

REGULATORY SPACE IN INTERNATIONAL TRADE LAW AND INTERNATIONAL INVESTMENT LAW

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Domestic regulatory decisions involving matters of human health or the environment are increasingly coming under scrutiny by international courts and tribunals. One of the latest examples concerns an Australian law mandating the plain packaging of cigarettes, which is currently being challenged under both international investment and international trade law. Both of these fields are closely related and are governed by similar rules. However, despite their similarities, they also differ in important respects.

This article analyzes the extent of the regulatory space afforded to states and World Trade Organization (“WTO”) members in the international investment and international trade regimes. It does so by comparing the jurisprudence of investment tribunals regarding regulatory expropriations and the jurisprudence of the WTO dispute settlement organs in cases concerning human, animal or plant life or health, as well as cases concerning technical barriers to trade.

Additionally, this article suggests that international trade and

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investment law can offer valuable insights for one another, despite the differences between the two regimes. While international trade law has been more adept at incorporating health or environmental concerns as a countervailing force to the prevailing paradigm of trade liberalization, changes in international investment law may soon close the gap. International investment law is currently undergoing a discourse similar to the one that has shaped international trade law since the inception of the WTO in 1995. Thus international investment law may be shaped in a similar manner, as there are growing signs that the regulatory space afforded in international trade and investment law are converging, despite the fact that the international trade law discussion was carried out in a different context, through a different set of institutions, and within different epistemic communities.

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1. INTRODUCTION

The regulation of domestic economic activities was traditionally a matter of a state's regulatory power, subject mostly to domestic legal and political constraints. International legal obligations existed to the extent that a state entered into binding international obligations to regulate or abstain from regulating with respect to particular goods or services. States entered into trade obligations that required them to lower tariff levels in exchange for reciprocal benefits that at least part of its constituency regarded as important. Similarly, states concluded treaties that provided foreign investors the same treatment accorded to their own nationals. In short, countries had almost unlimited "regulatory space." They possessed a large degree of regulatory autonomy, especially when making decisions that implicated non-economic values such as human health, human safety, the environment or social mobility.

The situation changed with the adoption of the General Agreement on Tariffs and Trade ("GATT")¹ after WWII. The GATT provided not only for mechanisms to reduce tariff barriers and non-tariff barriers and contained a number of justificatory provisions that seemed to afford the contracting parties a great deal of regulatory space. The relative importance of non-tariff barriers compared to tariff barriers became evident through a growing number of complaints by other GATT parties against domestic regulations, arguing that such regulations were in contravention of the GATT.² The establishment of the World Trade Organization ("WTO") in 1995 accelerated this trend.³ A considerable number of disputes now involve complaints about

¹ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

² Roy Santana & Lee Ann Jackson, *Standards and Non-Tariff Barriers in Trade*, 11 *World Trade Rev.* 462, 465 et seq. (2012); ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 344-45 (1993).

³ Santana & Jackson, *supra* note 2, at 470; WORLD TRADE ORGANIZATION, *WORLD TRADE REPORT 2012, TRADE AND PUBLIC POLICIES: A CLOSER LOOK AT NON-TARIFF MEASURES IN THE 21ST CENTURY* 39 et seq. (2012).

regulations in the areas of health and the environment.

The increase in bilateral and multilateral investment agreements over the last decades, guaranteeing rights to foreign investors, has led to complaints not only against alleged expropriations, but also against domestic regulations where no property was actually seized. These so-called regulatory expropriations are akin to the “regulatory takings” under domestic law in many countries. Some of the most famous complaints include the devaluation of currency, while other complaints oppose health and environmental regulations. Other potential areas in which disputes may arise include the regulation of antitrust/competition policy, taxation, the sale of securities, banking requirements or human rights measures.

This article explores how the dispute settlement mechanisms in both fields struggle with the concept of regulatory space. It contrasts the developments in the areas of trade and investment law, although questions concerning regulatory autonomy are not limited to these two regimes. Importantly, investor-state dispute settlement has come under increased scrutiny over the last years, evidenced not only by public and academic debates, but also by some countries reconsidering their commitment to investor-state dispute settlement.⁴ The WTO has undergone similar debates after its inception.⁵ Thus, another aim of the article is to show how the WTO’s dispute settlement organs have been able to avoid continued debates about the propriety of their jurisprudence. The article analyzes the degree to which the regulatory space afforded to governments converges between these two regimes, mainly through analyzing disputes concerning health and the environment. These disputes have been highly contentious in the trade arena and have taken on great importance in recent investment disputes.

An illustrative example of this convergence is the dispute concerning Australia’s legislation concerning the plain packaging of cigarettes.⁶ The sale of cigarettes in Australia has been under

⁴ See *infra* notes 86-88 and accompanying text.

⁵ Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 World Trade Rev. 7 (2002).

⁶ The dispute over Australia’s plain packaging law serves illustrative

tight restrictions for years. One of the latest regulations of the sale of cigarettes, which went into effect on December 1, 2012, is the Tobacco Plain Packaging Act.⁷ This law imposes strict packaging requirements regarding the shape, size, and type of packaging and cartons to be used for tobacco products, and even goes as far as specifying that the packaging of all tobacco products must be a particular color—“drab dark brown”—with a matte finish.⁸ The law also prohibits the use of trademarks or other distinguishing characteristics and stipulates that the “brand, business or company name, or variant name (if any), for the tobacco products” may only appear in a prescribed place and form, alongside any other marks permitted by the Act’s regulation.⁹ The Australian government claimed that enacting the legislation was in the interest of improving public health.¹⁰ It argued that despite the high level of regulation in place prior to the enactment of the plain packaging law, more than 15,000 Australians die of tobacco-related diseases each year, costing AUS\$31.5 billion per annum.¹¹

A challenge against the law’s constitutionality was denied by the High Court of Australia in 2012.¹² The law is currently

purposes with respect to the convergence of cases in both the international investment law regime and that of the WTO as well as the trend towards convergence of regulatory space in both fields. This article will not fully analyze the proceedings under either regime. On the convergence of the two fields, see generally Jürgen Kurtz, *On the Evolution and Slow Convergence of International Trade and Investment Law*, JERUSALEM REV. LEGAL STUD. 1 (2013); Giorgio Sacerdoti, *Trade and Investment Law: Institutional Differences and Substantive Similarities*, 9 JERUSALEM REV. LEGAL STUD. 1 (2014); Tomer Broude, *Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law*, 9 JERUSALEM REV. LEGAL STUD. 24 (2014); Donald McRae, *The World Trade Organization and International Investment Law: Converging Systems - Can the Case for Convergence Be Made?*, JERUSALEM REV. LEGAL STUD. 13 (2014).

⁷ *Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

⁸ *Id.* §§ 18, 19.

⁹ *Id.* §§ 18–20.

¹⁰ Explanatory Memorandum, *Tobacco Plain Packaging Bill 2011* (Cth), 1 (Nicola Roxon, Minister for Health and Ageing) (Austl.), available at http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/cth/bill_em/tppb2011190.pdf.

¹¹ *Id.*

¹² *JT Int’l SA v. Commonwealth* [2012] HCA 43 (Austl.) available at <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/projt-2012-08-15.pdf>. The original ruling was made on August 15, 2012. For the full judgment made on October 5, 2012, see *id.* at 1, 6, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2012/43.html>.

undergoing scrutiny before two international dispute settlement systems: the WTO and an international investment tribunal.¹³ In the case of the former, a number of WTO members initiated the action against Australia.¹⁴ In the case of the latter, Philip Morris Asia Limited brought a suit against Australia under the Bilateral Investment Treaty (“BIT”) between Hong Kong and Australia.¹⁵ Under both processes, the claimants argue, inter alia, that the Australian government’s measure infringes trademark rights.¹⁶ In

¹³ See generally the contributions in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES (Tania Voon et al. eds., 2012).

