitral tribunal in Mytilineos Holdings SA v. Serbia and Montenegro and Serbia, Partial Award on Jurisdiction and Dissenting Opinion, UNCITRAL, 8 September 2006, at para. 152.

150 Fraport AG Frankfurt Airport Services Worldwide v. Philippines, Award, ICSID Case No. ARB/03/25, 16 August 2007 (involving local anti-dummy legislation); World Duty Free Company Ltd. v. Kenya, Award, ICSID Case No. ARB/00/7, 25 September 2006 (involving local bribery laws); Inceysa Vallisloetane SL v. El Salvador, Award, ICSID Case No. ARB/03/26, 2 August 2006 (involving local contract principles against undue enrichment and fraud); Anderson and ors v. Costa Rica, Award, ICSID Case No. ARB (AF)/07/3, 10 May 2010, para. 55-59.
human rights obligations also belongs to those corpus of “fundamental” laws notified to the investor at the outset as necessary to qualify the investment as a covered or protected investment under the IIA. 151 This approach contains its own set of complexities, least of which is building the appropriate due diligence process and transparent information infrastructure152 for the investor to be genuinely and timely notified of a host State’s continuing international human rights obligations – including how the investment may or may not affect compliance with such obligations – in order to avoid any pretextual or trope assertions of human rights defenses by the host State during the life of the investment.153

Stabilization clauses have also not featured prominently in investment jurisprudence, although there is considerable literature advocating their inclusion in both foreign investment contracts as well as IIAs to ensure that host States’ international human rights obligations are also deemed part of the investment regulatory framework. 154 IIA provisions “on the mutual obligation of parties to

151 Diane A. Desierto, Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises, 10 Transnational Dispute Management 1 (January 2013), at p. 80.


154 See Lorenzo Cotula, Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses, 1 Journal of World Energy Law & Business 2 (2008), at 158-179; Sheldon Leader, Risk management, project finance and rights-based development, pp. 107-141 in SHELDON LEADER AND DAVID ONG (EDS.), GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT (Cambridge University Press, 2011) [hereafter, “LEADER AND ONG 2011”] (arguing in particular at p. 121 that “[i]f lenders and borrowers are to create projects able to give adequate place to the avoidance of damage…it may be necessary at certain points to carve out exceptions to the classic non-recourse model…this might only be a realistic prospect if either the sponsor is required to help meet the company’s shortfall in funds, or the lender relaxes its reimbursement schedule to make room for such delays. Negotiation among the parties, reflecting the impact of CSR (corporate social responsibility), would add this necessary element of flexibility to the
provide ‘full protection and security’ and to ensure ‘fair and equitable treatment’ of investments…may confer treaty status on the stabilization clauses in an investment contract.”

Some recent innovations to the design of stabilization clauses expressly exempt from stabilization those changes in law, regulations, or policies, which are reasonably required to ensure that host States to meet international human rights obligations. These are likewise incipient proposals untested thus far in investor-State arbitration.

Owing largely to the arbitrations involving measures taken by the Argentine government during its 2000-2002 financial crisis, arbitral tribunals in the past decade have had more occasions to engage in the interpretation of exceptions clauses or “measures not precluded” clauses. What is immediately evident from the genre of exceptions clauses in IIAs is that they are not all similarly worded, with some reflecting detailed language resembling GATT Article XX and GATS Article XIV.

positions…”); Lorenzo Cotula, Freezing the balancing act? Project finance, legal tools to manage regulatory risk, and sustainable development, pp. 142-173 in LEADER AND ONG 2011 (observing at p. 144 that while “increasingly broad stabilization clauses tend to ensure a level of regulatory stability that far exceeds that accorded by international law under regulatory taking doctrine”, while proposing in p. 162 two options for the construction and treatment of stabilization clauses to reflect sustainable development compliance – “(a) carefully limiting the scope of stabilization clauses; and (b) adopting an evolutionary approach to their application.”).

155 See Evaristus Oshionebo, Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries, 10 Asper Review of International Business and Trade Law 1 (2010) at 25. Although note that an arbitral tribunal expressly rejected viewing an IIA’s fair and equitable treatment standard as bearing the same purpose as stabilization clauses specifically granted to foreign investors. See EDF (Services) Ltd v. Romania, Award, ICSID Case No. ARB/05/13, 2 October 2009, at para. 218.


157 DESIERTO 2012, at Ch. 5.

158 Article 10.9.3(c) of Chapter 10 (Investment) of the 2004 Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA); Article 17 of the 2009 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement; Article 1106, Section 6 of Chapter 11
while others tersely referring only to “essential security interests” without explicitly providing for the effect of the host State’s invocation of such “necessary” measures on IIA obligations.\textsuperscript{159} The Argentine arbitrations have, by and large, generally rejected Argentina’s proposed theory that interpreted various exceptions clauses in Argentine BITs, e.g. resulting in the outright inapplicability of such treaties (and thus, preventing the existence of any treaty breach from arising) the moment the exception is invoked.\textsuperscript{160} There has not yet been any arbitral jurisprudence where a host State has invoked an exceptions clause that is worded identically with (or clearly traces its

\textsuperscript{159}For a survey of these types of treaty language, see OECD, Essential Security Interests under International Investment Law, in INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD (OECD, 2007), available at http://www.oecd.org/investment/investmentpolicy/40243411.pdf (last accessed 10 January 2013).

drafting genealogy to) GATT Article XX or GATS Article XIV,\(^{161}\) and it is impossible to forecast for now if investment arbitral tribunals would, in the future, be able to construe their mandates, methodologies, and arbitral competences as liberally as the WTO Appellate Body and dispute settlement panels have done insofar as the interpretation of the GATT Article XX and GATS Article XIV exceptions. Such being the case, the ultimate usefulness of exceptions clauses as the treaty vehicle for ensuring States’ regulatory freedom to pursue human rights or public interest concerns still remains very much a question for treaty draftsmanship.

Turning to the definition of “investment”, as well as other provisions that could carve out treaty applicability, one finds similar dissonance in investment arbitral jurisprudence on the requisite criteria of “investment”, and whether the same should involve a requirement that the supposed investment make a “contribution to the economic development of the host State”.\(^{162}\) As I have discussed elsewhere,\(^{163}\) the majority of arbitral tribunals thus far have preferred to regard this aspect as a mere feature, and not a definitive criterion or threshold requirement to establish the existence of an investment.\(^{164}\) In practice, however, many tribunals have found that...

\(^{161}\) Continental Casualty v. Argentina, as I have discussed elsewhere, involved a measures not precluded clause (Article XI of the Argentina-US BIT) that did not in any way resemble GATT Article XX in the least, but the tribunal in that one case strangely saw fit to use GATT Article XX and WTO jurisprudence interpreting GATT Article XX to interpret Article XI of the Argentina-US BIT. See Diane A. Desierto, Necessity and 'Supplementary Means of Interpretation' for Non-Precluded Measures in Bilateral Investment Treaties, 31 University of Pennsylvania Journal of International Law 3 (2010), 827-934.

\(^{162}\) Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52: “…doctrine generally considers that investment infers: contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction…In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

\(^{163}\) Id. at footnote 124.

\(^{164}\) Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction, paras. 82, 83, 94, 96 (May 29, 2009); Pantechniki SA Contractors and Engineers v. Albania, ICSID Case No. ARB/07/21, Award, paras. 36, 43, 38, (July 28, 2009); Fakes v. Turkey, ICSID Case No. ARB/07/20, Award, para. 111 (July 12,
“contribution to a host State’s development” is a relatively easy standard for investors to satisfy, so long as some linkage – no matter how attenuated - could be shown between the investment and a favorable economic outcome in the host State.

IIA practices further show how States differentiate between aspects of social protection and the public interest for which they design relative policy flexibility (e.g. non-applicability of IIA standards to certain measures), as opposed to absolute policy flexibility (e.g. complete inapplicability of the entire IIA). Many IIAs show that States favor relative policy flexibility for most public policy areas, and rarely

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165 For the few awards that denied the existence of a covered investment under an IIA, see Malaysia Historical Salvors Sdn Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007) paras. 123-124; Joy Mining Machinery Ltd. v. Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, para. 57 (July 30, 2004); Mitchell v. The Democratic Republic of the Congo, ICSID Case No. ARB/08/18, Decision on Jurisdiction and Liability, para. 273 (January 14, 2010).

166 Consortium RFCC v. Morocco, ICSID case No. ARB/00/6, Decision on Jurisdiction, para. 65 (July 16, 2001); Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 137 (November 14, 2005); Toto Costruzioni Generali SpA v. Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, para. 86 (September 8, 2009); Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, paras. 116-117 (July 6, 2007); Helnan International Hotels A/S v. Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, para. 77 (October 17, 2006); Saipem SpA v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, para. 101 (March 21, 2007); Jan de Nul NV and Dredging International NV v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, para. 92 (June 16, 2006); Noble Energy Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, para. 132 (March 5, 2008); Ceskoslovenska Obchodni Banka As (CSOB) v. Slovakia, ICSID Case No. ARB/07/4, Decision on Objections to Jurisdiction and Admissibility, para. 378 (August 4, 2011); Societe Generale v. Dominican Republic, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, paras. 16, 30 (September 19, 2008).

167 See 1998 United States/Bolivia BIT Article II(2)(b) (on intellectual property); 1982 United States/Egypt BIT Protocol, Clause 4 (on ownership of real estate); NAFTA Article 1108 (Reservations and Exceptions); 2004 DR-CAFTA Article 10.9(3)(b) (making some IIA provisions inapplicable to intellectual property, competition laws, procurement, among others); 2005 United States/Uruguay BIT, Article 8(3) [identical to DR-CAFTA Article 10.9(3)]; 2006 Canada/Peru BIT, Article 9(5) (removing public procurement, sovereign subsidies/loans/insurance, and public retirement pension/social security systems from the coverage of national treatment and MFN obligations in the IIA); 2009 Canada/Czech
reserve absolute policy flexibility except for key sovereign functions such as taxation matters.\textsuperscript{168}

Interestingly, balance of payments and financial crises provisions in new IIAs probably represent the clearest instances to date of the direct incorporation of provisions from WTO law into investment law. Newer generations of IIAs contain language purposely identical to GATT Article XII and GATS Article XII – provisions in international trade law that authorize States to impose certain restrictions in order

\textsuperscript{168} See 2009 Canada/Jordan BIT, Article 10(6) (“The provisions of this Agreement shall not apply to investments in cultural industries.”); 1988 China/New Zealand BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting State…”); 1999 Argentina/New Zealand BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 1985 China/Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 2002 Spain/Bosnia and Herzegovina BIT, Article 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Czech Republic/Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 1993 Poland/Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 1995 Russian Federation/Hungary BIT, Article 11(2) (“The provisions of this Agreement shall not apply to taxation matters.”); 1993 Russian Federation/Denmark BIT Articles 11(2) and (3) (“This Agreement shall not apply to the Faroe Islands and Greenland…The provisions of this Agreement shall not apply to taxation.”); 1999 Slovenia/Singapore BIT, Articles 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 2002 Spain/Jamaica BIT, Article 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Singapore/Pakistan BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 2005 Uganda/Belgium-Luxembourg Economic Union BIT, Article 4(4) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 1995 Sweden/Russian Federation BIT, Article 11(2) (“The provisions of this Agreement shall not apply to taxation matters, except as follows: Article 4, 6, 8, and 9 may apply to taxes imposed by a Contracting Party but only if such taxes have an effect equivalent to expropriation.”); 1997 Hungary/Singapore BIT Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”); 2004 China/Uganda BIT Article 3(5) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party…”).
to safeguard their balance of payments position. Recent investment agreements concluded by the Association of Southeast Asian Nations (ASEAN) – a region particularly alert to currency risks and capital flight after its experience with the 1998 Asian financial crisis – all contain extensive provisions authorizing States to take temporary “measures to safeguard balance of payments”, such as restrictions on transfers of capital. These provisions appear more detailed (and are worded in a more expansive and self-judging manner) than other IIAs that only recognize States’ rights to *equitably* exercise sovereign powers to temporarily limit transfers during exceptional balance of payments difficulties. United Kingdom BITs, for example, often put a cap on the period for imposing restrictions and the extent of such restrictions, also stipulating a mandatory minimum amount to be transferred annually. Hungarian BITs tend to use more general language focusing on standards of equitableness, non-discrimination, and good faith. Czech BITs focus on assessing restrictive measures from international standards of non-discrimination.

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170 2009 ASEAN Comprehensive Investment Agreement, Article 16 (Measures to Safeguard Balance of Payments); 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations, Article 21 (Measures to Safeguard Balance of Payments); 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 11 (Temporary Safeguard Measures); 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China, Article 11 (Measures to Safeguard the Balance of Payments).

171 Article 4(2)(b) of the 1987 United Kingdom/Jamaica BIT, Article 6(1) of the 1987 United Kingdom/Antigua and Barbuda BIT, Article 6(4) of the 1990 United Kingdom/Argentina BIT, Article 6 of the 1987 United Kingdom/Benin BIT, Article 6(1) of the 1988 United Kingdom/Grenada BIT, Article 6 of the 1985 United Kingdom/Haiti BIT, Article 7(2) of the 1987 United Kingdom/Hungary BIT, Article 5 of the 1981 United Kingdom/Malaysia BIT, Article 6(1) of the 1986 United Kingdom/Malta BIT, Article 6 of the 1986 United Kingdom/Mauritius BIT, Article 7 of the 1990 United Kingdom/Morocco BIT, Article 6(1) of the 1987 United Kingdom/Poland BIT, Article 6 of the 1989 United Kingdom/Tunisia BIT, Article 6(1) of the 1991 United Kingdom/Turkey BIT.

172 Article 13(2)(a) and (b) of the 2007 Hungary/Azerbaijan BIT and the 2007 Hungary/Jordan BIT.
equitableness, and good faith rather than specific contours of restrictions.\textsuperscript{173} Italian BITs do not specify the exact terms of what should comprise host States’ restrictions to protect their balance of payments position, other than to prescribe that such measures should conform to international legal standards of equitableness, non-discrimination, and good faith,\textsuperscript{174} similar to the characteristics of Mexico BITs.\textsuperscript{175} Netherlands BITs stress the importance of a restriction’s consistency with the International Monetary Fund’s rules on transfer restrictions,\textsuperscript{176} while Australian BITs confine their treaty language to simply recognizing States’ inherent rights, “in exceptional balance of payments difficulties, to exercise equitably and in good faith powers conferred by its law”,\textsuperscript{177} to restrict outgoing capital transfers. Canadian BITs favor affording host States more flexibility to respond to balance of payments crises.\textsuperscript{178} German BITs, by contrast, tend to contain more specific language on

\textsuperscript{173} Article 6(4) of the 1998 Czech Republic/Costa Rica BIT, Clause 3 of the Protocol to the 1995 Czech Republic/Philippines BIT, Article 6(5) of the 2002 Czech Republic/Mexico BIT.