¹⁴ It should be noted that with the exception of Cuba and Indonesia, none of the complainants are large exporters of tobacco products, and there is little to no trade between the applicant countries and Australia. Sergio Puig, *The Merging of International Trade and Investment Law*, BERKELEY J. INT’L L. 6-30 (forthcoming) (draft on file with author). See generally PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES, *supra* note 13; Dispute Settlement, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm; Dispute Settlement, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm; Dispute Settlement, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS441 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm; Dispute Settlement, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS458 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds458_e.htm; and Dispute Settlement, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm.

¹⁵ See Letter from Allen Arthur Robinson, Counsel, Philip Morris Asia Ltd., to Hon. Robert McClelland MP, Attorney-General for Australia, (Nov. 21, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf> (giving a Notice of Arbitration concerning claims made by Philip Morris Asia Limited against the Commonwealth of Australia); International Center for Trade and Sustainability Development, *Morris Launches Legal Battle Over Australian Cigarette Packaging*, 15 BRIDGES 1 (June 29, 2011) available at <http://www.ictsd.org/bridges-news/bridges/news/philip-morris-launches-legal-battle-over-australian-cigarette-packaging>.

¹⁶ In the case of investment law, trademarks are likely considered to be an investment under the relevant Hong Kong – Australia BIT. In the case of WTO

addition, the WTO disputes also allege violations of the Agreement on Technical Barriers to Trade ("TBT Agreement")¹⁷ and the GATT 1994.¹⁸

Regardless of the venue, the cases invariably involve a discussion of the ability of governments to regulate in the field of human health.¹⁹ These cases essentially deal with the amount of regulatory space that governments have under both international

law, the applicants claim a violation of Articles 20 and 15(4) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article 7 of the Paris Convention. For an instructive overview of intellectual property rights in international investment law with specific reference to the plain packaging measures of both Australia and Uruguay, see Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 J. INT'L ECON. L. 871 (2012) and Rochelle Dreyfuss and Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property* (New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 14-53, 1, 24 et seq., 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503135.

¹⁷ Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120 [hereinafter TBT Agreement], available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf. This section outlines the pertinent legal questions surrounding the regulatory space according to WTO members within disputes concerning the SPS Agreement and the TBT Agreement.

¹⁸ Dispute Settlement, Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434 (May 5, 2014), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm. The importance of these proceedings in the WTO context is evidenced by the unusually high number of WTO members that have joined the dispute as third parties. See generally Tobacco Plain Packaging - Investor-State Arbitration, AUSTRALIAN GOV'T, ATT'Y-GEN. DEPT, <http://www.ag.gov.au/tobacoplainpackaging>.

¹⁹ A procedural obstacle to the investment arbitration claim presented by Philip Morris Asia consists in the fact that it did not become the sole shareholder of Philip Morris Australia Limited until after the government of Australia announced that it would proceed with its plain packaging plan. This likely precludes Philip Morris Asia from arguing that it had legitimate expectations that its trademarks would not be affected by the plain packaging legislation. See generally AUSTRALIA'S RESPONSE TO THE NOTICE OF ARBITRATION, ¶ 5, (Dec. 21, 2011), available at <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf>.

trade and investment law.

In the past, these two fields of international economic law had divergent approaches towards the amount of regulatory autonomy governments possessed. This jurisprudential bifurcation has not been problematic so far. However, with the initiation of proceedings in two different dispute settlement systems regarding the exact same governmental measure, the question of how much regulatory space governments should be afforded under each international regime takes on crucial importance.²⁰ One could argue that states should foresee situations in which a subsequent treaty that allows for less regulatory space supersedes an earlier treaty. However, this assumes that the restrictions on regulatory space concern the same subject matter, which is not necessarily the case. The starting point is quite different in the case of trade and investment law, although there may be overlap, as the case of plain packaging of cigarettes shows. This may be due to a different regulatory regime with respect to the same subject matter, due to the two regimes having been designed to be complementary, but it turns out that they are not, or – even more problematically – in situations in which the rules of one regime undermine the application of the other regime.²¹

The increasing importance of so-called Global Value Chains (GVCs) shows the interdependence of these two fields.²² As pointed out by the 2013 report of the United Nations Conference on Trade and Development (UNCTAD), because of the inextricable

²⁰ Divergence in the interpretation of different (or even similar) treaty language is not a new phenomenon. Moreover, coherence between different international regimes is not required, as the debate on the fragmentation of international law shows. See generally International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Rep. of the Study Group of the International Law Commission*, at 253, U.N. Doc A/CN.4/L.682 (Apr. 13, 2006) (Martti Koskenniemi).

²¹ One example of the latter concerns countermeasures that are legal under WTO law, but are illegal under investment law. Junianto James Losari & Michael Ewing-Chow, *Decentralization, Due Process and Disputes: Indonesia's Recent Experiences with IIAs and Investor-State Disputes*, J. World Inv. & Trade (2015) (forthcoming) (on file with author); Puig, *supra* note 14, at 24.

²² On global value chains in general, see generally UNCTAD, *WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT* 122 (2013); *IMPLICATIONS OF GLOBAL VALUE CHAINS FOR TRADE, INVESTMENT, DEVELOPMENT AND JOBS*, JOINT REPORT BY THE OECD, WTO, & UNCTAD 19 (Aug. 6, 2013).

linkage between trade and investment in GVCs, “it is crucial to ensure coherence between investment and trade policies,” as “inconsistent policies weaken the effectiveness of GVC-related policies and can ultimately be self-defeating.”²³

Finally, the potential of the two dispute settlement systems to decide that countries have different degrees of regulatory autonomy may undermine the ability of governments to predictably regulate public health and environmental issues. This is especially the case when the disputes involve a challenge to the same governmental measure in two systems that do not regulate the same subject matter. Having at least similar regulatory space increases efficiency and reduces costs that governments and the private sector otherwise incur. The importance of this matter cannot be overstated with respect to the plain packaging legislation. A number of countries plan to institute similar regulations to those of Australia and are awaiting the outcome of these disputes.²⁴ Even more importantly, the number of cases in which the regulatory fabric of countries is being challenged can be expected to increase in the near future.

After briefly discussing the common origins of international trade and investment law (2), this article introduces the legal frameworks of both regimes and shows that there is a trend towards convergence with respect to the regulatory autonomy governments have when making public policy decisions (3). The article then provides reasons for the existing differences in how both fields approach the question of regulatory autonomy through an analysis of the different textual, contextual and institutional design, as well as the different epistemic communities prevalent in trade and investment law (4). The final section offers concluding remarks (5).

²³ UNCTAD, *supra* note 22, at 190 et seq.

²⁴ Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws*, N.Y. TIMES, Dec. 13, 2013, at A1.

2. INTERNATIONAL TRADE LAW AND INTERNATIONAL INVESTMENT LAW: TWINS SEPARATED AT BIRTH

Over the last twenty years, the interest in international investment law has intensified, shown not only by the increasing number of international investment agreements (“IIAs”), but also by the increasing number of cases that are being adjudicated.²⁵ This rising interest is similar to the one observed in international trade law, following the creation of the WTO in 1995.

The two fields are closely interrelated and many modern preferential trade agreements contain not only rules with respect to trade, but also rules pertaining to investment.²⁶ Examples can be found in the ongoing negotiations about the Trans-Pacific Partnership Agreement (TPP)²⁷ as well as the Transatlantic Trade and Investment Partnership (TTIP).²⁸ Both areas fall under the purview of public international law,²⁹ as the underlying treaties are

²⁵ See *infra* notes 41 et seq. and accompanying text.

²⁶ See generally Andreas Dür, Leonardo Baccini & Manfred Elsig, *The Design of International Trade Agreements: Introducing a New Dataset*, R. INT’L ORGS. 1, 6 (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141141.