\textsuperscript{174} Article 6(1)(c) of the 1993 Jamaica/Italy BIT, Article VI(4) of the 2004 Italy/Yemen BIT, Article VI(4) of the 2004 Italy/Nicaragua BIT.

\textsuperscript{175} Article 9(4) of the 2005 Australia/Mexico BIT, Article 7(6) of the 1998 Austria/Mexico BIT, Article 6(6) of the 1998 Belgium-Luxembourg Economic Union/Mexico BIT, Article 6(5) of the 2000 Denmark/Mexico BIT, Article 7(4) of the 1999 Finland/Mexico BIT, Article 7(4) of the 2000 Greece/Mexico BIT, Article 8(4) of the 2007 India/Mexico BIT, Article 6(4) of the 2005 Iceland/Mexico BIT, Article 6(4) of the 1999 Italy/Mexico BIT, Protocol to the 2000 Republic of Korea/Mexico BIT, Ad Article 4 of the Protocol to the 1998 Netherlands/Mexico BIT, Article 6(4) of the 2000 Sweden/Mexico BIT, Article 8(3) of the 2006 Trinidad and Tobago/Mexico BIT, Article 8(4) of the 2006 United Kingdom/Mexico BIT.

\textsuperscript{176} Article 5(3) of the 2002 Netherlands/Yugoslavia BIT, Clause 1 of the Protocol to the 2003 Netherlands/Korea BIT, Article 7(1) of the 1985 Netherlands/Philippines BIT, Article 5(4) of the 1991 Netherlands/Jamaica BIT, Ad Article 5(a) of the Protocol to the 2002 Netherlands/Namibia BIT, Article 7 of the 1984 Netherlands/Sri Lanka BIT.

\textsuperscript{177} See 1992 Australia/Indonesia BIT, Article VII(1); 1994 Australia/Lao People’s Democratic Republic, Article 9(1).

\textsuperscript{178} Article IX(3) of the 2010 Canada/Slovakia BIT, Article XVII(4) of the 2009 Canada/Latvia BIT and 2009 Canada/Romania BIT, Article IX(3) of the 2009 Canada/Czech Republic BIT, Article VII(2) of the 1991 Canada/Hungary BIT as well as the 1990 Canada/Poland BIT.
restructuring payment terms after the termination of the balance of payments crises.\textsuperscript{179}

To date, the IIA balance of payments provisions (e.g. mirroring language from GATT Article XII) have not yet been interpreted by any investment arbitral tribunal.

The foregoing topographic survey of IIA standards has been undertaken to show that both treaty language and the interpretation of States’ regulatory freedom to pursue human rights or public interest concerns remains differentiated and nonlinear. Unlike the core set of WTO agreements (and its subsidiary legal sources or WTO soft law), interpretation of IIAs has to be conducted on a piecemeal (and often insular) basis, according to the terms of the IIA at issue before a tribunal at a given point in time, for a particular dispute. Short of the direct incorporation of provisions from WTO law, it is perilous to assume that IIA treaty drafters and negotiators indeed intend future arbitral tribunals to use WTO law as some kind of \textit{travaux preparatoires} to interpret IIA standards. After all, interpretation of treaty text according to its terms always antecede any attempt at recourse to supplementary means of interpretation.\textsuperscript{180}

Where IIA texts do not lend themselves to ambiguity, or are at least susceptible of interpretation according to their own terms, it is neither necessary nor legitimate to contrive at using WTO law and jurisprudence as proxies for interpretation.

\textsuperscript{179} Clause 4 of the Protocol to the 1995 Germany/Ghana BIT, Clause 5 of the Protocol to the 1982 Germany/Lesotho BIT, Article 5(2) of the 1985 Germany/Saint Lucia BIT, Clause 5(b) of the 1990 Germany/Swaziland BIT, Clause 5(c) of the Protocol to the 1994 Germany/Namibia BIT, Clause 5 of the Protocol to the 1986 Germany/Nepal BIT, Clause 4(c) of the Protocol to the 1981 Germany/Bangladesh BIT.

\textsuperscript{180} Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See Mahnoush H. Arsanjani and W. Michael Reisman, \textit{Editorial Comment: Interpreting Treaties for the Benefit of Third Parties: The ‘Salvors’ Doctrine’ and the Use of Legislative History in Investment Treaties}, 104 American Journal of International Law 4 (October 2010), 597-604, at 600 (“The Vienna Convention’s rule in Article 31 thus focuses, through several different lenses, on the text of the instrument and events that follow rather than precede it, as the critical grist for the interpretive exercise…the language of Article 32 is facultative and contingent and looks largely to pre-text rather than post-text events…this recourse may be exercised only where Article 31’s application (1) ‘leaves the meaning ambiguous or obscure’; or (2) leads to a result which is manifestly absurd or unreasonable; or (3) is undertaken to confirm the meaning resulting from the application of article 31.”
IIAs remain central to the applicable law in investor-State dispute settlement.\textsuperscript{181} Admittedly, in the absence of parties’ choice of law, international law may also form part of the law applicable to an investor-State dispute under Article 42(1) of the ICSID Convention.\textsuperscript{182} While the potential overlap between IIA norms and other rules of international law, such as international human rights treaty and customary norms, has received much scholarly attention,\textsuperscript{183} using Article 31(3)(c) of the Vienna Convention on the Law of Treaties\textsuperscript{184} to integrate human rights in IIA interpretation\textsuperscript{185} has not yet been applied in practice in investor-State arbitrations.


B. Authoritative Decision-Makers and Interpretive Communities in WTO Law vis-à-vis Investment Law

The preceding section outlined key differences in the bases of obligation in WTO Law and investment law, as well as some nonlinear interpretations of the public interest and human rights ensuing from each regime. The following subsections briefly show the contrast between the authoritative decision-makers and interpretive communities in WTO Law and investment law, and why the former’s centralized legal and political organs are functionally better-situated than the latter to achieve harmonized and coordinated interpretation of States’ regulatory freedom to pursue public interest and human rights concerns.

1. WTO Law

The mandates and functions of legal and political institutions at the WTO, I submit, contribute to making the system quite amenable to the coordination of trade law rules with the human rights and public interest obligations of the Member States. This is not to say that the system is *ipsos facto* ideal for ensuring that Member States simultaneously comply with their international human rights obligations as well as their trade obligations, and neither do I take the position that the WTO should be radically transformed into a human rights organization.\(^\text{186}\) (To recall, WTO Secretary-General Pascal Lamy had called for “coherence” between WTO law and human rights law,\(^\text{187}\) not “co-optation” of one by the other. One can be just as wary of creating a

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186 Armin von Bogdandy famously cautioned that if the European Union were to be “focused on progressive human rights policy”, it would “easily endanger the European constitutional set-up between the Union and the Member States without any real need for protecting human rights, at least as they are traditionally understood.” See Armin von Bogdandy, The European Union as a Human Rights Organization? Human Rights and the Core of the European Union, 37 Common Market Law Review (2000), 1307-1338, at 1338.

“human rights imperium”,\textsuperscript{188} as with the encroachment or “acquisition” of human rights by WTO law.\textsuperscript{189}) Rather, my lens of observation is limited to the phenomena of the system of governance and adjudication in the WTO, which, at the very least, appears arguably conducive to democratized, consultative, centralized, and transparent decision-making on the spaces of States’ regulatory freedoms to pursue human rights and public interest concerns. The approach largely subscribes to Joel Trachtman’s fairly agnostic and functionalist theory of “constitutional economics” to analyze the WTO – scrutinizing constitutional functions and processes within a system to ascertain how they maximize individual preferences.\textsuperscript{190} In my view, the deepening and regularizing dialogue on Member States’ compliance with human rights obligations alongside WTO obligations is, in large part, attributable to the capacity of non-State actors as well as Member States to engage the issue systematically through different levers of WTO governance.\textsuperscript{191} That it has not always been completely successful in doing so is a subject left to Part IV of this Article.

\textsuperscript{188} Michael Barnett put forward a critical comparison between the evolution of the human rights movement and humanitarianism, with the historical concept of empire. “Empires are branded as illegitimate because of their authoritarian qualities, but humanitarian governance is hardly a paragon of democratic rule...the legitimacy of humanitarian governance does not depend on a process of deliberation, dialogue, or even consent...Humanitarianism has become a big business, and increasingly aid agencies are administered by executive offices that focus on the bottom line and market share. As humanitarian governance has grown, it has become more centralized, more distant from those it wants to help...In the typical humanitarian case, the ruling class is made up of well-to-do foreigners, and local populations largely provide security, support, and menial labor in a way that is reminiscent of earlier empires.” \textbf{MICHAEL N. BARNETT}, \textit{Empire of Humanity: A History of Humanitarianism}, (Cornell University Press, 2011), pp. 221-222.


\textsuperscript{191} \textit{See Caroline Dommen, Raising Human Rights Concerns in the World Trade Organization: Actors, Processes, and Possible Strategies}, 24 Human Rights Quarterly 1 (February 2002), 1-50. Susan Ariel Aaronson has estimated that about 75% of the world’s governments now participate in preferential
The political organs of the WTO collectively contribute to the WTO’s core functions under Article III of the WTO Agreement, namely: 192 1) the facilitation of the implementation, administration, and operation of the WTO Agreement, the multilateral and plurilateral trade agreements; 2) providing the forum for negotiations of new agreements among its Members concerning their multilateral trade relations; 3) administer the Dispute Settlement Understanding (DSU); 4) administer the Trade Policy Review Mechanism (TPRM); and 5) coordinate with other global economic institutions such as the International Monetary Fund, the World Bank, and affiliated agencies. Nothing within this spectrum of functions, on its face, is itself prohibitive to the consideration of the public interest or human rights by the Member States. Implementation of the WTO Agreements and other multilateral or plurilateral agreements call for “further legislative or regulatory action – on the national or international level – which is necessary to give practical effect to WTO obligations.” 193 Inimitably, States advocating increased regulatory freedom to pursue public interest or human rights concerns through measures otherwise deemed restrictive of trade, may articulate the matter within any of the foregoing functions of the member-driven WTO, either through its participation in the political processes of the WTO organs and bureaucracy, or through the legal and adjudicatory processes of the dispute settlement system.

192 See full text of WTO Article III (Functions of the WTO) at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed 10 January 2013).

Article IV of the WTO Agreement outlines the institutional structure of the WTO and its key political organs – the Ministerial Conference (composed of all Member States meeting at least once every two years); the General Council, which conducts the day to day functions of the Ministerial Conference when the latter is not in session, and also acts as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB); the three sectoral councils (Council for Trade in Goods, Council for Trade in Services, Council for TRIPS) which oversee the implementation of the GATT, GATS, and TRIPS; other specialized councils, committees, and groups as created by the Ministerial Conference (such as the Trade Negotiations committee, Committee on Trade and Development, etc.). The WTO Secretariat discharges “exclusively international” responsibilities and administrative duties to implement instructions solely from the WTO.

Various issues have been mediated and debated within this framework in regard to States’ regulatory freedom to pursue trade-restrictive measures due to human rights considerations, spanning issues such as economic embargoes or sanctions against States committing egregious human rights violations, process and


196 CASSIMATIS 2007, at 289-402.

production mechanisms (PPMs) which seek to restrict or ban trade of goods that have been manufactured or produced through human rights violations,\textsuperscript{198} voluntary and mandatory labeling schemes disclosing social or environmental processes or inputs used for production,\textsuperscript{199} among others. In 2007, Susan Ariel Aaronson observed that the contemporary political processes of negotiations, trade policy reviews, and WTO waiver decisions and Ministerial Conference discussions and practices already reflect the reality that “WTO members increasingly seek to reconcile their trade and human rights objectives.”\textsuperscript{200} Her survey of years of WTO practices significantly revealed that: 1) accession applications frequently include questions on rule of law and the compliance with human rights by the applicant States;\textsuperscript{201} 2) the WTO had already issued its first waiver specifically to protect human rights, e.g.
the Kimberley Process Certification Scheme to prevent trading in conflict diamonds;\textsuperscript{202} 3) human rights concerns were increasingly being litigated in the dispute settlement system through GATT Article XX exceptions;\textsuperscript{203} 4) trade policy reviews conducted by the TPRB systematically engage questions of social and environmental impacts of, and human

general ineffectiveness of economic sanctions, while at the same time admitting the possibility of their limited or strategic use, so long as they do not contravene pre-existing WTO obligations).

\textsuperscript{198} See CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMs) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS (Cambridge University Press, 2011), at 20-30, 92-114.


\textsuperscript{200} Susan Ariel Aaronson, Seeping in slowly: how human rights concerns are penetrating the WTO, 6 World Trade Review 3 (2007), pp. 1-37.

\textsuperscript{201} Id. at footnote 200, at pp. 12-15.

\textsuperscript{202} Id. at footnote 200, at p. 16. Note that another well-known WTO waiver was that issued to enable access to essential medicines by suspending patent protections under TRIPS, see footnote 62.

\textsuperscript{203} Id. at footnote 200, pp. 18-22.
rights considerations in, Member States’ trade policies; and 5) trade negotiations under the Doha Round increasingly reflect the prioritization of human rights obligations as the premise of the global development agenda. Other scholars confirm various aspects of this evolving phenomenon of accommodation and coordination of human rights in the political organs and processes of the WTO system.

Perhaps the best indication of some institutional coordination of human rights and WTO law might stem from the General Council, which doubly acts as the Dispute Settlement Body (DSB) in adopting reports of dispute settlement panels and the Appellate Body. One can plausibly expect that the increased DSU litigation of human rights and public interest concerns over the past decade has not only brought these issues to the forefront of awareness of the same representatives of the Member States in the General Council (who in turn, act as the DSB as required under the DSU), but more to the point, that such cyclical referrals of Appellate Body interpretations of the GATT Article XX exceptions and other WTO law provisions that involve the issue of States’ regulatory freedom to implement (ordinarily) trade-restrictive measures to protect human rights and public interest priorities, would also conceivably inform the Council’s political decision-making in light of the ongoing

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204 Id. at footnote 200, pp. 22-26.

205 Id. at footnote 200, pp. 27-32.


207 On the multi-functional nature of the General Council, see VAN DEN BOSSCHE at 225.
jurisprudential precedents crystallizing from the dispute settlement system.\textsuperscript{208} The DSB does not only adopt panel and Appellate Body reports, but is also tasked to maintain surveillance of the implementation of rulings and recommendations, authorize suspension of concessions and other obligations under the WTO covered agreements, and inform the relevant WTO Councils and Committees of related developments arising from disputes under the WTO covered agreements.\textsuperscript{209} It is precisely due to these broad powers that the DSB is widely known to be “a political institution”\textsuperscript{210} that has demonstrated a generally positive and successful ability to ensure Member States’ compliance with WTO dispute settlement rulings.\textsuperscript{211}

Moreover, it must also be emphasized that the WTO Appellate Body apprehends a deep, but also careful sense of its unique judicial function and influential constitutive role within the WTO system.\textsuperscript{212} In practice, the Appellate

\textsuperscript{208} See Barbara Marchetti, \textit{The WTO Dispute Settlement System: Administration, Court, or Tertium Genus?}, unpublished paper (2008), available at http://www.iijil.org/GAL/documents/Marchetti.pdf (last accessed 10 January 2013) at 7 (“A crucial role regarding the panel’s and Appellate Body’s decisions is played by the Dispute Settlement Body. This body is nothing more than the General Council in a different guise. Beyond its panel establishing power, it has the authority to adopt the panel’s decisions, to supervise the panel’s decisions and recommendations, and to authorize the suspension of concessions and other obligations of the WTO (DSU Art. 2). In this way, the dispute resolution taken by the adjudicatory bodies, \textit{temporarily excluded from the Members’ negotiation circuit and given to third and neutral judicial bodies, comes back to the decision-making power of the contracting parties (DSB).}” (Italics in the original.) Holger Hestermeyer has analyzed the possibilities for deploying the legal argument on the right to health and the right of access to medicines through the WTO dispute settlement mechanism, along with the political developments that culminated with the decision to amend the TRIPS agreement to enable access to essential medicines through compulsory licensing. \textit{See Holger P. HESTERMeyer, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES} (Oxford University Press, 2007).

\textsuperscript{209} DSU, Annex 2 of the WTO Agreement, Arts. 2(1) and 2(2).

\textsuperscript{210} WOLFRUM, STOLL, & KAISER 2006, at 279.

\textsuperscript{211} Bruce Wilson, \textit{Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date}, 10 Journal of International Economic Law 2 (2007), 397-403.

Body has been able to look to the practice of other courts and tribunals in the course of its own interpretation of trade standards only because its mandate and the relative porousness of the applicable procedural law in particular cases enabled it to do so.\textsuperscript{213} The distinction of its role within the WTO system is such that the Appellate Body’s interpretations are deemed to “effectively allocate decision-making authority to market mechanisms, to political or administrative processes at the national or international levels, or to itself…[when it] must determine the amount of deference to show to national and local regulations that affect foreigners…it shapes the operation of [] second-order governance mechanisms.”\textsuperscript{214} It is thus impossible to discount the normative pull that Appellate Body decisions on GATT Article XX have had on the WTO political organs’ understanding and engagement of human rights in WTO law and governance.\textsuperscript{215} WTO legalism, at least in this sense, inevitably influences the future course of WTO politics and policy-making.

\textsuperscript{213} VAN DAMME 2009, at pp. 163, 209-210: “[u]nderstanding the judicial function of Appellate Body Members means appreciating that the DSU and other procedural rules developed in the WTO may not be the only sources of their powers. International procedural law may provide other powers or restrict the exercise of existing ones….The Appellate Body is amenable to such principles in the absence of any (contrary) rules in the DSU and its Working Procedures, and any contrary will of the disputants. General principles of procedural law, if proven to exist, apply if there are no more specific WTO rules. When deciding that such principles exist and apply, the Appellate Body often does not justify their application on the basis of principles of treaty interpretation. It becomes a matter of the applicable law, not of treaty interpretation. The creative function of the Appellate Body then lies in the expansion of the mandate to apply only WTO law, whether procedural or substantive, and less in the norm-creating function as such….The assertion and exercise of inherent powers is illustrative of this maturing but equally self-enforces the Appellate Body’s early decision to function as a court or tribunal. That decision was not inevitable, but perhaps its consequences were. In part, the evolution of procedural law in the WTO is the result of a dialectic relationship between consent-based powers and inherent powers. Increasingly, the consent of parties forces the Appellate Body to source procedural powers from outside the DSU and on an ad hoc basis, and to look at the practice of other courts and tribunals.…”


\textsuperscript{215} Ingo Venzke briefly touches upon a similar point in suggesting that Appellate Body decisions might influence \textit{domestic} regulatory policies. See Ingo Venzke, \textit{Making General Exceptions: The Spell of
Finally, one cannot overlook a key democratizing feature of the WTO – which is the consultative facility made for intergovernmental and non-governmental organizations (NGOs) to engage with the WTO under Article V of the WTO Agreement. Despite recurring criticisms of the width of, (and the perceived democratic deficit) in NGO participation in WTO processes and policy-making, it remains an undeniable fact that NGOs have been able to strategically engage the WTO throughout various areas of trade policy-making and agenda-setting. NGOs are able to observe plenary sessions and ministerial conferences, obtain information (albeit under certain limits) on trade issues under consideration at the WTO, and have been able to influentially debate and strategically push their particular advocacies on WTO member States, such as those on enforcing labour rights, protecting the right to


216 Article V of the Agreement states:
“1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.
2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.”


health and enabling access to essential medicines through compulsory licensing as an exception to TRIPS obligations.  

It is through this complex dynamic of formal institutions vested with broad global governance powers, generally centralized adjudication under a unique judicial function with constitutive and systemic impacts, and regular State and non-State actor involvement in trade policy and interpretation that one can appreciate the coordination of the trade-human rights dialectic within the WTO system. While one can easily critique the quality or success of this dialogue depending on one’s perspective on WTO history, there are at least entrenched and embedded formal and informal mechanisms for ensuring interpretive continuity and the repeated public auditing of the issue of States’ regulatory freedom to pursue trade-restrictive measures to fulfill human rights obligations or public interest concerns. As will be shown in the next section, the authoritative decision-making processes and actors in the international investment system nowhere approximate this dynamic.

2. Investment Law

Investment treaty negotiations, compliance monitoring, and interpretation of IIA standards are not, by any means, institutionally or formally centralized. To reiterate, States have, for the most part, historically concluded their own investment treaty programmes independently and usually without having to follow the route of multilateral negotiations.  

As discussed in Part II.A.2., IIA standards reflect

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220 There are only a few regional investment treaties negotiated as part of trade groupings. See among others, Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa), full text available at http://vi.unctad.org/files/wksp/ilawkp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf (last accessed 10 January 2013); North American Free Trade Agreement (NAFTA), Chapter 11
considerable textual diversity, albeit tending to contain common legal standards of protection and dispute settlement provisions that enable investors to directly sue host States for IIA breaches.221 Because each IIA must be taken according to its own terms, it is difficult to generalize that IIAs all possess identical institutional or structural features for monitoring IIA compliance, establishing recourse to dispute settlement procedures, or standardizing IIA interpretations of States’ spaces of regulatory freedom222 between arbitral tribunals in investor-State arbitration and the actual States Parties to the IIAs.

Unlike the coordinative processes between political and legal organs of the WTO, there are no formal institutions in international investment law that could centralize and coordinate foreign investment policy-making undertaken by all States, with the IIA interpretations emerging from a constantly growing corpus of investor-State arbitral jurisprudence. While investment arbitral tribunals usually observe a

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221 Stephan Schill has long demonstrated the emergence of a “multilateralized” system from the universe of bilateral treaties. See Stephan W. Schill, The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds, 2 Trade Law & Development 1 (2010).

sense of precedent, this is not formally required of them within the terms of their arbitral function or mandate. The consent of the disputing parties – a foreign investor and the host State – determines and shapes the jurisdiction of the investment arbitral tribunal. In the particular case of arbitration administered through the 1965 Convention on the Settlement of Investments Disputes Between States and Nationals of Other States (otherwise known as the ICSID Convention), the jurisdiction of the arbitral tribunal depends upon the fulfillment of the requirements in Article 25 of the ICSID Convention – written consent, either through direct agreement of the parties, national legislation of the host State that enables investor recourse to ICSID arbitration, or an IIA between the host State and the investor’s State of nationality that provides for consent to ICSID jurisdiction.

Unlike the extended litigation procedures in the WTO, there is no counterpart standing body (like the Dispute Settlement Body) that ensures the enforcement of ICSID arbitral awards. While the ICSID Convention makes it obligatory for all States Parties to the ICSID Convention recognize and enforce ICSID awards, there is no international body or organ that oversees the practical procedures for enforcement of ICSID awards – rather, as with the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards, it is the party seeking enforcement that must submit

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227 ICSID Convention, Article 54.
the ICSID award to the local court or authority charged with enforcement of ICSID awards in the State concerned. Excluding Argentina’s particular circumstances and its current policy of non-payment in around forty pending or concluded arbitrations, enforcement of ICSID awards has been reported to be fairly successful.

Ongoing developments, nevertheless, do show that States are increasingly trying to address the issue of their regulatory freedom to pursue public interest or human rights concerns through a variety of structural approaches in their IIAs, such as: 1) ad hoc joint decision mechanisms; 2) treaty-based institutional commissions; 3) inter-State consultative mechanisms; 4) incorporation of other subject matter-specific treaties (e.g., environmental, labor, human rights); and 5) inter-State bilateral appellate mechanisms to review arbitral awards under the IIA’s investor-State dispute settlement mechanism, or the outright omission of investor-State dispute settlement mechanisms under the IIA. The ad hoc joint decision mechanism is a relatively recent device in the newer generations of IIAs, and it may be utilized in the future to enable States to control the interpretation of an IIA so that States continue to retain sufficient policy flexibility to respond to domestic public interest and regulatory

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228 Note that initiating the investment arbitration through ICSID (as opposed to ad hoc arbitration under UNCITRAL arbitration rules), has been observed by some as not necessarily a predictive indicator of future enforcement success. See Freya Baetens, Enforcement of Arbitral Awards: ‘To ICSID or not to ICSID’ is NOT the Question, in TODD WEILER AND IAN LAIRD (EDS.), THE FUTURE OF ICSID, Juris Arbitration Series (Martinus Nijhoff Publishers, 2013).


objectives. As seen from Article 30(3) of the United States Model Bilateral Investment Treaty (BIT), States Parties to an IIA reserve the right to issue a “joint decision” declaring their interpretation of any provision of the IIA, which would be binding on any present or future arbitral tribunal constituted under the IIA’s dispute settlement mechanism. The States Parties may issue the joint decision interpreting an IIA standard (such as, for example, the fair and equitable treatment standard) at any stage, with or without reference to pending investor-State disputes, and with or without reference to contemporaneous interpretations by other international tribunals of the same IIA standard contained in other IIAs. Other joint decision mechanisms are present in Article 30(3) of the 2005 United States-Uruguay BIT, Article 30(3) of the 2008 United States-Rwanda BIT, Article 29(2) in relation to Article 18(2) of the 2007 India-Mexico BIT, Article X(6) of the 2009 Canada-Czech Republic

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233 Full text of the 2012 United States Model BIT available at [http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf](http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf) (last accessed 10 September 2012). Article 30(3) of the US Model BIT states: “A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.”

234 Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States/Uruguay BIT 2005), S Treaty Doc No. 109-9 (2006), Article 30(3): “A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”


236 Agreement between the United Mexican States and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (India/Mexico BIT 2007), IC-BT 742 (2007),
Article 27(3) of Chapter 11 (Investment) of the 2010 ASEAN-Australia-New Zealand Free Trade Agreement.

While these mechanisms openly permit States Parties to the IIA to agree on any interpretation of IIA provisions that would prevail over any arbitral tribunal, they problematically do not refer to international law as the Parties’ guiding principles when deciding on any future agreed interpretation of the IIA. Neither do the joint decision mechanisms provide for any internal control or guidance for the States Parties when their interpretation frontally collides with an arbitral tribunal’s legal interpretation of an IIA standard, issued by arbitrators in observance of their fundamental duties to maintain independence and impartiality. There has not yet been an occasion to resolve the potential jurisdictional tension between arbitral tribunals’ exercise of their competences to interpret and apply the IIA to concrete investor-State disputes, and how States Parties to the IIA might strategically wield the joint decision mechanism to minimize or avoid liability under the IIA by controlling the latter’s ultimate interpretation at any stage of a given investor-State dispute.

Treaty-based institutional commissions or inter-State consultative bodies, on

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238 2010 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, available at http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf (last accessed 10 September 2012), Article 27(3) of Chapter 11: “A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”
the other hand, pose less of a danger of undue interference with arbitral tribunals’ competences in specific pending investor-State disputes. While the IIA interpretations of treaty-based commissions are generally binding on arbitral tribunals, they are nevertheless issued presumably with a more institutional view of the interpretation’s consequences for the future implementation, oversight, supervision of the IIA. A treaty-based institutional commission also has the advantage of entrenching regular consultations and dialogue between the States Parties to the IIA, and thus may be said to have a more long-term view of the IIA’s implementation when it issues an interpretation, as opposed to an ad hoc joint decision mechanism which may be triggered purposely only to affect the outcome of specific pending investor-State disputes. One example of such a treaty-based institutional commission is the North American Free Trade Area (NAFTA) Free Trade Commission, which was set up as an institution composed of cabinet-level representatives from the three contracting States, with the specific powers to “supervise the implementation” of the treaty, “oversee its further elaboration”, and “resolve disputes that may arise regarding its interpretation or application”. The Free Trade Commission issued Notes of Interpretation in 2001, although admittedly it has since been criticized for the


240 Id. at footnote 239, Article 2001 (2)(a).

241 Id. at footnote 239, Article 2001 (2)(b).

242 Id. at footnote 239, Article 2001 (2)(c).

seeming *de facto* amendment of NAFTA treaty provisions as a result of the Notes.\(^{244}\)

Other IIAs that establish institutional commissions authorized to undertake IIA interpretation binding upon future arbitral tribunals include: Article 10.22(3) of the 2004 Dominican-Republic-Central America-United States Free Trade Agreement (DR-CAFTA),\(^{245}\) Article 40(3) of the 2006 Canada/Peru BIT,\(^{246}\) Article 40(2) of the 2009 Canada/Jordan BIT,\(^{247}\) and Article X(6) of the 2010 Canada/Slovakia BIT.\(^{248}\)

In contrast to ad hoc joint decision mechanisms and treaty-based institutional commissions, inter-State consultation mechanisms in an IIA have the least potential for disrupting arbitral independence and impartiality in handling investor-State disputes. They are not likely to affect the substantive content of an IIA, but rather, could serve as a structural device to facilitate continuing communications between States Parties to the IIA. This structural device could be particularly useful for States Parties to transparently articulate and make of record any ongoing regulatory and public interest concerns that could affect the future implementation of the IIA. Examples of these include Article 12 of the 1996 Greece/Chile BIT,\(^{249}\) Article 12 of

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\(^{245}\) Dominican Republic-Central America-United States Free Trade Agreement, Chapter 10: Investment (DR-CAFTA 2004), IC-MT 012 (2004), Article 10.22(3) (Governing Law).