²⁷ One overview of the current status is provided by the Office of the US Trade Representative. *Trans-Pacific Partnership*, U.S. TRADE REPRESENTATIVE, available at <http://www.ustr.gov/tpp>. The TPP has been the subject of intense debate; see generally Paul Krugman, *No Big Deal*, N.Y. TIMES, Feb. 27, 2014, at A23.

²⁸ The TTIP has led to discussions on transparency in treaty negotiations, as well as with regard to the inclusion of investor-state dispute settlement. For insight into the former issue, see generally Bernd Lange, *TTIP Debate Suffering from Lack of Transparency*, THE PARLIAMENT (Oct. 31, 2014), <https://www.theparliamentmagazine.eu/articles/opinion/ttip-debate-suffering-lack-transparency>. On the issue of investor-state dispute settlement and the impact on the European Commission’s policy space, see generally Javier García Olmedo, *ISDS: Which Way Will the Scales TTIP?*, KLUWER ARBITRATION BLOG (Oct. 3, 2014), available at <http://kluwerarbitrationblog.com/blog/2014/10/03/isds-which-way-will-the-scales-ttip/>.

²⁹ Indeed, the first ICSID case appeared to indicate that direction. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 526, 557 (June 27, 1990). See generally Charles N. Brower, *W(h)ither International Commercial Arbitration*, 24 ARB. INT’L 181, 187 (2008); and INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010). But see Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Tribunals Is Not Working*, 59 HASTINGS L. J. 241, 241–46 (2007).

entered into by states. In both instances, states play a central role in the enforcement of adjudicatory decisions.³⁰ Similarly, both entities have seen a remarkable increase in interest: in the case of international trade law, this became evident in the aftermath of the creation of the WTO in 1995; in the case of international investment law, it has grown through a sharp increase in the number of IIAs as well as through an increase in dispute settlement based on these agreements.³¹

There are nevertheless a considerable number of differences.³² World trade law is based on a set of mostly multilateral treaties (with a small number of so-called plurilateral treaties) that prohibit discriminatory treatment regarding foreign and domestic like goods and services (so-called “national treatment obligation”), and also with respect to distinguishing between like products or services that come from different countries (so-called “most-favored nation obligation”). In the context of the Uruguay Round, a number of additional agreements have been developed with respect to intellectual property, subsidies, dumping, agriculture, sanitary and phytosanitary measures, and technical barriers to trade. This system is buttressed by a dispute settlement mechanism – the Dispute Settlement Understanding (“DSU”) – often referred to as one of the most effective international enforcement mechanisms. States in WTO disputes oftentimes serve as proxies for private actors on both sides of any dispute.

International investment law is characterized by states guaranteeing the protection of foreign investors through rules pertaining to fair and equitable treatment, non-discrimination based on the origin of the investor and compensation in the case of expropriations in exchange for foreign direct investments.³³

³⁰ Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006).

³¹ UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 2011, 100 (2000). For a more detailed overview of the parallels and differences between the two fields, see generally Puig, *supra* note 14, at 6-13.

³² See generally Stephan W. Schill, *International Investment Law and Comparative Public Law – An Introduction*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 3, 10-17 (Stephan W. Schill ed., 2010).

³³ THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

Contrary to WTO law, there is no need for investors to convince their home countries to bring a case, but rather international investment treaties allow for the investor to bring a claim against the host state, without having to exhaust local remedies, before ad hoc arbitral tribunals. Procedurally, such panels more closely resemble commercial arbitration tribunals compared to their WTO counterparts. Investment law is undergoing a marked shift – one that is commensurate with a shift in the type of case that is being arbitrated. While early cases mostly concerned expropriation measures, or questioned discrete sanctions, investors have started to challenge the regulatory fabric of their host states.³⁴ As a corollary, international investment law is becoming increasingly scrutinized for being potentially unfair to developing countries or, as some have argued, is perceived as a threat to domestic governance. This increased interest is not only true for academic writing;³⁵ international investment law has also gained a considerable amount of public attention.

Di Mascio and Pauwelyn summed up the difference between the two regimes by characterizing the trade regime as being about “overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities – not individual rights.”³⁶ In contrast, investment law is concerned with “fairness grounded in customary rules on treatment of aliens, not efficiency.”³⁷ Furthermore, “[i]t is about protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities.”³⁸

The development towards challenging not only particular administrative decisions, but also challenging the domestic regulatory fabric – and the ability to do so internationally – raises

³⁴ This includes cases concerning higher tariffs for basic utilities, harmful substances, or general regulatory policies. Schill, *supra* note 32, at 15.

³⁵ For an excellent overview of the existing literature on international investment law and its changing nature, see generally Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875, 885 (2011).

³⁶ Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L., 48, 54 (2008).

³⁷ *Id.* at 56.

³⁸ *Id.*

new questions about (1) what role private actors should play, (2) what vehicle is appropriate to challenge domestic regulatory measures, and (3) to what extent international adjudicatory bodies should have decision-making authority over domestic policy preferences such as the protection of human health, the environment, or human rights. Although international trade and investment law have different enforcement mechanisms, they both raise similar questions with respect to the amount of regulatory space that is accorded to domestic decision-makers. Interestingly however, these two areas of law appear to have taken divergent trajectories regarding this question.

This article contributes to the nascent literature on comparing international trade and investment law.³⁹ Unlike other articles, it does not attempt to provide a broad comparison between various fields in international law.⁴⁰ Rather, it presumes that international trade and investment law are sufficiently close to warrant a meaningful comparison. This article provides an analysis of the regulatory space that states and WTO members are provided when

³⁹ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013); DiMascio & Pauwelyn, *supra* note 36; Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93 (2013); Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonweal*, 16 J. INT'L ECON. L. 613 (2013); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents*, 20 EUR. J. INT'L L. 749 (2009); Diane A. Desierto, *Public Policy Design in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, N.Y.L. SCH. L. REV. (2013) available at <http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/04/Solving-Global-Problems.CLE-Reading-Materials.Panel-III.pdf>; Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 LOY. U. CHI. L.J. 691; Todd Weiler & Walid Ben Hamida, *Intersections: Dissemblance or Convergence Between International Trade and Investment Law*, TRANSNATIONAL DISPUTE SETTLEMENT SPECIAL (2013), available at <http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=36>; Roger P. Alford, *The Convergence of International Trade and Investment Arbitration* (2013), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?filename=0&article=1018&context=globalevents&type=additional>; RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL, AND BILATERAL GOVERNANCE (2010); and TRADE AND INVESTMENT RULE-MAKING: THE ROLE OF REGIONAL AND BILATERAL AGREEMENTS (Stephen Woolcock ed., 2006).

⁴⁰ Roberts, *supra* note 39; Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 546 (2014).

appearing before international investment law panels and WTO dispute settlement organs. The degree of regulatory space governments possess is important. On one hand, an abundance of regulatory space may undermine the efficacy of the discipline of international investment law or international trade law. On the other hand, limiting the regulatory autonomy of governments too drastically allows international adjudicators to nullify domestic decisions without any form of democratic control. Given that international trade and investment law are closely related, and are used to challenge administrative and regulatory decisions, it is surprising that there is a disconnect between these two fields with respect to the amount of regulatory space that states have at their disposal.

3. THE WTO AND INVESTMENT FRAMEWORKS COMPARED

3.1. *Introducing the Legal Frameworks*

This section compares the different frameworks that WTO law and international investment law employ and highlight important differences in the application of the legal frameworks.⁴¹ Regime comparison is not a particularly novel undertaking, having been employed in a number of areas in international law. Nevertheless, some argue that international investment law belongs in a category of its own as “[i]t is not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere.”⁴² While this statement was made in the context of a beginning – though quickly burgeoning – practice of enforcing investor rights through investment arbitration, international investment law is being regarded by a number of authors as *sui generis*.⁴³ Of course, the same was said of the WTO

⁴¹ The article is based on an understanding of WTO law and investment law as forming part of public international law. While they may deviate from general international law rules in some instances (taking on the character of *ius specialis* under Article 55 of the Articles on State Responsibility), both fields are either firmly grounded in public international law or have developed into belonging in this field. Vadi & Gruszczynski, *supra* note 39, at 617.