\(^{246}\) Agreement between the Government of Canada and the Government of the Republic of Peru for the Promotion and Protection of Investments (Canada/Peru BIT 2006), IC-BT 014 (2006), Article 40(3).

\(^{247}\) Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (Canada/Jordan BIT 2009), IC-BT 1154 (2009), Article 40(2).

\(^{248}\) Agreement between the Government of Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada/Slovakia BIT 2010), IC-BT 1533 (2010), Article X(6).

the 1989 Netherlands/Ghana BIT,\footnote{Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (Netherlands/Ghana BIT 1989), IC-BT 938 (1989), Article 12.} Article VIII of the 1993 Spain/Philippines BIT,\footnote{Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of the Philippines (Spain/Philippines BIT 1993), 1842 U.N.T.S. 91, IC-BT 1369 (1993), Article VIII.} Article XI of the 1997 Denmark/Philippines BIT,\footnote{Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of the Philippines Regarding the Promotion and Reciprocal Protection of Investments (Denmark/Philippines BIT 1997), IC-BT 893 (1997), Article XI.} Article 43 of the 2009 ASEAN Comprehensive Investment Agreement,\footnote{2009 ASEAN Comprehensive Investment Agreement (ACIA), Article 43.} Article VIII of the 1995 Czech Republic/Philippines BIT,\footnote{Agreement between the Czech Republic and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Czech Republic/Philippines BIT 1995), IC-BT 592 (1995), Article VIII.} Article 8 of the 1985 Netherlands/Philippines BIT,\footnote{Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, Article 8.} Article VIII of the 1999 Philippines/Pakistan BIT,\footnote{Agreement between the Government of the Republic of the Philippines and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investment (Philippines/Pakistan BIT 1999), IC-BT 668 (1999), Article VIII.} Article 7 of the 1997 Germany/Philippines BIT,\footnote{Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Germany/Philippines BIT 1997), IC-BT 123 (1997), Article 7.} and Article 29(1) of the 2007 India/Mexico BIT.\footnote{Agreement between the United Mexican States and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (India/Mexico BIT 2007), IC-BT 742 (2007), Article 29(1).}

Alternatively, some IIAs include language that purposely cross-references other treaty obligations involving social protection, human rights, or public interest objectives. Article 18(2) of the 2002 Austria/Malta BIT, for example, specifically provides that the application of the European Convention on Human Rights “shall not
Clause 1 of the Protocol to the 1998 Japan/Pakistan BIT prohibits the interpretation of the treaty in a way that would derogate from intellectual property rights agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, “and other treaties concluded under the auspices of the World Intellectual Property Organization.” Article 5(3) of the 2004 Belgium-Luxembourg Economic Union/Serbia and Montenegro BIT re_affirms the States’ Parties “commitments under international environmental agreements”. While


261 Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Serbia and Montenegro BIT 2004), Article 5(3): “The Contracting Parties re_affirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their national legislation.” See identical or similar provisions in Article 5(3) of the Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Republic of Sudan, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Sudan BIT 2005); Article 5(3) of the Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Ethiopia BIT 2006); Article 13(3) of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Guatemala BIT 2005); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Great Socialist People’s Libyan Arab Jamahiriya, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Libyan Arab Jamahiriya BIT 2004); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Republic of Mauritius, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Mauritius BIT 2005); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Government of the Republic of Peru, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union/Peru BIT 2005).
Article 12 of the 2005 United States/Uruguay BIT holds that “it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws”.\textsuperscript{262} Articles 13(1) and 13(2) of the same treaty makes references to “internationally recognized labor rights”.\textsuperscript{263} Other IIAs tend to provide rules governing the application of other international agreements along with the IIA, usually calling for the application of the “more favorable” provision to the States Parties without indicating the criteria for determining the “favorability” of the applicable agreement. Examples of these types of references to the application of other treaties include: Article 11 of the 1993 Slovenia/Slovakia BIT,\textsuperscript{264} Article 10 of the 1994 Hungary/Bulgaria BIT,\textsuperscript{265} and Article 13(1) of the 1994 Czech Republic/United Arab Emirates BIT.\textsuperscript{266} Apart from these modes of referring to other

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\textsuperscript{263} Id. at footnote 255, Articles 13(1) and 13(2). Italics added.

\textsuperscript{264} Agreement on Reciprocal Investment Protection and Promotion between the Republic of Slovenia and the Slovak Republic (Slovenia/Slovakia BIT 1993), IC-BT 1522 (1993), Article 13(1): “When any matter is treated simultaneously by this agreement and some other international agreements of which the two parties hereof are signatories, or the matter is governed by the general international law, then the most favourable provisions shall apply to both parties hereof and their respective investors, on a case-by-case basis.”

\textsuperscript{265} Agreement between the Republic of Hungary and the Republic of Bulgaria on Mutual Promotion and Protection of Investments (Hungary/Bulgaria BIT 1994), Article 10: “Should national legislation of the Contracting Parties or present or future international agreements applicable between the Contracting Parties or other international agreements entered into by both Contracting Parties contain regulations, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.” See similar or identical provision in Article 11 of the Agreement between the Czech Republic and the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments (Czech Republic/Bulgaria BIT 1999).

\textsuperscript{266} Agreement between the Government of the Czech Republic and the Government of the United Arab Emirates for the Promotion and Protection of Investments (Czech Republic/United Arab Emirates BIT 1994), Article 13(1): “Where a matter is governed simultaneously both by this Agreement and by other international agreements to which both the Contracting States are parties or general principles of law commonly recognized by both Contracting States or domestic law of the host State, nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory of the other contracting State from taking advantage of whichever rules are the more favourable to their case.”
applicable treaties, current IIAs seldom contain language that explicitly integrates international human rights treaties, environmental, or labor agreements as part of subsisting obligations to be observed alongside IIA obligations.

Finally, it should be stressed that the ICSID arbitration system does not contain any full-blown appeals procedure to review arbitral awards’ factual and legal findings, instead providing for limited annulment procedures in Article 52 of the ICSID Convention.267 States Parties tend to rely on the “self-contained”268 dispute settlement system under the ICSID Convention, and thus rarely contemplate building any bilateral appellate mechanism into their IIAs. The 2005 United States/Uruguay BIT provided for the possibility of creating such a bilateral appellate mechanism,269 but none of the other IIAs concluded by the United States contain such a provision. Unlike this unusual practice, IIAs would usually state that an arbitral award “shall not be subject to any appeal or remedy other than those provided for in [the ICSID] Convention.”270 In this sense, carving out a bilateral appellate mechanism from the

267 ICSID COMMENTARY, pp. 890-1095.


269 Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States/Uruguay BIT 2005) Annex E (Possibility of a Bilateral Appellate Mechanism): “Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.”

270 See for example Agreement between Federal Republic of Germany and the Republic of Indonesia concerning the Encouragement and Reciprocal Protection of Investments (Germany/Indonesia BIT 2003) Article 10(3); Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union concerning the Reciprocal Promotion and Protection of Investments (Saudi Arabia/Belgium-Luxembourg Economic Union BIT 2001) Article 10(3)(b); Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments (Denmark/Zimbabwe BIT 1996), Article 9(3)(b).
investor-State dispute settlement mechanism under the IIA, well outside of the self-contained dispute settlement procedures in the ICSID system, problematically introduces more uncertainty over the future enforceability of arbitral awards issued under the IIA. Nonetheless, a State may also choose to ensure that it has full policy flexibility by altogether omitting any provision that establishes an investor-State dispute settlement mechanism in the IIA. This structural omission insulates the host State from investors’ direct recourse to investor-State arbitration, thereby diminishing the possibility that the host State could be held liable to pay compensation for IIA breaches against investors. Moreover, investors would be forced to seek legal remedies from local courts of the host State, or apply with their respective home States to exercise diplomatic protection over their claims. While removing the investor-State dispute settlement mechanism from an IIA would thus make it much easier for a host State to implement policy changes at its own wherewithal in the future, it would also correspondingly increase regulatory risks for foreign investors. This is best illustrated in the Australian Government’s April 2011 announcement that it would reject any investor-State dispute settlement mechanism from its IIAs.

As seen in the foregoing, the institutional limitations and diversity of IIA texts within the investment law system impedes coordinated law-making towards uniform interpretations of States’ regulatory freedom to pursue human rights and public


interest concerns, unlike in WTO law. Apart from being a matter of text and structure, I further submit that this is also an ontological issue involving competing ideologies unique to each treaty regime. In the following Part III, I present the ideological and thematic differences that have respectively arisen in WTO law and investment law on States’ regulatory freedoms to pursue (ordinarily) non-conforming or non-compliant measures within each regime to comply with human rights and public interest concerns. Using the “necessity” cases in GATT Article XX jurisprudence as an example, I show why the deeper ideological considerations of market access and trade policy adjustment in these particular cases additionally militate against simply transferring the “weighing and balancing” tests developed by the WTO panels and Appellate Body into the interpretation of “necessity” exceptions in investment treaties that have no traceable drafting history or linkage with GATT Article XX.

III. Two Visions of Regulatory Freedom to Achieve Public Policy and Human Rights Objectives

When a State asserts its regulatory freedom against international regulation or oversight, it is actually re-articulating Hans Kelsen’s classic problem on the sovereignty of the state: “the problem of the sovereignty of the national legal order in its relation to the international legal order.”273 The seeming Gordian knot between national law and international law cannot be disentangled simply by arguing that one is superior to the other. What was more critical, in Kelsen’s view, was to appreciate the “difference of two systems of reference. One of them is firmly connected with the legal order of one’s own state or national legal order; the other is firmly connected with the international legal order. Both systems are equally correct and equally

legitimate”, and ultimately, it would be a matter of policy or “political considerations” rather than hard positivist legal science to assign priorities between one and the other. The same reasoning may be analogized in characterizing the issue of States’ regulatory freedom asserted in WTO law vis-à-vis international investment law. While States commonly seek to assert policy space and regulatory freedom in both treaty regimes, the assertions are addressed to different questions and frames of reference. The contours of States’ regulatory freedom and policy spaces that are accepted and understood in WTO law, would thus very likely prove quite different from those sought in international investment law.

A. Clarifying Frames of Reference: WTO Law

Regulatory freedom in WTO law is addressed to issues of market access, non-discrimination, and the restoration of the economic equilibrium expected from trade liberalization commitments under the WTO agreements. WTO law purposely delineates between a State’s justifiable exercise of regulatory freedom, from protectionist measures designed to circumvent commitments under the WTO Agreements. These trade agreements purposely accept that a margin of domestic regulatory freedom must continue to be maintained both as a matter of economic efficiency (assuming asymmetric information on world markets, technologies, consumer preferences, and all other exogenous factors that cannot be anticipated in

274 Id. at footnote 273, at p. 639.

275 Id. at footnote 273, at 640.

276 Id. at footnote 53, Vranes, at 956-957: “Determining the GATT’s impact on national regulatory autonomy, in particular, requires a legal analysis of two ‘triangular’ relations’ in the GATT agreement: regarding regulatory measures in general, the principal confines of national regulatory autonomy are demarcated by the triangle which consists of Article XI (General Elimination of Quantitative Restrictions), Article III (National Treatment), and Article XX (General Exceptions). As respects taxation, these borderlines are drawn by the triangular relationship between Articles II (concerned with further border measures, namely customs duties, and all other duties and charges ‘imposed on or in connection with importation’), Article III (National Treatment) and Article XX (General Exceptions)."
designing the trade agreement), as well as to build in a “safety-valve” precaution against unforeseeable contingencies that could disrupt the anticipated or forecasted terms of trade. The criteria for determining the lawfulness of the State’s assertion of regulatory freedom, however, differs across the various provisions of the WTO covered agreements. The State’s justifiable exercise of regulatory freedom could be manifested in different ways. It may be asserted to permit the State to implement an ordinarily trade-distorting or trade-restrictive non-conforming measure, in order to promote and advance specific public or non-trade aims accepted within the sphere of the agreements – such as the exceptions enumerated in GATT Article XX or GATS Article XIV. Not every domestic regulatory measure of a State that might pose some obstacle to trade, however, will require legal justification: “Articles II, III, and XI…of the GATT restricts itself to establishing a non-discrimination regime for internal regulation and internal taxation, under which only de jure and de facto discriminatory measures need to be justified under pertinent GATT exceptions.”

Regulatory freedom may also be justifiably invoked to permit a State to recalibrate or reschedule performance of its trade liberalization commitments, when certain domestic constituencies or sectors cannot yet meet the terms of competition brought by opening up to foreign market access, or when the State’s level of economic development itself requires a longer timeframe to comply with trade liberalization commitments. Examples of this may be gleaned from the emergency safeguards measures in GATT Article XIX, the Agreement on Safeguards, Article 5

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279 Id. at footnote 53, Vranes, at 962.
of the Agreement on Agriculture, and Article 6 of the Agreement on Textiles and Clothing,\textsuperscript{280} as well as various provisions on special and differentiated treatment for developing countries.\textsuperscript{281} Finally, a State’s regulatory freedom may justify it to monopolize regulatory oversight (or in some cases, directly supply) certain public goods according to its own legislative or political agenda, and in keeping with its own economic programming and social protection objectives,\textsuperscript{282} such as GATS Article I:3(b) (which recognizes “services supplied in the exercise of governmental authority”\textsuperscript{283}) and Article 2.2 of the TBT Agreement (which acknowledges that technical regulations shall not be more trade-restrictive than necessary to fulfill certain “legitimate objectives”, such as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment).

The inherent flexibility and accommodation built into the WTO agreements makes it clear that States already contemplate inevitable and continuing tensions between domestic regulations and legislation with their duties to fulfill all trade

\textsuperscript{280} See GATT Article XIX (Emergency Action on Imports of Particular Products); Agreement on Safeguards (see Article 2 – a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.); Agreement on Agriculture, Article 5 (Special Safeguard Provisions); Agreement on Textiles and Clothing, Article 6 [see “transitional safeguards” in Article 6(1) ].

\textsuperscript{281} On special and differential treatment (SDT) provisions, see Article 27 of the Subsidies and Countervailing Measures (SCM) Agreement; Articles 65.2 and 65.4 of the TRIPS Agreement; Articles 12.4, 12.6, and 12.8 of the TBT Agreement; and Articles 10.1, 10.2, 10.4, and 14 of the SPS Agreement. See also proposals for transparency and specificity of SDT provisions and monitoring mechanisms for SDT provisions, Bernard Hoekman, Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment, World Bank, October 2004, available at http://www.yeag.yale.edu/focus/gta/operationalizing.pdf (last accessed 10 January 2013).