⁴² Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 256 (1995).

⁴³ Roberts, *supra* note 39, at 94; Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. OF INT’L LAW 151, 152–53 (2004). For a

after its creation of 1995.⁴⁴

Recent developments make such a comparison even more apt. A number of trade agreements are now more encompassing, including not only provisions pertaining to trade, but also provisions pertaining to investment. Both areas are increasingly regarded as two sides of the same coin.⁴⁵

This section will outline the basic structures of (a) international investment law and (b) international trade law. Historically speaking, both fields are of relatively recent origin. The WTO's predecessor formed part of the post-WWII attempt to regulate international finance, development, and trade through the Bretton Woods institutions, and was later supplanted and considerably expanded through the creation of the WTO in 1995. While international investment law was created in the aftermath of WWII as well, it did not fully form as a more developed field until after the end of the Cold War.⁴⁶

There are a number of areas where analogies have been drawn between international trade and investment law. This has become evident in a number of investment cases in which the panels used

counterpoint, see Martins Paparinskis, *Analogies and Other Regimes of International Law*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* 73, 73 (Zachary Douglas et al. eds., 2014).

⁴⁴ Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 259 (2006); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 341 (2000).

⁴⁵ Some states are including investment protections within bilateral and multilateral trade agreements. For an example, see generally North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289; Association of Southeast Asian Nations [ASEAN] Comprehensive Investment Agreement, Feb. 26, 2009, *available at* [http://www.asean.org/images/2013/resources/publication/2012%20-%20ACIA%20An%20Introduction%20\(Apr\).pdf](http://www.asean.org/images/2013/resources/publication/2012%20-%20ACIA%20An%20Introduction%20(Apr).pdf). Some multilateral trade agreements also incorporate provisions on investment. For examples of such agreements, see Agreement on Trade-Related Investment Measures and General Agreement on Trade in Services, 15 April 1994, 33 I.L.M. 81 (1994); Debra P. Steger, *International Trade and Investment: Towards a Common Regime?*, in *PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY* 156, 160 et seq. (Roberto Echandi & Pierre Sauvé eds., 2013).

⁴⁶ José Alvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 15 (M. Arsanjani et al. eds., 2010) (stating that "[t]he 1990s, not the 1980s and certainly not the 1970s, were the era when the modern investment regime was born.").

previous decisions on “likeness” or national treatment or procedural decisions on amicus curiae briefs in the WTO context.⁴⁷

3.1.1. *The Investment Law Framework*

International investment protection originally developed largely in conjunction with trade agreements and oftentimes contained provisions that guaranteed wide-ranging protection of the property of nationals of one party in the territory of the other party.⁴⁸ Additional, and sometimes successful, avenues for protection included diplomatic protection at the discretion of the home state, ad hoc commissions, arbitral tribunals, recourse to local courts, or contractual agreements with the host state.⁴⁹ This remained largely unchanged until after WWII. Until then, the protection was based on an emerging body of mostly bilateral trade agreements and customary international law.⁵⁰

The increasing interchange of capital after WWII, as opposed to the previous practice of property protection,⁵¹ allowed the field of international investment law to emerge. Capital exporting countries, as proxies for capital providers, were however interested

⁴⁷ Roberts, *supra* note 39, at 52. See generally the contributions in WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION (Jorge Alberto Huerta-Goldman et al. eds., 2013); Alford, *supra* note 39, at 35 et seq.; Trujillo, *supra* note 39, at 713 et seq.; Kurtz, *supra* note 39, at 752-55.

⁴⁸ DiMascio & Pauwelyn, *supra* note 36, at 52; Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 159 (2005–2006).

⁴⁹ Lionel M. Summers, *Arbitration and Latin America*, 3 CAL. W. INT’L L.J. 1, 4-11 (1972). These measures were almost exclusively *ex post facto* measures. For further analyses of the history of the protection of the property interests of aliens, Douglas, *supra* note 43, at 151; EDWIN MONTEFIORE BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* (1916). Some of these dispute settlement mechanisms were carried out by mutual agreement between the parties, others involved pressure by one of the states involved. ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 9 (2009).

⁵⁰ For a more complete history, see NEWCOMBE & PARADELL, *supra* note 49, at 3-18.

⁵¹ At the time, a conceptual shift is said to have taken place, one from protection of property to investment protection, which also took account of the need of economic development for developing countries. *Id.* at 21.

in obtaining assurances that investment protection was to be put on a more secure footing than the previous mechanisms that were oftentimes of an ad hoc nature. This started with the first BIT, which was concluded in 1959 between Pakistan and Germany.⁵² The system grew slowly, but steadily from 72 investment agreements at the end of the 1960s, to 165 at the end of the 1970s, and 385 at the end of the 1980s,⁵³ when a number of European countries pursued BITs with developing countries.⁵⁴ This was partially due to the adoption of the New International Economic Order, which signaled a push towards revising the international economic system by developing countries.⁵⁵ It is also worth noting that a number of developing countries remained on the sidelines of this development. For example, China did not conclude its first BIT until 1982, and neither Brazil nor India did so until 1994.⁵⁶ The real change these treaties brought about came through allowing private parties – on the basis of BITs – to have recourse against discriminatory treatment, the prohibition of export-related import quotas, or the repatriation of income in convertible currencies. The ability to challenge state measures on these grounds was seen as the creation of a “dramatic extension of arbitral jurisdiction in the international realm.”⁵⁷

By the end of the millennium the number of BITs had reached a total of 1,857 with other capital exporting countries having

⁵² Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Nov. 25, 1959, 457 U.N.T.S. 24 (Ger. & Pak.).

⁵³ United Nations Conference on Trade & Development, *Bilateral Investment Treaties, 1959-1999*, 1 (2000), available at <http://unctad.org/en/docs/poiteiid2.en.pdf>.

⁵⁴ See generally Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L. LAW. 655, 655 (1990).

⁵⁵ See generally G.A. Res. 6/3201, U.N. Doc. A/RES/S-6/3201 (May 1, 1974). For an overview of the differing political views of countries, see Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 646-51 (1998).

⁵⁶ NEWCOMBE & PARADELL, *supra* note 49, at 43-44.

⁵⁷ Paulsson, *supra* note 42, at 233; Christoph Schreuer, *Paradigmenwechsel im Internationalen Investitionsrecht*, PARADIGMENWECHSEL IM VÖLKERRECHT ZUR JAHRTAUSENDWENDE 237 et seq. (Waldemar Hummer ed., 2002). Providing a critical view of the system, GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008).

undertaken BIT programs.⁵⁸ That number grew to just over 2,800 BITs by the end of 2010.⁵⁹ Additionally, a considerable number of trade agreements contain investment chapters, bringing the total number to well over 3,000 instruments.⁶⁰ Importantly, the number of new investment agreements has grown with such rapidity due to the fact that they are no longer concluded solely between developed and developing countries, as the old boundary between capital exporting and capital importing countries has broken down.

Since the first investor-state dispute filed under a BIT in 1987, the number of cases has been rising constantly, amounting to 450 cases by the end of 2011.⁶¹ Moreover, according to UNCTAD, 2011 saw the highest number of cases brought in one year, showing the dynamic nature of dispute settlement in this area. ICSID remains the focal point for investor-state arbitration.⁶²

While investment law was previously confined to being grounded in customary international law,⁶³ it has now firmly evolved into a field that is – at least with respect to its basis –

⁵⁸ See generally KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010). By mid-1996, only Botswana, Guatemala, Ireland, Mozambique, Myanmar and Suriname had not concluded a BIT. Guzman, *supra* note 55, at 640.