\textsuperscript{283} On the lack of clarity or definition in regard to this standard, see Robert Howse and Elisabeth Tuerk, The WTO negotiations on services: The regulatory state up for grabs, 9 Canada Watch 1-2 (September 2002).
obligations under the WTO. This is evidenced by the particular text of the WTO agreements that purposely preserve State regulatory freedom for certain identified public policy or public interest areas and human rights concerns, as well as in the organic structure and competences of its interpretive institutions (e.g. the Appellate Body and the dispute settlement panels under the DSU). Ensuring the continued flexibility of the WTO Agreements towards delineating lawful exercises of State regulatory freedom, from covert or openly protectionist measures, is an interpretive function deliberately entrusted to the panels and the Appellate Body under the DSU. The breadth of their interpretive authority well explains how GATT jurisprudence has correspondingly “evolved” to “encompass protective discrimination” or “hidden discrimination” that would “represent an innocuous disparate impact on trade, unrelated to protection”.284

The “weighing and balancing” methodology of the Appellate Body and the dispute settlement panels axiomatically reflects both the functional mandates of these tribunals, as well as the fundamental flexibility explicitly maintained in the Agreements to uphold State regulatory freedoms exercised for public policy, public interest, or human rights objectives. Because not every internal regulation or domestic measure of a State that could have some possible or forecasted impact on trade automatically rises to the level of an unjustified trade distortion or trade restriction, it is understandable that the Appellate Body and the dispute settlement panels devised certain legal tests to differentiate purely protectionist discriminatory measures, from those that had the cloak of WTO protection for State regulatory freedom. It is further comprehensible that these legal tests would leave considerable

margin of appreciation for the design of a measure vis-à-vis proposed reasonable alternative measures. This uniquely-textured standard of review of the Appellate Body and the dispute settlement panels is a particular “procedural instrument and, in addition to substantive treaty rules and other procedural techniques developed by panels and the Appellate Body, shapes the jurisdictional competence of the WTO adjudicating bodies vis-à-vis WTO members.”

The fact-intensive and context-specific “weighing and balancing” methodology of the Appellate Body and the dispute settlement panels also enables the management and allocation of the burden of proof, when either tribunal has to compare a challenged State measure with other possible (or less trade-distorting) alternatives. More to the point, this method is entirely appropriate to the internal design logic underlying the remedies system of the DSU, where directing the violating Member State to bring its measure “in conformity” with the Agreements is the “ultimate remedy”. The remedy prescribed under the DSU for a State’s domestic measures that distort the achievement of the ideal general economic equilibrium in fully liberalized international trade is to adjust that State’s policies

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285 MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (Oxford University Press, 2003), at p. 14 (“…the notion of standard of review defines the margin of appreciation which panels and the Appellate Body grant national authorities in enacting and enforcing their obligations under the WTO agreements. Panels respect this margin before they are prepared to declare a national measure inconsistent with WTO law…) [hereafter, “OESCH”].

286 OESCH at p. 14.

287 See MICHELLE T. GRANDO, EVIDENCE, PROOF, AND FACT-FINDING IN WTO DISPUTE SETTLEMENT (Oxford University Press, 2009), at pp. 213-214.


289 JACOB L. MOSAK, GENERAL EQUILIBRIUM THEORY IN INTERNATIONAL TRADE (Principia Press, Inc., 1944), at 180.
in a manner that would correct the trade distortion. To this end, the panel or the Appellate Body issues a recommendation “that the Member concerned bring the measure into conformity with that agreement”, and may additionally “suggest ways in which the Member concerned could implement the recommendations”.\textsuperscript{291} As stressed by the Panel in \textit{US – Section 301 Trade Act},\textsuperscript{292} however, there could be any number of ways, short of or apart from changing an offending domestic statute, to remove the trade-distorting effect of the inconsistency between the challenged State measure and the State’s WTO obligations.\textsuperscript{293} After adoption of the panel or Appellate Body report, the DSB then oversees compliance (or keeps “surveillance”\textsuperscript{294}) by the Member State concerned with its recommendation and ruling, either through withdrawal or modification of the challenged measure.\textsuperscript{295} It is only when a Member State fails to comply with the recommendation or ruling that the complaining State could either initiate negotiations to obtain compensation from the non-complying State,\textsuperscript{296} or impose countermeasures through discriminatory suspension of WTO concessions.\textsuperscript{297}

This is precisely why Appellate Body and dispute settlement panels could afford to interpret the GATT Article XX “necessity” provisions using a “least

\begin{itemize}
\item \textsuperscript{291} DSU Article 19.1.
\item \textsuperscript{293} Id. at footnote 292, paras. 7.101-7.104.
\item \textsuperscript{294} DSU Article 21.6.
\item \textsuperscript{295} Id. at footnote 288, at p. 159, citing \textit{Argentina – Hides and Leather (Article 21.3)}.
\item \textsuperscript{296} DSU Article 22.2. See footnote 288, at 198-200 (on the rare resort to compensation due to problems of its voluntariness, prospective application, form through trade concessions and not money, etc.)
\item \textsuperscript{297} Id. at footnote 288, at p. 193.
\end{itemize}
restrictive means” test. By the time the tribunal undertakes a detailed analysis of the asserted GATT Article XX justification, it has already reached a preliminary conclusion that the State’s challenged measure is already inconsistent or non-conforming with GATT obligations, and the respondent State’s challenged measure must thus be adjusted or reformed to bring it into GATT compliance. At that point, then, the respondent State assumes the burden of proving – after the complaining Member State shows that a “reasonably available” alternative exists – that the challenged measure was the “least restrictive means” employed to accomplish the public interest objective specified in the GATT Article XX justification.

Andrew Mitchell and Caroline Henckels have argued that the above method of reasoning “might well improve the decision making process of investment tribunals.” However, they also (rightly) concede that the WTO jurisprudence on “necessity” tests are laden with numerous ambiguities: 1) “the role of the assessment of the importance of the measure’s objective in WTO necessity analysis is still not entirely clear”; 2) “the ‘aptness’ standard in WTO law is still somewhat embryonic and is yet to be fully clarified”; 3) “[WTO analysis] requires detailed consideration of whether the respondent could actually adopt the proposed alternative, taking into account is resources and technical capacities”; 4) “[the] significant general difficulty with the WTO weighing and balancing test is its opacity. The test has been expressed in a number of different ways and indeed seems to change each time it is

298 Id. at footnotes 80 and 83.
299 Id. at footnote 4, Mitchell & Henckels, at p. 47.
300 Id. at footnote 4, Mitchell & Henckels, at p. 46.
301 Id. at footnote 4, Mitchell & Henckels, at p. 49.
302 Id. at footnote 4, Mitchell & Henckels, at p. 51.
articulated…”  

303 If this level of ambiguity and methodological inconsistency already subsists in the context of centralized, cyclical, and repeat adjudication by the WTO Appellate Body, one is left to wonder how the demonstrated dangers of this “weighing and balancing” proposal could somehow be avoided by dispersed and diversely-constituted investment arbitral tribunals with limited mandates to resolve particular one-off investment disputes. Andrew Mitchell and Caroline Henckels celebrate the “sophistication” of WTO jurisprudence, but omit to discuss how exactly an investment arbitral tribunal gets from point A (e.g. finding the GATT Article XX necessity test applicable despite vastly different treaty texts, as well as GATT Article XX’s evident differences with the customary norm of necessity under Article 25 of the Articles of State Responsibility), to point B (e.g. reaching a decision on the host State’s right to regulate well in accord with treaty interpretation rules and within the confines of the arbitral function). Opening the door to investment arbitral tribunals to this process of reasoning in its adjudication – in the absence of a comparable centralized adjudication system and a Member State-driven Dispute Settlement Body that ultimately determines, monitors, and oversees the adjustment of a respondent State’s challenged measure to bring it to GATT compliance – is inviting license for arbitral overreach. It will not necessarily yield just legal outcomes, as tribunals would have to engage in extensive *ex post* scientific and technical assessments of the legislative/administrative design and public policy objectives of the host State’s challenged measure, and then ascertain whether it was indeed “least restrictive” given other “reasonably available” alternatives. This is a ponderous slippery slope that only depends on the arbitrator’s self-restraint as a precarious limit.

303 Id. at footnote 4, Mitchell & Henckels, at p. 51. Italics added.
B. Checking Criteria for Comparator Applicability: Investment Law

Within the investment treaty regime, the State can assert its regulatory freedom to vindicate public interest or human rights concerns within the interpretation of the primary norm asserted to constitute the treaty breach (e.g. interpretation of the IIA standard of treatment alleged to have been violated such as fair and equitable treatment or indirect expropriation).\textsuperscript{304} It may also attempt to assert the issue to establish an independent first-order defense (e.g. “necessity” as a circumstance precluding wrongfulness under Article 25 of the Articles of State Responsibility, “non-precluded measures” under an IIA provision, or the notion of regulatory freedom as an independent customary norm of international law).\textsuperscript{305} It may also assert the issue contextually, as an alternative defense to equitably mitigate or substantially reduce the ultimate value of compensation that it must pay for incurring liability through the IIA breach.\textsuperscript{306} Regulatory freedom can be deployed as an argument for host States in various \textit{ratione materiae} within an investment dispute precisely because of the nature of investment treaty texts and the formulation of substantive standards therein, the remedy designed under the investor-State dispute

\begin{itemize}
\item \textsuperscript{304} See Marcela Klein Bronfman, \textit{Fair and Equitable Treatment: An Evolving Standard} pp. 609-680 in \textsc{Armin Von Bogdandy and Rüdiger Wolfrum (Eds.), Max Planck Yearbook of United Nations Law}, Vol. 10 (Brill, 2006); \textsc{Ronald Kläger}, ‘\textit{Fair and Equitable Treatment}’ in \textsc{International Investment Law} (Oxford University Press, 2011), pp. 158-159; \textsc{Organisation for Economic Cooperation and Development}, ‘\textit{Indirect Expropriation}’ and the ‘\textit{Right to Regulate}’ in \textsc{International Investment Law} (September 2004), available at \url{http://www.oecd.org/investment/internationalinvestmentagreements/33776546.pdf} (last accessed 10 January 2013).
\item \textsuperscript{305} Id. at footnote 35. \textit{See also} Anthony D’Amato, \textit{Human Rights as Part of Customary International Law: A Plea for Change of Paradigms}, 25 \textsc{Georgia Journal of International and Comparative Law} (Fall/Winter 1996), 47-98 at 33 (“…the only logically satisfying and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties. But people who are prisoners of the Contract Paradigm are disabled from taking such a position. I can only hope that with the passage of time this Paradigm, like the Sovereignty Paradigm, will gently erode…”).
\item \textsuperscript{306} Id. at footnote 133; Diane A. Desierto, \textit{ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises}, 44 \textsc{George Washington International Law Review} (2012), at 473 [hereafter, “Desierto GWILR”]; \textsc{Sergey}
\end{itemize}
settlement mechanism, and the mandate of an investment arbitral tribunal convened only upon the consent of the parties.

Unlike WTO law which looks to provide a system of legality and adjudication to restore the economic equilibrium and terms of trade anticipated from trade liberalization commitments by eliminating or reforming trade-distorting State measures, the investment treaty regime operates to provide a predictable legal environment that guarantees anticipated investment returns to the investor alongside the macroeconomic gains received by the host State, considering risks identified at the establishment of the investment, as well as building in other risk premia to capture other risks that could materialize beyond the contemplation of the host State and the investor. The mechanism for restoring disruptions to the economic equilibrium of foreign market access in WTO law is primarily adjustment or elimination of a State’s challenged measure; while the mechanism for restoring disruptions to the anticipated flow of investment returns given assumed risks is a “price” mechanism to remediate the loss of expected or agreed returns, e.g. compensation (either treaty-stipulated, as in the case of “prompt, adequate, and effective compensation” for expropriations, or as a form of reparations under customary norms of international

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308 For early doubts expressed concerning the supposed universality of the Hull formula, see Oscar Schachter, *Compensation for Expropriation (Editorial Comment)*, 78 American Journal of International Law 1 (January 1984); Frank G. Dawson and Burns H. Weston, ‘Prompt, Adequate, and Effective’: A Universal Standard of Compensation?, 30 Fordham Law Review 4 (1962) 727-758, at 757 (“Far from being a ‘rule’ of international law in the extensive deprivation context, the demand for ‘full’ or ‘prompt, adequate and effective’ compensation would appear to be little more than a preference assumed for bargaining purposes – an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy.”)
responsibility for breach of treaty provisions other than expropriation.  

Moreover, the dispute between States in a WTO proceeding arises from mutually and multilaterally agreed trade liberalization commitments that are jeopardized by unjustified State measures that alter the terms of competition and result in inefficient trade; while the dispute between an investor and a host State arises from a pre-existing contractual setting, the non-performance of certain obligations by the host State or the investor in their established relationship within the jurisdiction of the host State, and the ensuing unjustified change in the forecasted returns from investment. While not every breach of a foreign investment contract will amount to an actionable breach of an IIA standard of protection, acts of the host State towards the investment that extend beyond the zones of permissible treatment defined under an IIA are what give rise to the host State’s international responsibility to a third-party beneficiary of the IIA, e.g. the investor. The ultimate question for a State asserting its regulatory freedom to vindicate public interest or human rights concerns, is thus, whether its measures taken under the aegis of regulatory freedom exceed the risk parameters and anticipated returns as understood by both the host State and the investor at the time of the establishment of the contract.

309 Ripinsky & Williams, pp. 88-110.

310 Alan Sykes authoritatively proved that the private right of action for money damages in investment law is the appropriate efficient enforcement mechanism to signal that the State/capital importer will not engage in injurious practices against the capital exporter, while trade policy adjustment and the threat of withdrawal of trade concessions (authorized countermeasures) is the most efficient way to ensure compliance with government to government commitments in WTO law. See Alan O. Sykes, Public versus Private Enforcement of International Economic Law: Standing and Remedy, 34 Journal of Legal Studies (June 2005), reproduced in pp. 446-481 in Eric A. Posner (Ed.), Economics of Public International Law (Edward Elgar Publishing, 2010).