⁵⁹ United Nations Conference on Trade & Development, *supra* note 31, at 100.

⁶⁰ *Id.*

⁶¹ Note that this number may not reflect all disputes submitted under BITs, as not all cases are necessarily public. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT, IIA ISSUES NOTE NO. 1* (Apr. 2012), available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

⁶² See *id.* at 2. For a breakdown of the ICSID cases, see *The ICSID Caseload – Statistics*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, 7 (2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31>. The total number of cases registered with ICSID from 1972 until the end of 1996 amounted to 38. 2011 alone saw 38 newly registered cases with ICSID, with the total number of cases between 1997 and 2011 being 331, subsequent to the inclusion of provisions into BITs that committed host states to investor-state arbitration in the 1990s.

⁶³ See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 19 (3d ed. 2010) (“Both views were premised on the idea that law should be designed to further the free movement of trade and investments across state boundaries.”).

characterized by treaty law.⁶⁴ The vast majority of investment treaties are bilateral – with regional agreements such as the North American Free Trade Agreement (NAFTA) or sectoral agreements such as the Energy Charter Treaty or the Lomé III and IV conventions constituting rare exceptions.⁶⁵ Given the lack of an overarching institutional framework,⁶⁶ it is not surprising that a coherent direction is – at least so far – lacking. Unlike the WTO's Appellate Body ("AB"),⁶⁷ investment arbitration panels are not guided by the jurisprudence of a higher adjudicatory level. And yet, despite the bilateral nature of the field, there appear to be early signs of convergence given that many of the BITs are based on so-called model BITs which provide – at least for some states – a blueprint, with some deviation depending on the country's counterpart.⁶⁸ Moreover, the vast majority of BITs or multilateral investment treaties contain a number of common provisions. While the "repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law,"⁶⁹ there is growing evidence that certain

⁶⁴ See *supra* Section I.

⁶⁵ For an overview of the procedural requirements in these conventions, see Paulsson, *supra* note 42, at 241–54.

⁶⁶ Repeated attempts at creating a multilateral investment framework have failed. Rainer Geiger, *Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment*, 11 N.Y.U. ENVTL. L.J. 94, (2002); EDWARD M. GRAHAM, *FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES* 15–49 (2000).

⁶⁷ Despite the arguably existing hierarchy, panels for a long time have deviated considerably from the guidance of the AB in SPS Agreement cases. See Mark Wagner, *Law Talk v. Science Talk: The Languages of Law and Science in WTO Proceedings*, 35 FORDHAM INT'L L.J. 151, 194 et seq. (2011).

⁶⁸ For the relevant literature, see Schill, *supra* note 35, at 892 et seq. See also what is arguably a convergence in the model BITs of China and the U.S., albeit from different directions, Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007); Kenneth J. Vandavelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008–2009, 283 (Karl P. Sauvant, ed., 2009); Cai Congyan, *China–US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L. ECON. L. 457 (2009).

⁶⁹ Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 126 (1984). This is not merely an expression of academic sentiment, but was a position the ICJ already expressed in the North Sea Continental Shelf cases. *North Sea Continental Shelf Cases* (Fed. Repub. Ger. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20).

fundamental rules and principles can be discerned from the existing treaty law and investment jurisprudence.⁷⁰

Anthea Roberts helpfully identifies three stages in the development of international investment law: the system's infancy, its adolescence, and its approaching adulthood.⁷¹ The first stage is characterized by power imbalances between developing states and developed states, the latter of which exported its capital to the former and could oftentimes dictate the terms of the agreement. While they were reciprocal in nature, in practice the large majority of such relationships were characterized by strong power imbalances and the belief that only through such treaties could developing countries attract much-needed capital.⁷² Investors were given protections from expropriations or other measures that could inhibit their investments. Procedurally, the broadly worded obligations were accompanied by mechanisms that allowed investors to bring disputes before arbitral tribunals, which were given wide discretion to decide over such disputes. As Roberts points out, the "net result was a considerable shift of interpretive power away from the treaty parties and toward investment tribunals, leading to investment treaty law being developed through a body of de facto precedents."⁷³ The community of arbitrators being small and to a large extent coming from commercial arbitration was another characteristic of this phase.⁷⁴ This led to the mindset that was prevalent in commercial arbitration (of regarding the two parties as being on equal footing) without due regard for the different roles that states and investors actually play.⁷⁵ Finally, the treaties were structurally skewed

⁷⁰ See generally STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

⁷¹ Roberts, *supra* note 39, at 75–93. For a slightly different classification, see Vandeveld, *supra* note 48, at 158 et seq.

⁷² SORNARAJAH, *supra* note 63, at 19.

⁷³ Roberts, *supra* note 39, at 77.

⁷⁴ Additional factors included that arbitral institutions were deeply vested in commercial or investor-state contractual arbitration, thus favoring arbitrators with whom they were familiar. Given that these institutions were involved in commercial arbitration, it is no surprise that they would choose from among the same rosters of arbitrators. Brower, *supra* note 29, at 190 et seq.; Thomas W. Wälde, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 63, 114–15 (Philippe Kahn & Thomas W. Wälde eds., 2007).

⁷⁵ William W. Burke-White & Andreas von Staden, *The Need for Public Law*

towards investor rights and rarely contained solid provisions that would safeguard the interests of states in defending regulatory changes. The protection of pursuing domestic policy goals – coming to the fore in recent years – was hardly mentioned in these treaties. This is understandable, given that the capital-exporting country was generally not concerned with such issues in the capital-importing country. The greater concern with investor rights becomes evident when looking at some of the early (and even today's) literature that emphasizes the parallel between investment law and human rights law.⁷⁶ It is important to emphasize in this context that – barring certain rights – such rights are not absolute, but in most instances are subject to limitations.⁷⁷ In a number of cases, panels found that – based on the assumption that investment treaties exist to “create and maintain favorable conditions for investments,” – resolution of uncertainties should result “so as to favor the protection of covered investments.”⁷⁸

Standards of Review in Investor-State Arbitration, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 689, 691 (Stephan W. Schill ed., 2010); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 576 (2011); Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 97, 108 et seq. (Pierre-Marie Dupuy et al. eds., 2009).

⁷⁶ Geneviève Burdeau, *Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États*, 1995 REVUE DE L'ARBITRAGE 3, 15 (1995) (Fr.); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 J. OF INT'L ECON. L. 223, 241 (2012); Karl-Heinz Böckstiegel, *Enterprise v. State: The New David and Goliath?*, 23 ARB. INT'L 93, 104 (2007); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 7-8 (2009). Douglas relies on the European Court of Human Rights on the one hand and the jurisprudence of the U.S.-Iran Claims Tribunal on the other. The latter is a tribunal whose creation was based on a bilateral agreement between both states and while its jurisprudence is often cited, one can question whether its existence is truly evidence for such an alleged parallel. See Steven Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 499 (2008). For a similar approach, see Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61 INT'L & COMP. L.Q. 641, 655 (2012).

⁷⁷ See, e.g., European Convention on Human Rights, art. 15, Nov. 4, 1950.

⁷⁸ *SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). See generally Michael Waibel, *International Investment Law and Treaty Interpretation*, in INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO

It is also prudent to be aware of the different goals of human rights protection and investment protection. Although asymmetries in the power relations between states and individuals exist in both investment law and human rights law,⁷⁹ and although human rights treaties very often include provisions relating to the protection of property rights, the procedural and substantive provisions in human rights treaties are considerably different from those found in investment law treaties. This not only includes the different location of human rights law and investment law along the public / private divide.⁸⁰ It also includes the observation that unlike the reciprocal obligations a state enters into in investment law, the obligations in human rights law “reflect fundamental values of the international community.”⁸¹ A second observation is that granting legal protection to investors finds justification from a state’s desire to attract investments by non-state actors.⁸²

According to Roberts, international investment law is undergoing significant change, as the importance of private law considerations and investor interests diminishes in favor of greater regulatory space for states.⁸³ Investments from developing countries have increased, causing existing developed states to lose the immunity from suit they once factually enjoyed. Capital flows

SYSTEMIC INTEGRATION? 29, 39-40 (Rainer Hofmann & Christian J. Tams eds., 2011). On the other hand, see decisions that favor the application of the principle of *in dubio pro mitius*, such as *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 8 ICSID Rep. 451 (2005); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 160 et seq. (June 26, 2003), 7 ICSID Rep. 442 (2005). See generally Schill, *supra* note 70, at 314-19.

⁷⁹ Hirsch, *supra* note 75, at 98; Paparinskis, *supra* note 43, at 80.

⁸⁰ Hirsch, *supra* note 75, at 107.

⁸¹ See *id.* at 109-10 (explaining that international human rights and investment law have different characteristics). An additional factor to consider is that the traditional power relationship between states and investors, in which the state assumed the dominant role, may not always be true in certain circumstances, which may actualize in the negotiations of concessions and stabilization clauses. Paparinskis, *supra* note 43, at 81. See also Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82 (Pierre Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersman eds., 2009).

⁸² Paparinskis, *supra* note 43, at 80.

⁸³ Roberts, *supra* note 39, at 78.

are no longer uni-directional, leaving states that had previously considered themselves immune from such suits open to investment arbitration.⁸⁴ Developed states are now being called upon more frequently to defend their own policy decisions before arbitral tribunals. Moreover, an increasing number of cases are no longer concerned with discrete matters that can be decided without exerting considerable influence on public policy in areas such as public utilities, the environment, or public health.⁸⁵ The decreasing immunity from suit experienced by developed countries and the resulting public policy implications, together with what is perceived to be an investor-friendly jurisprudence, have led some countries to rethink their commitments to the enterprise of international investment arbitration.⁸⁶ Some states (such as Bolivia, Ecuador and Venezuela) have taken the rather aggressive step of withdrawing from the ICSID dispute settlement system entirely,⁸⁷ while other countries (such as South Africa and Australia) have decided to no longer include investor-state arbitration provisions

⁸⁴ United Nations Conference on Trade and Development, *South-South Cooperation in International Investment Arrangements* 6 et seq., UNCTAD/ITE/IIT/2005/3 (2005). See also José E. Alvarez, *The Once and Future Foreign Investment Regime*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 634 (Mahnoush H. Arsanjani et al. eds., 2011) ("More countries than ever before are . . . capital exporters as well as capital importers.").

⁸⁵ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, IIA ISSUES NOTE, NO. 1, 2012: LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 2, UNCTAD/WEB/DIAE/IA/2012/10 (Apr. 16, 2012).

⁸⁶ United Nations Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD/ITE/IIA/2007/3 (2007), at 92.

⁸⁷ ICSID, News Release, *Venezuela Submits a Notice Under Article 71 of the ICSID Convention* (Jan. 26, 2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>; ICSID, News Release, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, (July 9, 2009), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>; ICSID, News Release, *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, (May 16, 2007), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>.

in their IIAs.⁸⁸

Roberts projects changes to international investment law on the basis of these developments in a number of distinct, yet interrelated, areas. She identifies a shift in the interpretative balance of power towards states, and away from investment tribunals.⁸⁹ One major reason for this shift is the diminishing divide between capital-importing and capital-exporting countries. Whereas certain investment treaty provisions had almost exclusively benefitted developed countries in the past, they may now work to the detriment of these countries. As a result, Roberts expects clarifications and changes to the content of such provisions in future IIAs.⁹⁰ She predicts that the system's trajectory is one that places more "attention on the state as a treaty party and regulatory sovereign," while on the other hand "those that draw comparisons with private law or that narrowly focus on the importance of investor protections are declining in value."⁹¹ If this prediction holds true, it would very much follow in the footsteps of international trade law, which also saw a maturing from an initial stage in which non-trade law considerations were incorporated rather restrictively,⁹² to one which recognizes these elements and substantively no longer treats non-trade concerns in "clinical isolation."⁹³

International investment dispute adjudication is another area of investment law that is undergoing significant change due to the diversification of its participants. What was previously a rather

⁸⁸ Leon Trakman, *Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo*, 35 U. NEW S. WALES L.J. 979 (2012).

⁸⁹ Roberts, *supra* note 39, at 78. William W. Park similarly describes the whole undertaking of arbitration – commercial and investment arbitration – as being in an autumnal stage, positively connoted. William W. Park, *Arbitration in Autumn*, 2 J. INT'L DISP. SETTLEMENT 287 (2011).

⁹⁰ Roberts, *supra* note 39, at 78.

⁹¹ *Id.*

⁹² STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS 107-09 (2010); Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 GERMAN L.J. 1111, 1116 et seq. (2011).

⁹³ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline 17*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US – Gasoline Appellate Body Report*].

close-knit circle of specialized lawyers with a common background in commercial arbitration has diversified to include participants from various academic and professional backgrounds. This diversified group has also come under public scrutiny to a much greater extent than in previous stages.⁹⁴ Importantly, there is a change in the perception of what is being arbitrated. International investment dispute adjudication is no longer limited to illegal conduct by states in relationships between states and private investors. Its scope has broadened to adjudication of public interests by investment tribunals.

The approaching “adulthood” era of the investment treaty system described in Roberts’ view is about to set in, and it abounds with uncertainty surrounding its nature.⁹⁵ Whether the system will continue its current trajectory away from a private law paradigm to one that is fully public remains to be seen. The maturing of the field may lead to changes on both the procedural and substantive levels. Procedurally, this maturation can bring about a further increase in the number of amicus curiae briefs or third-party interventions, especially in cases that concern challenges to a country’s regulatory fabric that other countries may wish to emulate. Substantively, the system has the potential to mature to a stage where disputes are seen as the adjudication of public matters rather than discrete, individual controversies.

3.1.2. *The WTO Framework*

The history of the GATT/WTO framework has had a longer period of maturation since its inception in 1947. In addition, it has undergone substantive, procedural, and institutional makeovers through the creation of the WTO in 1995. Negotiations after WWII led to the provisional adoption of the GATT, pending the anticipated creation of the International Trade Organization (ITO).⁹⁶ The failure of the establishment of the ITO led to the GATT being viewed as a quasi-organization, despite Article XXV

⁹⁴ Roberts, *supra* note 39, at 83 et seq.

⁹⁵ *Id.* at 90.

⁹⁶ JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 16 (1998).

GATT, which did not accord that status to the GATT regime. Although the GATT provided a framework for the contracting parties to conduct eight subsequent trade rounds and to continue working towards greater liberalization of trade, over time the existing structure was considered to be insufficient by some parties to the GATT.⁹⁷ This resulted in the negotiation of fundamental changes to the existing system during the Uruguay Round, which led to the creation of the WTO in 1995.⁹⁸

The WTO changed the existing international trading system in a number of important ways. Not only was the subject matter which fell under the purview of the WTO enlarged, but because of what is known as the “single-undertaking” approach, WTO members were no longer able to opt-in to specific agreements according to their individual preferences. With the exception of the plurilateral agreements in Annex 4 of the WTO Agreement, membership in the WTO requires future members to abide by all treaties under the WTO umbrella. Two of the changes brought about by the creation of the WTO are particularly worth analyzing in greater detail: the dispute settlement process and the increased recognition of balancing trade liberalization with other important societal values and interests.

The conclusion of the Dispute Settlement Understanding (DSU) brought about several important changes to the dispute settlement mechanism, as it had existed under the GATT. Article 3.3 DSU points to the dual nature of WTO law, stating that “[t]he prompt settlement of [disputes] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”⁹⁹

The compulsory nature of dispute settlement under Article 23.1 DSU serves another function – the provision of “security and predictability to the multilateral trading system.”¹⁰⁰ While dispute settlement can take on a variety of forms (including good offices,

⁹⁷ *Id.* at 24.