311 See Duke Energy Electroquil Partners and Electroquil SA v. Ecuador, ICSID Case No. ARB/04/19, Award of 12 August 2008, para. 345 (“Establishing a treaty breach is a different exercise from showing a contract breach. Subject to the particular question of the umbrella clause, in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power.”).
Most importantly, there is a markedly different *temporal* dimension to an investment tribunal’s analysis of legally-actionable State disruptions to the economic equilibrium protected by investment treaties that contrasts with that undertaken by the DSU, the Appellate Body and dispute settlement panels in WTO law, and this difference shapes the nature of remedial measures taken by adjudicatory bodies. WTO analysis of regulatory measures will tend to focus on its prospective effects or impacts on market access, and remedies will be prescribed on the basis of that prospective assessment. In WTO tribunals’ analysis of GATT Article XX exceptions, the relevant issue for determination is whether, at *Time 1*, a State’s challenged regulatory measure is inconsistent with a Member State’s GATT obligations (e.g. causes or results in an actionable trade-distortion or foreign market access restriction). If so, then, at *Time 1 + n*, the issue is whether the regulatory measure can be redesigned or calibrated towards achieving GATT consistency. At *Time 1 + n*, what matters for the DSU is to monitor the respondent State’s implementation of the challenged measure to ensure that the latter is brought to conform with GATT and thereby immediately stop the injurious effects of the trade-distortion. If the redesign or withdrawal of the trade-distorting measure cannot be accomplished, then compensation by way of trade concessions (as a “second-best” alternative to avoid future damage from the continued existence of the measure) is a temporary option.\(^\text{312}\)

In the event of a respondent State’s further recalcitrance or non-compliance, counter-measures may be authorized by the DSB in the form of authorizing WTO Members to suspend concessions or observance of other obligations towards the recalcitrant State.\(^\text{313}\)

\(^{312}\) BABU, at 193-202.

\(^{313}\) See Article 22.1 of the DSU.
In investment treaty arbitration, however, once the primary liability of a host State is established for breach of an IIA standard of protection, the only issues left for the tribunal to resolve are whether a customary norm of necessity lawfully suspended the duty to perform the contemplated IIA standard of protection, or whether there is a specific provision in the IIA itself that would operate to excuse the host State from the second-order consequences (e.g. the duty to compensate as a form of reparations) flowing from having incurred primary liability due to breach of the IIA. There is no room for an investment tribunal to calibrate a State’s regulatory measure ex post to restore a loss of market access or prevent further injury from loss of market access – the host State’s regulatory measure is simply taken as a given operative fact that must be assessed either in determining the existence of primary liability or the scope of second-order consequences arising after such primary liability is established. The analysis of a State’s regulatory measure is therefore retrospective, and remedies are likewise prescribed with a view to ameliorating a past injury (not anticipating future losses to the investment). At Time 1, an investment tribunal determines whether an investment treaty breach has occurred and a State then puts forward its defense of regulatory freedom. The tribunal then has to work backwards, and determine whether the risk parameters and anticipated returns at Time 1-n were justifiably or unlawfully distorted by the State’s challenged regulatory measure (e.g. an actionable injury that engages international responsibility exists). If it finds that there is indeed actionable injury triggering international responsibility, the investment tribunal would have to prescribe compensation that approximately remedies the loss incurred in Time 1-n. 314

314 Although there are cases involving other states such as Unglaube and Unglaube v. Costa Rica, Award, ICSID Case Nos. ARB/08/1 and ARB/09/20, 16 May 2012 (which involved an expropriation finding arising from regulatory actions taken by Costa Rica to create an ecological zone protecting the endangered leatherback sea turtles and their nesting sites), as well as Tecnicas Medioambientales Tecmed SA v. Mexico, Award, ICSID Case No. ARB (AF)/00/2, 29 May 2003 (also involving an
This is where the proposed application of the “least restrictive means” test in GATT Article XX “necessity” jurisprudence into investment arbitration turns on its head. Andrew Mitchell and Caroline Henckels extolled the “sophisticated” analytical value of setting up a comparison of a host State’s regulatory measures (as the supposed “least restrictive means”) with proposed “reasonable alternatives”, similar to what the Appellate Body and dispute settlement panels have done in “necessity tests” for GATT Article XX. But they did not show how this method of reasoning could be replicated by an investment tribunal that mainly has to decide the existence of an IIA or treaty breach, and the quantum of compensation to remedy loss from the breach. Comparing a State’s regulatory measure with other “reasonably available alternatives” makes sense for a WTO tribunal that has to decide on altering the contours of that measure to bring it to full conformity with GATT commitments and the Member States’ multilateral expectations of market access. But comparing a host State’s regulatory measure with a plethora of other macroeconomic acts that it could or should have taken at Time 1-n does nothing for the assessment of primary liability, except to introduce a heightened level of subjectivity in, and arbitrary scrutiny of, the


315 Id. at footnote 4, Mitchell & Henckels, pp. 56-57.
host State’s “treatment” of an investment and whether the same falls within the bounds of permissible treatment defined under the IIA. Given the universe of possible policy options and the propensity for hindsight or “black swan” reasoning often employed by economists, more than likely an arbitral tribunal would be swamped by the parties with competing analyses by their respective expert economists, leading to at least some preponderance that “reasonably available alternatives” exist. Rather than afford a feasible defense to a State (presumably the purpose behind the Mitchell and Henckels’ proposal), the likely outcome would be quite similar to how investment tribunals have dealt with the virtually impossible requirement in the customary norm of necessity in Article 25 of the Articles of State Responsibility that the measure taken was the “only way for the State to safeguard an essential interest against a grave and imminent peril”. Under the Mitchell and Henckels proposal where investment arbitral tribunals would have full sway to “weigh and balance” the host State’s regulatory measure and proposed alternatives at hindsight (and even with the fiction of “margin of appreciation”), it would be more likely that a host State would be unable to bear the additional evidentiary burden of showing that other alternatives to the challenged regulatory measures were not realistically available at Time 1–n. Neither is the evidentiary burden clearly explicated for the claimant investor that posits “other reasonable alternatives”

316 Metaphor originated by Nassim Nicholas Taleb to describe a surprising (and unexpected) event found to have had massive effects, which is subsequently rationalized (often wrongly or inappropriately) with the benefit of hindsight. See NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE FRAGILITY (Random House Publishing, 2nd edition, 2010). Paul Krugman has also acknowledged the difficulty of formally modeling international economic crises. See Paul Krugman, The International Aspects of Financial Crises, pp. 85-134 in MARTIN FELDSTEIN (Ed.), THE RISK OF ECONOMIC CRISIS (University of Chicago Press, 1991).

317 On the evidentiary hurdles to meet the “only way” requirement in Article 25 of the Articles of State Responsibility, see Enron Corporation and Ponderosa Assets LP v. Argentina, ICSID Case No. ARB/01/3, Decision on Application for Annulment, 30 July 2010, paras. 368-377; EDF International SA and ors v. Argentina, ICSID Case No. ARB/03/23, 11 June 2012, paras. 1171-1172.
(whether regulatory measures or macroeconomic policies) that the host State could or should have taken to avoid injury to the investment. Much of this line of analysis sweepingly induces an arbitral tribunal to engage in more speculative and hindsight armchair reasoning on host States’ macroeconomic policies and the design of government regulations that could have avoided or diminished injury or loss to the value of the investment, in order to resolve the questions of the existence of an IIA breach, and/or the level of compensation required to redress such breach. This analysis is suited to WTO tribunals that have to issue recommendations to calibrate, withdraw, or adjust a respondent State’s regulatory measure to prevent further trade distortions or unjustifiable market access restrictions against other WTO Member States, but it makes no sense whatsoever for investment tribunals tasked with providing compensatory redress for IIA breaches.

Interestingly, the recent UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) acknowledges the complexities of designing language for public policy exceptions in IIAs, and one of its suggested options is patterned after GATT Article XX language in IIA treaties. This has already been concretely followed in recent treaty practice, specifically the 2009 ASEAN Comprehensive Investment Agreement (ACIA), Article 17 (General Exceptions) which is a replica of GATT Article XX/GATS Article XIV exceptions. Although this provision has not yet been tested by an arbitral tribunal, several interpretive difficulties could already be anticipated for an investment arbitral tribunal tasked to apply this provision. Would the tribunal defer to a host State’s (self-judged) invocation of the public policy objective specified in the enumerated exceptions, and

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if so, to what extent will this deference affect its standard of review for the exception-based defense? If the tribunal will not defer to the self-judged assessment of a host State, what *onus probandi* would it assign to a host State invoking, for example a “public morals” exception? If the investment tribunal were to apply the “least restrictive means” test to establish the necessity of a host State measure, would it mean that it would first make a preliminary finding that the host State measure breaches the IIA, and afterwards require the host State to prove its exception as opposed to some kind of “reasonably available alternative” under the “weighing and balancing approach”? (As already discussed, this method of reasoning contains its own set of evidentiary complications.) Finally and most importantly, what effect on a State’s international responsibility is intended by the phrase “*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures*”\(^{319}\) – does it result in the inexistence of any primary breach due to the wholesale inapplicability of a treaty (e.g. an effect of treaty inapplicability that is not borne out by WTO jurisprudence on GATT Article XX, but which is unique to the *Continental Casualty* interpretation\(^{320}\)), or does it affect the second-order consequences of primary breach (e.g. mitigation or reduced damages)? While one can understand the function of GATT Article XX as a State’s residual defense seeking to permit the continuity of the measure notwithstanding its possibly trade-distorting or market access-restricting impact (and notably *after* the WTO tribunal already finds that measure to be non-compliant or inconsistent with GATT), one is not too sure about what treaty effects will be generated from a GATT Article XX-type provision in an IIA that says utterly nothing about preventing a treaty breach from arising, preventing a treaty from being applicable, or preventing international

\(^{319}\) 2009 ASEAN Comprehensive Investment Agreement, Article 17(1). Italics added.

\(^{320}\) Id. at footnote 16, Desierto UPennJIL, at pp. 882-893.
responsibility from attaching. The only effect that could be literally read from the phrase “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures” is that the Agreement will literally NOT be construed or interpreted to prevent a Member State from adopting or enforcing such measures. But at Time 1, when an arbitral tribunal has to deal with a host State that has already enforced the regulatory measure that causes economic injury to an investment or a breach of an IIA standard of protection in Time 1-n, what is still there to prevent? How would a “weighing and balancing” approach then serve any realistic purpose to afford host States a genuine defense against a primary breach when the evidentiary burden is increased? Clearly, there is a need to scrutinize the actual functional criteria for making investment tribunals use WTO law as a relevant comparator in investment law.

The literature on the WTO law qua investment law proposition has not yet reached a point where the premises, policies, and methods of comparisons between both regimes have been fully and transparently disclosed.321 Rather, the proposition has often been argued from the standpoint of either supposedly shared normative or genealogies or teleologies between treaty texts (e.g. “necessity”, “most favoured nation treatment”, “national treatment”),322 glowing descriptions of the settled interpretive processes within WTO adjudication,323 or by arguing the negative consequences of keeping both WTO law and investment treaty regimes “separate”.324

321 Id. at footnote 4.
323 Id. at footnote 4, Mitchell & Henckels.
324 Id. at footnote 26, Broude 2012.
But each of these approaches have been inadequate to justify the *function* of the comparison or transposition of WTO law into investment law interpretation. First, while shared normative genealogies, teleologies, or common *travaux* might prove true in some IIAs (especially for those negotiated within or alongside free trade agreements\(^{325}\)), there has not been any empirical validation of the latter for the entire constellation of IIAs – at least enough to say that the WTO law *qua* investment law proposition can indeed be generalized to all IIAs. Second, celebrating WTO interpretive methods, as previously shown, does not address the crucial question of how to validly apply or transplant them into investment treaty interpretation – whether it would be through a “broad” (albeit questionable) construction of the investment arbitral mandate or a demonstrable textual or contextual nexus with the IIA standard within the system of unitary interpretation in VCLT Article 31. Finally, listing some negative consequences that could arise from keeping both treaty regimes separate, without discussing how these consequences overpower any perceived or actual gains from distinct treaty regime design and institutions, unfortunately misses out on the rest of the analysis necessary in an actual cost-benefit equation.\(^{326}\) If the WTO law *qua* investment law proposition is to be accepted as the public policy tool for resolving contended “legitimacy” issues on the right to regulate in international investment law, clearly we need more well-developed criteria before we seek to turn our investment arbitrators into full-scale comparativists.

A basic method in comparative law that might prove to be of some use in

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\(^{325}\) See Diane A. Desierto, *For Greater Certainty*: Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements, 8 Transnational Dispute Management 5 (December 2011).

making this determination, although not without its detractors, is the “functional method” in comparative law. The basic principle of all comparative law, according to this method, is “functionality” – all other rules which determine from the choice of laws to be compared, the scope of the undertaking, and the creation of the system of comparison are to be determined according to functional terms – “[functionality] rests on what every comparatist learns… that the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results.” Some of the basic premises of the functional method are the following: 1) there is a relationship between concept and function, such that “[r]ules, which have functions or purposes, are framed in terms of concepts…unless concepts are themselves defined in terms of the purposes that the rules serve, they become ‘doctrinal abstractions’ that are obstacles to understanding the rules”, 2) the meaning of “function” or “purpose” is “the end served by a rule…an end which accounts for its structure and its contribution to the behavior of a larger structure of which it is a part: the legal system…”, and 3) even when there are “deeper universal values that all societies share…these values are expressed in different ways. It does not follow that the legal systems of all societies…face the same problems. Problems that have been solved by jurists in some societies…have

327 Ralf Michaels, The Functional Method of Comparative Law, pp. 339-382 in Mathias Reimann and Reinhard Zimmermann (Eds.), The Oxford Handbook of Comparative Law (2007). It has also been described as a “chimera, in both the theory and practice of comparative law.” See Peter de Cruz, Comparative Law in a Changing World (Cavendish Publishing, 1999), at 339 [hereafter, “Cruz”].


329 Id. at footnote 327, Cruz, pp. 230-231, citing Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung (1977).

330 Id. at footnote 328, Gordley, at p. 110.

331 Id. at footnote 328, Gordley, at p. 114.
been solved elsewhere in other ways…”. Applying this method of functionality, especially in this Part III, it should be evident that the spaces for commonality of treaty functions adjudicatory functions, remedial functions, and institutional functions, for WTO law and investment law, respectively, appear much more diminished than others might intuitively assume. As discussed in Part II there are historical as well as policy reasons for the emergence of these distinct treaty systems, and in particular, the remedial measures within these systems.

Thus far, we have examined the WTO law qua investment law provision from a somewhat microscopic lens of treaties, constitutive decision-making processes, institutional structures and interpretive communities, and the subject-matter addressees of a State’s regulatory freedom in each regime. The following Part IV attempts a brief critical historical analysis to explore the state of human rights compliance facilitated by, or accomplished under the auspices of, the WTO system, (including reform areas that remain in progress), to further examine the plausibility of using WTO law as the “public policy toolbox” for the international investment treaty regime.