⁹⁸ See generally *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Terence Stewart ed., 1993).

⁹⁹ Marrakesh Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3(3), Apr. 15, 1994, 1867 U.N.T.S. 425 [hereinafter DSU].

¹⁰⁰ *Id.* art. 3.3.

conciliation, mediation,¹⁰¹ and arbitrations¹⁰²), the default option today is adjudication by panels and the AB subsequent to mandatory consultations.¹⁰³

Once adjudication commences, the dispute comes before a panel, and appeals of panel decisions are brought before the AB. The panel or AB report is adopted by the DSB quasi-automatically through a reverse or "negative" consensus – the report is adopted unless a party to the dispute notifies the DSB of its decision to appeal (for panel reports), or the DSB decides by consensus not to adopt it.¹⁰⁴ This is one of the essential differences between the DSU dispute settlement mechanism and the previous GATT regime, under which an affirmative consensus, including a vote from the losing party, was required to adopt a report.¹⁰⁵

Another important change brought about by the emergence of the WTO is the very existence of an appellate mechanism, through the creation of the AB. While disputing WTO members can choose the members of the panels,¹⁰⁶ AB members are appointed by the DSB to serve four-year terms, with a possible one-time reappointment.¹⁰⁷ Although not envisioned as playing an important role at the outset,¹⁰⁸ the AB's role changed rather dramatically from "an afterthought to a centerpiece" of the WTO dispute settlement system.¹⁰⁹ The AB consists of seven members

¹⁰¹ *Id.* art. 5.

¹⁰² *Id.* art. 25.

¹⁰³ *Id.* arts. 4, 6-20.

¹⁰⁴ For examples of reverse or negative consensus provisions relating to the adoption of panel reports and AB reports by the DSB, see *id.* arts. 16(4), 17(14).

¹⁰⁵ HUDEC, *supra* note 2; Andreas Lowenfeld, Editorial Comment, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 480 (1994).

¹⁰⁶ See DSU, *supra* note 99, arts. 8.6, 8.7. A significant number of panelists are now being determined by the WTO Director-General, particularly in situations in which the disputing members are unable to agree on the composition of the panels. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 214 (3d ed. 2013).

¹⁰⁷ DSU, *supra* note 99, art. 17.2.

¹⁰⁸ See generally Establishment of the Appellate Body, *Recommendations by the Preparatory Committee for the WTO Approved by the Dispute Settlement Body on 10 February 1995*, ¶¶ 11 et seq., WT/DSB/1 (June 19, 1995).

¹⁰⁹ Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in *THE WTO*

and appeals are heard by three-member divisions selected on a rotational basis, which takes into account the principles of random selection, unpredictability and opportunity for all members to serve regardless of their origin.¹¹⁰ The importance of the fixed-term appointments for AB members should not be underestimated. It provides a level of impartiality that allows for the AB to make decisions without needing to be concerned about reappointment to a subsequent dispute.¹¹¹ Decisions related to an appeal are made exclusively by the three-member division to which it has been assigned. However, to “ensure consistency and coherence in its case law and to draw on the individual and collective expertise of all seven Members, the division responsible for deciding an appeal exchanges views with the other Members on issues raised by the appeal” prior to rendering a final decision.¹¹² The purpose of this discussion is in line again with the general goal of dispute settlement in the WTO: to achieve “security and predictability in the multilateral trading system.”¹¹³

Another change brought about by the existence of the AB is the precedential value of AB decisions with respect to subsequent panel decisions. While the decisions of panels and the AB are technically binding only on the parties to a dispute, the development in the jurisprudence has unofficially established an adjudicatory system with precedential value. In one of its earliest decisions, the AB explained that “adopted panel reports are an important part of the GATT *acquis*” and should be taken into account when they are relevant to a dispute because they are “often considered by subsequent panels” and they “create legitimate expectations among WTO members.”¹¹⁴ This position was reinforced several years later, with the AB stating that it

AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 289 (Giorgio Sacerdoti et al. eds., 2006).

¹¹⁰ Appellate Body Working Paper, *Working Procedures for Appellate Review*, rule 6, WT/AB/WP/6 (Aug. 16, 2010).

¹¹¹ The ability of reappointment after four years is somewhat concerning in this respect. An alternative could consist of a one-time appointment with a term of six years.

¹¹² VAN DEN BOSSCHE, *supra* note 106, at 260.

¹¹³ DSU, *supra* note 99, art. 3.2.

¹¹⁴ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

“would have expected the Panel” to consider the AB’s reasoning from a prior report, because the AB report was intended to “provid[e] interpretative guidance for future panels.”¹¹⁵

The culmination of this development in jurisprudence solidifying the precedential value of AB decisions was *US – Steel*, in which the AB laid out its view on the binding nature of AB decisions: “WTO members attach significance to reasoning provided in previous panel and Appellate Body reports,” which are “often cited by parties in support of legal arguments in dispute settlement proceedings” and “relied upon by panels and the Appellate Body in subsequent disputes.”¹¹⁶ It then expressed its deep concern “about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues” and went on to state that “[t]he Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system.”¹¹⁷ Moreover, the AB supported this argument by mentioning what appears almost obvious: it would be difficult to realize “the hierarchical structure contemplated in the DSU,” which provides for appellate review by the AB of panel decisions, without assigning some sort of precedential value to AB decisions.¹¹⁸ Indeed, the AB may have even issued an implied threat towards the panels when it poignantly suggested that the panel’s decision not to follow the AB jurisprudence constituted a “[failure] to discharge its duties under Article 11 DSU.”¹¹⁹ This form of de facto precedent has paved the way for the elucidation of overarching principles in the jurisprudence of the AB,¹²⁰ which is at least by and large now

¹¹⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 107, WT/DS8/AB/RW (Oct. 22, 2001). See also Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WT/DS268/AB/R (Nov. 29, 2004) (stating furthermore that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same”).

¹¹⁶ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (Apr. 30, 2008).

¹¹⁷ *Id.* ¶ 162.

¹¹⁸ *Id.* ¶ 161.

¹¹⁹ *Id.* ¶ 162.

¹²⁰ David Palmetier & Petros Mavroidis, *The WTO Legal System: Sources of*

followed by the panels.¹²¹

A second change concerning dispute settlement from the era of the GATT to the current system under the WTO lies in the different normative environment between the two eras.¹²² Dispute settlement under the GATT was consistently regarded as a more formal exercise in diplomacy¹²³ and procedures were only changed towards a more formalized legal order in the 1980s with the creation of the legal division in the GATT secretariat. Nevertheless, the traditional paradigm under the GATT prior to 1995 remained “embedded liberalism,” a term coined by John Ruggie denoting that despite the existence of the interventionist welfare state, trade liberalization was a firmly entrenched paradigm.¹²⁴ This meant that the ethos of trade experts of the first hour remained the orthodox view in the context of the GATT as an organization, including its dispute settlement process.

For present purposes, it is important to bear in mind that the GATT from the beginning contained justifications for breaches of other GATT provisions, including justifications under the heading of general exceptions in Article XX GATT or on the basis of economic emergencies,¹²⁵ security concerns,¹²⁶ regional integration mechanisms,¹²⁷ balance of payment concerns,¹²⁸ or for reasons of economic development.¹²⁹ These rules were supplemented by a

Law, 92 AM. J. INT’L L. 398, 401 (1998).

¹²¹ See generally Wagner, *supra* note 67 (commenting on the debate between the panels and the AB concerning the SPS Agreement).

¹²² For the approach taken under the SPS Agreement and the TBT Agreement, see *infra* Section II, 2, b.

¹²³ HUDEC, *supra* note 2 (arguing that the GATT was best characterized as a “diplomat’s concept of legal order. At least, that is the way it started out”).

¹²⁴ John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982).

¹²⁵ GATT, *supra* note 1, art. XIX GATT.