IV. Human Rights as a Work in Progress: the Uncertain Success of WTO Law’s Post-Neoliberal Public Policy Paradigm

A. Viewing Human rights in the WTO as a sociological project

It would be well-nigh impossible for this section to capture the complete record of human rights compliance facilitated by the WTO (or otherwise) in nearly

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332 Id. at footnote 328, Gordley, at p. 118.
thirty years of its institutional existence. Indeed, the narratives of engagement of human rights in trade (and vice-versa) have been anything but linear, to the point that one can only characterize the WTO as having achieved an uncertain success in the area of facilitating human rights compliance, and ensuring that trade policies and actions of Member States do not inhibit, prevent, or impede fulfillment of their human rights obligations. Andrew Lang has observed that “[d]uring any particular historical period, both the trade and human rights regimes represent a contingent compromise between the partisans of each perspective – a compromise which evolves over time as their relative influence changes…each regime is composed of complex and layered social phenomena…classical liberalism represents only one strand in the complex and contested ideological foundations of the trade regime.” He finds that the “normative orientation” of the WTO system is significantly influenced by “collective purposes” and “shared ideologies which animate that regime at any particular point in time”, so much so that “major re-orientations of the trade regime may not be possible without sustained contestation and destabilization of dominant ideas relating to the objectives of the regime, the purposes it serves, and the causal pathways by which it contributes to the achievement of those purposes.” The rise of, and resistance to, neoliberal thought in each respective regime accompanied the legal relationship between trade and human rights – in ways that reflect the legal tensions as “interventions into the political struggles internal to each regime.”

333 Jeff Waincymer valuably discusses the significance of interdisciplinary approaches from law, economics, political science, and philosophy to fully assess the status and prospects of the trade and human rights debate in the WTO. See Jeff Waincymer, The trade and human rights debate: Introduction to an interdisciplinary analysis, pp. 1-38 in JOSEPH, KINLEY, & WAINCYMER 2009.

334 LANG, at 57, 58.

335 LANG, at 58.

336 LANG, at 59.
There is much that persuades in the above sociological lens for viewing the (at times institutionally-conflicting\textsuperscript{337}) dialectic between WTO law and human rights. Certainly the body of analytical studies and experts’ reports from the United Nations Office of the High Commissioner for Human Rights (OHCHR) that explores the trade-human rights linkage and implications over the past decade often articulated many concrete political and social protection concerns, concordantly with its call for WTO Member States to design comprehensive compliance of their international human obligations alongside trade liberalization commitments.\textsuperscript{338} The bulk of these reports and studies define the key pillars of the “human rights-based approach to trade”, summarized by the OHCHR as: 1) “respecting the principle of non-discrimination” by ensuring that individuals and groups are protected against overt discrimination in multilateral trade processes, as well as by ensuring that they are not excluded from deliberations or policy-making in trade; 2) “promoting popular participation” in the development of trade rules and policies through democratic consultative processes not just reserved for States but also for individual and group


constituencies impacted by trade; 3) using “human rights impact assessments” to monitor the potential and real impacts of trade rules and policies on the enjoyment of human rights by individuals and groups; 4) “promoting accountability” in trade liberalization processes for individuals to have recourse, particularly on the justiciability of economic, social, and cultural rights; 5) “ensuring the promotion of corporate social responsibility initiatives” for standard practices of traders and investors; and 6) “encouraging international cooperation and assistance” that enables poorer countries to adjust to the trade process and benefit from its reform.339

Depending on perspective, one can either view WTO as having the ability to facilitate compliance with international human rights treaties,340 and conversely, as ineffective in curtailing human rights violations of WTO Member States.341 As previously discussed, Susan Ariel Aaronson noted in 2007 that there was already significant progress in the political and policy “seepage” of human rights (and a human rights consciousness) into the WTO decisions of the political organs as well as the legal/adjudicatory system under the DSU.342 The current deadlock on substantive human rights, development, and public policy issues in the Doha Round might be


342 Id. at footnote 200.
enough for some to indict the WTO system for its paralysis or vulnerabilities to multilateral stalemate when it comes to addressing deeper issues of income inequalities, deficits in meaningful social participation and opportunities for enabling human rights capabilities.\(^{343}\) At best, this lends a picture of the WTO system as a work in progress on the trade and human rights debate, where its policies and governance framework assuredly remains subject of reform.\(^{344}\) What these also ultimately convey, for purposes of scrutinizing the WTO law \textit{qua} investment law proposition, is that the WTO gridlock on these issues, borne out of its own institutional, ideological, and political experiences, neither inspire their emulation or replication in the dispersed, decentralized, and diffuse investment treaty regime.

\[\text{B. Human Rights Impact Assessments and Interdisciplinarity}\]

What is of more interest (and in my view also a more realistically feasible common gateway between WTO law and investment law to effectuate human rights compliance in international investment law),\(^{345}\) for purposes of getting a more substantial and empirically-based perspective of WTO impacts on human rights compliance for future operational design of State policies and regulations, is the


visible trend towards mainstreaming the use of human rights impact assessments (HRIAs) of trade-related policies. While there is a growing body of scholarly literature that accepts the use of HRIAs, elaborates on their possible design, and explains methods for conducting them in relation to trade and development policies, there is little as yet published that reports actual operational findings from HRIAs of WTO policies. But there are some incipient examples of HRIA analysis already filtering somewhat into the analysis of trade agreements, such as the 2011 issuance of the UN Special Rapporteur on the Right to Food, Olivier de Schutter, prescribing Guiding Principles on human rights impact assessments of trade and investment agreements; Canada’s first official HRIA report in May 2012 on the impact of the Free Trade Agreement between Canada and the Republic of Colombia; and the WTO’s own public policy efforts in 2009 to conceptualize and


implement a system of HRIAs for trade agreements.\textsuperscript{351} James Harrison and Alessa Goller have pointed out problems of methodology, measurement, information reliability and data verifiability that afflict many HRIA proposals.\textsuperscript{352} In a 2012 EJIL article, Philip Alston and Colin Gillespie proposed adapting open-source technologies to diversify and cross-verify the information gathering processes on human rights compliance.\textsuperscript{353}

There are likewise counterpart developments within the UN system for the establishment of statistical and empirical databases to track State compliance with human rights, specifically including economic, social, and cultural rights. In 2006, the UN Office of the High Commissioner for Human Rights prepared a Report (“Indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework”) in response to the requests of chairpersons of the various human rights treaty bodies.\textsuperscript{354} The High Commissioner stressed the particular utility of setting up quantitative indicators for the task of treaty monitoring:

“…in the context of the ongoing reform of the treaty bodies in general, and the Reporting procedure in particular, it has been argued that the use of appropriate quantitative indicators for assessing the implementation of human rights – in what is essentially a qualitative and quasi-judicial exercise – could contribute to streamlining the process, enhance its transparency, make it more effective, reduce the Reporting burden and above all improve follow-up recommendations and concluding


observations, both at the committee, as well as the country, levels.”

The High Commissioner distinguished human rights “indicators” (e.g. “specific information on the state of an event, activity, or an outcome that can be related to human rights norms and standards, that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights”), from “benchmarks” (e.g. “indicators that are constrained by normative or empirical considerations to have a predetermined value”), which the Committee on Economic, Social and Cultural Rights particularly favors. Indicators may be quantitative or qualitative. In defining the conceptual framework for human rights indicators, the High Commissioner drew attention to several methodological matters:

“First, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees. Secondly, it is necessary to reflect cross-cutting human rights norms or principles (such as non-discrimination and equality, indivisibility, accountability, participation and empowerment) in the choice of indicators. Thirdly, the primary focus of human rights assessment (and its value-added) is in measuring the effort that the duty-holder makes in meeting his/her obligations – irrespective of whether it is directed at promoting a right or protecting it. At the same time, it is essential to get a measure of the ‘intent or acceptance of’ human rights standards by the State party, as well as the consolidation of its efforts, as reflected in appropriate ‘outcome’ indicators. While such a focus recognizes an implicit linkage between the intent of a State party, its efforts in meeting those commitments and the consolidated outcomes of those efforts, the linkage may not always translate into a direct causal relationship between indicators for the said three stages in the implementation of a human right. This is because human rights are indivisible and interdependent such that

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355 Id. at footnote 354, at para. 3.
356 Id. at footnote 354, para. 7.
357 Id. at footnote 354, para. 12.
358 Id. at footnote 354, para. 8.
outcomes and the efforts behind the outcomes associated with the realization of one right may, in fact, depend on the promotion and protection of other rights. such a focus in measuring the implementation of human rights supports a common approach to assessing and monitoring civil and political rights, as well as economic, social and cultural rights the adopted framework should be able to reflect the obligation of the duty-holder to respect, protect, and fulfill human rights.”

The High Commissioner then laid out a sequence for developing the conceptual framework defining indicators for substantive human rights: 1) identifying the “attributes” of a right (“limited number of characteristic attributes that facilitate the identification of appropriate indicators for monitoring the implementation of the right”); 2) defining the configuration of structural indicators (e.g. “the ratification/adoptive of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned”); process indicators (e.g. “relat[ing] State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights...State policy instruments refer to all such measures including public programmes and specific interventions that a State is willing to take in order to give effect to its intent/acceptance of human rights standards to attain outcomes identified with the realization of a given human right”), and outcome indicators (e.g. “attainments, individual and collective, that reflect the status of realization of human rights in a given context...often a slow-moving indicator, less sensitive to capturing momentary changes than a process indicator”); 3) developing

359 Id. at footnote 354, para. 13. Italics in the original.

360 Id. at footnote 354, at para. 14.

361 Id. at footnote 354, para. 17.

362 Id. at footnote 354, para. 18.

363 Id. at footnote 354, para. 19.
sources and data-generating mechanisms (e.g. socio-economic and administrative statistics, events-based data on human rights violations);\textsuperscript{364} and 4) imposing criteria for the selection of quantitative indicators (e.g. “relevant, valid and reliable”, “simple, timely and few in number”, “based on objective information and data-generating mechanisms”, “suitable for temporal and spatial comparison and following relevant international statistical standards”, and “amenable to disaggregation in terms of sex, age and other vulnerable or marginalized population segments”).\textsuperscript{365}

Using the \textit{structure-process-outcome} indicators framework, the High Commissioner has since drawn up lists of illustrative indicators on civil and political rights as well as economic, social and cultural rights, and subjected such indicators to a comprehensive validation process before international experts, members of global academia, non-governmental organizations, international organizations, and national level policy makers.\textsuperscript{366} Among the ICESCR rights covered in the list of illustrative indicators are the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate food, the right to adequate housing, the right to education, the right to social security, the right to work, and the right to non-discrimination and equality.\textsuperscript{367} The High Commissioner had also previously issued a Handbook for National Human Rights Institutions on the implementation of the

\textsuperscript{364} Id. at footnote 354, paras. 24 and 25.

\textsuperscript{365} Id. at footnote 354, para. 26.


\textsuperscript{367} Id. at footnote 366 (see Annexes to the Article).
Notably, in 2012, the Office of the UN High Commissioner for Human Rights issued its consolidated volume, “Human Rights Indicators: A Guide to Measurement and Implementation”, which further developed the structure-process-outcome indicators conceptual framework for determining State compliance with international human rights treaties, particularly the ICESCR.

While the nascent state of the HRIAs thus far has not lived up to the promise of their contribution to the assessment and strategic design of WTO reforms, this is at least one promising area that could yield a broader and more reliable base of information for characterizing the success or failure of the WTO in facilitating human rights compliance by its Member States. It would also aid towards enabling more human rights-compliant and consistent trade and investment policy-making by States in the future.

V. Mediating the ICESCR: A Heuristic for Functional Decision-Making in WTO Law and Investment Law

The preceding Parts II, III, and IV laid out my contextual policy arguments against the automatic reception of WTO law into investment law to address the latter’s public policy quandaries. In the following subsections, I contrast some differences in the proposed use of the International Covenant on Economic, Social,

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and Cultural Rights (ICESCR) to justify State regulatory freedoms in WTO law and investment law. Perhaps more than any other human rights treaty, ICESCR obligations stand to shape and directly affect the content and substance of a State’s social protection agenda. States are more than likely to find that public policy objectives for which they seek to maintain regulatory freedom in either WTO law or investment law, are already mirrored within ICESCR obligations. To give a concrete example of the limits to the WTO law qua investment law proposition (or the supposed usefulness of WTO law to public policy issues in investment law), I point out how there have been material differences in the mediation of the ICESCR in WTO law (which reflects much of the same public policy objectives asserted to justify a State’s regulatory freedom), as opposed to international investment law. These differences will endure, I submit, so long as the design of treaty texts, and the composition of the epistemic and interpretive communities I described in Part II, remain divergent between the WTO treaty regime and the investment treaty regime.

A. ICESCR and WTO Law

The record and practice of WTO law has shown that, despite the interpretive openness of WTO treaty texts to public policy objectives and the broad judicial function wielded by the Appellate Body and the dispute settlement panels, the ICESCR has not figured significantly within the nearly thirty-year acquis of WTO law, jurisprudence, although a few Member States (notably, Mauritius and Brazil) have specifically invoked the ICESCR to justify State regulatory freedom to protect non-trade concerns. I suggest that this is less about the actual salience of the

ICESCR to a WTO litigation, than it is a trend exhibiting a more a conservative tendency on the part of States against putting the ICESCR into practice to lend substantive content to public policies already textually-referred to in WTO treaty provisions, such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2. This view accords with Holger Hestermeyer’s recent findings on the possible uses of the ICESCR within the WTO political organs and the DSU.\textsuperscript{371} Acknowledging that the overwhelming majority of WTO Member States are also parties to the ICESCR, in his investigation of WTO law and practice, Hestermeyer found that: 1) the WTO itself is not bound by the ICESCR even if its Member States are individually bound; 2) the ICESCR’s role in WTO dispute settlement is limited since it cannot be directly enforced or applied by the panels or the Appellate Body given their jurisdictional competences under the DSU, but that the ICESCR may be used to interpret WTO treaty norms in accordance with “customary rules of interpretation of public law” permitted under Article 3.2 of the DSU; 3) in practice, States have not been lodging arguments based on the ICESCR when they avail of the extended litigation process under the DSU, preferring instead to specify WTO treaty norms that already refer to public policy objectives; and 4) except for a few instances involving labor rights and/or health rights, the political organs of the WTO have rarely referred to economic, social and cultural rights in their decisions.\textsuperscript{372}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{372} Id. at footnote 371. On the salience of the ICESCR to the WTO, see however Fons Coomans, Application of the International Covenant on Economic, Social and Cultural Rights in the Framework
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Certainly, such observations regarding WTO law and jurisprudential practices do not yet confirm the possibilities for using the ICESCR in WTO practices that Robert Howse and Ruti Teitel have hypothesized, finding that “the [WTO] treaties themselves have been structured in many ways so as to ensure that the means adopted in the WTO to achieve economic goals are not inconsistent with the human purposes and values intrinsic to the norms in the ICESCR.” 373 Compatibility between the Preamble to the WTO Agreement and Article 2(1) of the ICESCR,374 for example, teleologically support the human security notion embedded in the ICESCR, which creates a “normative floor for the interpretation and application of the WTO treaties...”375 While they concede hurdles to the interpretation of WTO treaty provisions that specifically build in policy flexibilities (e.g. GATT Article XX), Howse and Teitel carefully demonstrate that States’ regulatory freedoms in WTO law to vindicate ICESCR obligations could be harnessed through programmatic adjustments of trade policies in ways that functionally operationalize ICESCR rights to work, health, and food.376

While one can readily concur with Howse and Teitel that the ICESCR could usefully furnish substantive guidance to WTO dispute settlement panels and the Appellate Body regarding the “normative floor” or interpretive baseline to give

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374 Id. at footnote 339, at 42-43.

375 Id. at footnote 339, at 47.

376 Id. at footnote 339, pp. 50-68.
meaning to economic, social, and cultural rights to “health”, “labor”, environmental protection, and/or other public policies already textually-referenced in WTO treaty provisions such as GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2, it is indeed curious, as Holgermeyer found in his survey, that States have not been marshalling ICESCR-based arguments in the WTO dispute settlement process, and that likewise, tribunals have not been independently referring to the ICESCR for purposes of treaty interpretation. It is quite possible that this is a phenomenon that could have arisen due to early difficulties in framing the ICESCR-based justification within the context of litigated issues in a trade dispute. Over a decade ago, Jose Alvarez pointed out several difficulties in setting up the ICESCR-driven interpretation of trade treaty norms within the framework of a WTO litigation as the authoritative method of interpretation: 377 1) the ICESCR is not a treaty that subordinates WTO treaties, in the sense of normative hierarchy provided for in Article 103 of the UN Charter; 378 2) the ICESCR does not speak to the issue of NGO participation within the WTO (which, at that time, was the immediate policy debate); 379 3) lex specialis rules militate against automatically applying human rights norms to avail of treaty-based remedies; 380 and 4) the lack of precision of ICESCR obligations that make their application in adjudicatory settings difficult. 381 To the extent that States have preferred to hew more closely to WTO treaty language and the body of DSU jurisprudence interpreting such language, the present dearth of ICESCR references is quite understandable.

378 Id. at footnote 377, at pp. 6-7.
379 Id. at footnote 377, at p. 8.
380 Id. at footnote 377, at pp. 9-10.
381 Id. at footnote 377, at pp. 11-12.
However, it is also possible that States have had some difficulty in marshalling ICESCR-based arguments in trade disputes over the last thirty years, precisely because the substantive content of ICESCR rights was still in the process of development by the Committee on Economic, Social, and Cultural Rights (hereafter, the “Committee”) at the same time. Unlike other human rights treaty monitoring bodies in the UN system, the Committee is a creation of the Economic and Social Council – the latter being the actual body specifically designated under the ICESCR to conduct treaty monitoring, manage the State reporting process, and issue recommendations to the General Assembly on measures taken and progress made to achieve compliance with the ICESCR. The Committee has thus far issued only twenty-one General Comments between 1989 to 2009, with those most pertinent to the interpretation of public policy objectives in WTO treaties (such as the right to take part in cultural life, the right to work, non-discrimination and equal rights to enjoy all economic, social and cultural rights, right to water, right to highest attainable standard of health) issued only within the last decade. Neither has it been able to develop its own “jurisprudence” through an inter-State or individual communications or complaints mechanism. The Optional Protocol to the ICESCR, which creates that precise mechanism for individuals or groups asserting violations of

384 Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009).
385 Committee on Economic, Social and Cultural Rights, General Comment No. 18 (2005).
386 Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009).
387 Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005).
388 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002).
their ICESCR rights, was only concluded by General Assembly resolution in 2008, and entered into force only on 5 February 2013 after having achieved the tenth ratification (from Uruguay) necessary for the Optional Protocol to enter into force. One thus cannot rule out the future possibility of State recourse to the ICESCR, especially as the Committee takes on a broader function in providing authoritative guidance, not just in the State reportage system but now adjudicating issues that apply the ICESCR in the individual communications procedure. In any event, using the ICESCR in multiple avenues in WTO law is a matter of framing the former properly into the latter, from interpretively testing the permeable public policy language in the WTO treaties and agreements, to plumbing the numerous sources of WTO law which include not just WTO treaties but also acts of WTO organs (including waivers and decisions of specialized WTO committees, Ministerial Conference or General Council interpretations of WTO agreements, and DSB adoptions of Appellate Body and panel reports) as well as the canonical sources of general international law. As rightly observed in a report to the Economic and Social Council, “[t]he WTO Agreements do not say anything about the type of policies which a government may wish to implement to bring about the fulfillment of human rights…”

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391 See Statement by Mr. Ivan Simonovic, Assistant Secretary-General, Deposit of the 10th instrument of ratification of the OP-ICESCR, New York, 5 February 2013, text available at http://www2.ohchr.org/english/bodies/cescr/ (last accessed 10 February 2013).

392 See for example exceptions clauses in GATT Article XX, GATS Article XIV, SPS Agreement Articles 2.1 and 2.2, TBT Agreement Article 2.2; safeguards provisions in GATT Articles VI, XII, XVIII, XIX, XXVIII, and XXV.

393 PAUWELYN 2003, 40-51, 459-460.

B. ICESCR and investment law

Similar to WTO law, the ICESCR has not yet been invoked in investor-State disputes as an independent justification for a State’s exercise of regulatory freedom, or for the framing of host State policies under an IIA. Mediating the ICESCR into investment law will not be framed in the same way as shown in the previous section in WTO law. Unlike WTO law that has treaty texts, sources of law, and an interpretive and institutional *acquis* that could be harnessed to infuse ICESCR-based substantive and interpretive content to the public policy language in WTO treaties and the acts of the WTO political organs, the international investment law system, as demonstrated in *Part II*, does not have these textual and institutional gateways.

In other works,395 I have shown several limitations to, and prospects of, using the ICESCR as an independent normative defense against international investment treaty obligations: 1) a host State prioritizing the ICESCR obligation over an investment treaty obligation finds little practical utility in the *lex posterior* rule on conflict of treaties codified in Article 30 of the Vienna Convention on the Law of Treaties; 2) using the ICESCR as a “relevant rule of international law” within Article 31(3)(c) of the Vienna Convention Law of Treaties could apply in “legality clauses”, where it can be shown that the ICESCR is part of the corpus of host State laws that should be complied with to qualify an “investment” as one covered by the protections of an investment treaty; and 3) in a situation (such as an economic crisis) where neither the ICESCR obligation nor the investment treaty obligation can be performed completely without undermining or imperiling the other, the authoritative decision-

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395 Id. at footnote 133.
maker has to embrace the “principle of political decision” and clarify its decision-making calculus to assess which “breach” it would incur given the consequences of international responsibility arising from the breach of either obligation, the institutional and political dynamics of relevant internal and external constituencies, as well as the community expectations unique to the host State. A political decision to “breach” an investment treaty obligation to provide compensation, for example, could be better managed if that State’s authoritative decision-makers could accurately forecast the commercial and political risks of the arbitral process, the likelihood of economic recovery and its estimated duration, and the margins of tolerance of the domestic and international political elites for a host State deliberately choosing this breach.

Given the diffuse (and mostly unreformed or amended) language of international investment agreements (IIAs), the diversity of its communities of law-appliers, and the lack of a centralizing political organ (such as the WTO) that could facilitate dialogue on ICESCR compliance within the design of IIAs, I anticipate that much of the efforts (at least in the short-term) towards designing IIAs with a view to ensuring ICESCR compliance would very likely be unilateral (at best regional) initiatives, set in accordance with the negotiation timetables of individual States, their respective political preferences and foreign policy agendas, and the nature of their current level of ICESCR compliance as ascertained under the State reporting process facilitated by the Committee. To this end, Bruno Simma and I have recommended that the Committee take on a more involved role in aiding unilateral State efforts to maintain ICESCR compliance alongside the design and implementation of their IIAs: 1) the Committee could extend technical assistance to States negotiating or designing IIAs, model investment contracts, template prospectuses, terms of reference and other
significant due diligence documentation for foreign investment contracts; 2) the Committee could assist host States in designing an ICESCR impact assessment method that could be applied during the negotiation process between foreign investors and host States; 3) the Committee could contribute its legal analysis as a distinct kind of *amicus* to investor-State arbitrations that involve complex public interests and ICESCR rights; 4) the Committee could contribute its fact-finding reports in the investor-State arbitral process, insofar as ICESCR-related conduct of host States and/or investors are concerned (and with the Optional Protocol to the ICESCR having entered into force on 5 February 2013, the Committee has the functional capacity to conduct such fact-finding); and 5) the information available under the Committee’s State reporting process and periodic review could be made accessible to determine and anticipate the State’s institutional capacities and resource constraints insofar as ICESCR compliance is concerned, leading to a better understanding of the risk parameters of an investment.\(^{396}\)

I have also proposed recently\(^{397}\) that the ICESCR might be strategically deployed in a contextual manner – to redefine the regulatory risks of an investment in ways that are more in accord with a State’s economic and social realities and institutional constraints. I showed how the due diligence process can be revised to identify areas of host State policy flexibility that should already be anticipated during the life of an investment as part of ICESCR compliance, especially with host States’ ICESCR compliance increasingly being susceptible to empirical investigation and inclusion in investors’ regulatory risk assessments. The assessment of regulatory risks

\(^{396}\) Id. at footnote 345.

in the due diligence process should also consider the actual ICESCR impacts on specific forms of investment. I also contended that the ICESCR may have an interpretive function for IIA standards of treatment where a textual nexus is established, and in the alternative, the ICESCR may also have a significant adjusting impact to the process of valuing compensation.\footnote{For new proposals to recast the valuation process, see Desierto GWILR, and for a new mathematical model recasting the Capital Asset Pricing Model used in investor-State arbitrations to take into account ICESCR compliance, see Diane A. Desierto and Desiree A. Desierto, \textit{Investment Pricing and Social Protection: A Proposal for an ICESCR-Adjusted Capital Asset Pricing Model}, (under submission).} Finally, I have also submitted that where an investor's home State is a party both to the ICESCR as well as to an IIA, such State assumes counterpart duties to ensure the extraterritorial application of the ICESCR, including in particular the duty to ensure that its (natural or juridical) nationals do not act in ways that cause other States to violate the fundamental obligation to ‘respect’, ‘protect’ or ‘fulfil’ ICESCR rights. Even if they do not participate in the investor-State dispute settlement mechanism, home States still have significant roles to play in voluntarily ensuring ICESCR compliance within the international investment treaty system, by continuing to exercise some oversight authority over the conduct of their nationals in other States. Regulatory predictability does not equate to static host State regulations, and investors cannot easily assume that legislation and regulations at the time of the establishment of an investment will remain, and be implemented in, completely the same manner, in perpetuity. The ordinary workings of government recognize adaptation, amendment, and change, and what is most important is to establish a legal framework within which the investor can adequately, sufficiently, and transparently track and predict such regulatory changes as would affect the investment. It is in this light that I propose that the expected policy uncertainty arising from host States’ compliance with dynamic ICESCR obligations be embraced, and framed uniquely, for international investment law.
CONCLUSION: RESTRAINING A FORCED JOINDER

There will always be a seductive resonance to having a unifying “principle of systemic integration” – the idea that “[r]eference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process.”399 Some years ago, then-President of the International Court of Justice Dame Rosalyn Higgins cautioned that “we should not exaggerate the phenomenon of fragmentation”, and said that she was “skeptical” that the invocation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties “is the overall answer to systemic fragmentation”, since it “brings with it as many problems as it resolves”.400 This caution holds true for the proposition that WTO law is somehow always instructive for investment law, especially for the latter’s issues on State regulatory freedom to vindicate public policies. Caution is justified – even inevitable – given the contemporary reality of how States thus far have chosen to bind themselves to observe different types of conduct across various spheres of international economic relations. Left unproven, the assumption that States intend economic transactions governed in one sphere to be equally, identically, or similarly governed for another economic transaction, and that they also intend their agents (courts, tribunals, political bodies, etc.) to look beyond the immediate rules States establish to govern a particular economic transaction, can wield havoc and instability to functional decision-making processes that have been purposely designed and built into distinct treaty systems. Not only is this a question of “fit”, but more importantly, it is a question of “outcome”. Grafting WTO law into investment law does not ensure that the public policy problems in the latter would indeed be successfully resolved.


At this point, it should also be clear that mere normative or transactional resemblance does not provide satisfactory criteria for transposing WTO law into investment law. As this Article has shown, the public policy language in WTO treaties, and corresponding DSB interpretations, collectively evolved according to a specific internal logic that bridges a “non-trade concern” (e.g. human rights compliance) to a trade liberalization and market access objective. This logic developed in tandem with sociological and ideological shifts within the WTO community – expectations of State regulatory freedom, as such, are shaped by what the WTO Member States have negotiated amongst themselves, and what public policy issues WTO Member States have also been pressed to respond to within the political levers of the WTO institutional machinery. Waivers for establishing a certification process for conflict diamonds and for enabling access to essential medicines through compulsory licensing represent hard-fought political battles within the WTO system, but they do not encompass the full range of human rights concerns that States may harbor when they seek to defend their policy spaces. As such, what States may understand by “necessity” in relation to a domestic policy measure asserted against a market access commitment, is not automatically what they may understand when they design a “necessary measure or measure not precluded” for an investment transaction within their own jurisdiction. The institutional and interpretive complexity in WTO law has to be fully grasped and engaged, to enable one to draw feasible, transparent, and acceptable criteria for the latter’s effective infusion into investment law to accomplish a shared objective of human rights compliance. The responsibilities of treaty negotiators, State policy-makers, law-appliers, and other authoritative decision-makers demand no less than a sustained effort to wed doctrinal rigor with our political sensibilities.
To date, the WTO law *qua* investment law proposition remains a forced joinder of treaty regimes and institutions that does not serve the broader objective of reaching better-considered defenses that uphold a State’s regulatory freedom to vindicate public policy or human rights concerns. At best, the proposition gives us a straw argument that may appear to contribute policy analysis, but ultimately paralyzes us from thinking more laterally and deeply on the actual reform processes and suitable proposals for international investment law to accommodate and fully engage public policy and human rights alongside investment obligations. It should be a sobering reality that human rights and public policies in the trading system remain very much a work in progress, and advocates themselves concede that their strategic success depends on their effective understanding and creative use of WTO institutions, processes, interests, and constituencies. That is one analogy we can helpfully adopt as we design and tailor our public policy solutions for States, individuals, and groups in the diverse, diffuse, and dispersed international investment system.

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