¹²⁶ GATT, *supra* note 1, art. XXI GATT.

¹²⁷ GATT, *supra* note 1, art. XXIV GATT.

¹²⁸ GATT, *supra* note 1, art. XII; art. XVIII, Sec. B GATT.

¹²⁹ Committee on Trade and Development, *Note by Secretariat: Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, ¶ 3, Oct. 25, 2000, WT/COMTD/W/77; *Note by the Secretariat – Addendum: Information on the Utilisation of Special and Differential Treatment Provisions*, Feb. 7, 2002, WT/COMTD/W/77/Rev.1/Add.4.

system of waivers.¹³⁰ The justifications under Article XX GATT serve as an exemption, within limitations, from GATT rules and concessions concerning the goals otherwise pursued by the GATT, most prominently the liberalization of trade.

The difference in how Article XX GATT was interpreted prior to the emergence of the WTO can be attributed not only to a less politicized process by way of introducing a permanent appellate mechanism, but also a different conception of the competing interests. Under the GATT regime, Article XX GATT was interpreted in a very narrow fashion, creating a standard for justification that was almost impossible to meet,¹³¹ including in cases concerning the environment.¹³²

Under the WTO, the AB interpreted the same provisions differently. The same cannot be said for the panel level, which had continued the jurisprudence that had previously existed under the GATT regime.¹³³ The AB took issue with the interpretation of Article XX(g) GATT, especially with respect to the term “related to” and adopted a more lenient standard. Prior to the *Gasoline* decision, disagreement arose over the order in which this provision is to be analyzed. The AB made it clear that the analysis is to be conducted in two steps: in a first step, panels and the AB examine a WTO member’s measure under one of the paragraphs (a) – (j), followed by an analysis of whether the measure’s application is in

¹³⁰ ISABEL FEICHTNER, *THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW* (Lorand Bartels et al. eds., 2014).

¹³¹ Venzke, *supra* note 92, at 1117.

¹³² Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198-29S/91 (Feb. 22, 1982); Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268-35S/98 (Mar. 22, 1998) (finding that the export prohibitions were not justified by Article XX GATT because they “could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and rendering effective the restrictions on the harvesting of these fish”); Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (Nov. 7, 1990) (considering Article XX(b) GATT measures “necessary for the protection of human, animal plant life or health” as the subject of interpretation). These decisions emphasized the maintenance of a regime of trade liberalization at the almost total expense of other public policy goals such as those enshrined in Article XX GATT.

¹³³ See, e.g., Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996).

accordance with the chapeau of Article XX GATT.¹³⁴ Importantly, this clarified the structure of the provision in that the chapeau exists in order to curb abuse by a WTO member invoking one of the justifications in Article XX GATT. Understood in this sense, the statement by the AB that the “*General Agreement* is not to be read in clinical isolation from public international law” makes clear that WTO law is embedded in a wider system of public international law.¹³⁵ A similar chain of events was evident in the *US – Shrimp* case, in which the panel similarly exhibited an approach that – while paying lip service to the “legitimacy of environmental policies” – saw such policies as “unilateral measures which, by their nature, could put the multilateral trading system at risk.”¹³⁶ The AB, similar to its previous decision in *US – Gasoline*, made clear what it saw as the purpose of Article XX GATT: allowing for a justification of measures that may otherwise contravene provisions such as Articles I, III or XI GATT, while making sure that such measures are not taken as an “abuse or misuse of a given kind of exception.”¹³⁷

The subsequent jurisprudence has followed this line of thought.¹³⁸ There is disagreement over the extent to which the AB

¹³⁴ See generally *US – Gasoline* Appellate Body Report, *supra* note 93; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12 2001) [hereinafter *EC – Asbestos* Appellate Body Report]; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 139, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil – Retreaded Tyres* Appellate Body Report].

¹³⁵ *US – Gasoline* Appellate Body Report, *supra* note 93.

¹³⁶ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.60, WT/DS58/R (May 15, 1998) [hereinafter *US – Shrimp* Panel Report].

¹³⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 116 (Dec. 12, 1998) [hereinafter *US – Shrimp* Appellate Body Report] (finding that “[i]t is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.”). See *ibid.*, ¶ 121.

¹³⁸ See, e.g., *EC – Asbestos* Appellate Body Report, *supra* note 134; *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 134; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (Dec. 11, 2000) [hereinafter *Korea – Various Measures on Beef*].

has developed this line of reasoning into a full-fledged proportionality jurisprudence.¹³⁹ Be that as it may, it is hard to contest that the jurisprudence of the AB, which has clearly expanded the argumentative space for invoking the justifications in Article XX GATT compared to the approach championed by panels in the GATT era, would not have developed without either the institutional change brought about by the adoption of the DSU or the realization that in an increasingly interdependent world, WTO members making domestic decisions over matters such as the protection of health or the environment deserve a certain amount of regulatory space. Such decisions are not permitted to be made without limitations, however. This increasingly legalized form of deciding complex interactions has moved away from the diplomatic-political origin of the GATT era,¹⁴⁰ although remnants of that system remain.

3.2. Trade Regulation and Regulatory Expropriations: Trade and Investment Law

Before comparing and contrasting the two fields of international trade and investment law, it is worth pointing out that the two fields have, at first sight, distinctly different goals: international investment law has developed as a protective mechanism concerning the investments that individuals or corporations make in a different jurisdiction. International trade law, on the other hand, has developed by reducing tariffs and other barriers to trade by curbing protectionism.

A comparison between terms in particular provisions of both regimes meets considerable challenges, as such terms are dependent on the overall purpose of the treaty in which they are found as well as the context of the provision in which they appear. The concept of regulatory space can be approached from two

Appellate Body Report].

¹³⁹ Venzke, *supra* note 92, at 1130.

¹⁴⁰ J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *J. WORLD TRADE* 191 (2001); Adrian T. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 *BERKELEY J. INT'L L.* 171, 173 (1998).

different directions. In the case of international investment law, regulatory space functions as a justification for an intrusion on investment guarantees, especially in cases where an investment may conflict with what the host state considers a desirable public policy. In the case of international trade law, the justification is similarly based upon a public policy decision against a commitment towards other WTO members to reduce barriers to trade and avoid protectionism.

This section uses the field of regulatory expropriations to examine the amount of regulatory space countries possess in international investment law. It then analyzes the regulatory space WTO members have under two agreements under the WTO umbrella: the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”)¹⁴¹ and the Agreement on Technical Barriers to Trade (“TBT Agreement”).¹⁴²

3.2.1. *Investment Law: Regulatory Expropriations*

International investment law pursues a number of goals, including the protection of investors and investments as well as the promotion of general welfare through foreign direct investment.¹⁴³ Investors demand protection: for example, investments in infrastructure projects are generally high-risk undertakings and require the infusion of often considerable capital over a long period of time and are subject to changing political realities within the host state. Because of these characteristics, investors expect

¹⁴¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf.

¹⁴² Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120 [hereinafter TBT Agreement], available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

¹⁴³ *Société Générale de Surveillance S.A. v. Republic of Phil.*, ICSID Case No. ARB/02/06, Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004) and *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, ¶ 171 (Aug. 6, 2003). *Saluka Investments BV v. Czech Republic*, UNCITRAL, ¶ 300 (Mar. 17, 2006). *But see* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397 (2011) (suggesting that bilateral investment treaties are “unlikely to significantly drive foreign investment”).

stability with respect to administrative decision-making.¹⁴⁴ Traditional international investment law has placed considerable emphasis on the protection of these investments, although, as laid out above, the field is undergoing change at the moment.

3.2.1.1. *The Changing Landscape of Investment Regulation*

As a counterpoint to the protection of investors, more recent IIAs have incorporated provisions that explicitly recognize the importance of non-economic factors, such as human, animal plant life or health or the environment.¹⁴⁵ This hints at the recognition of the need to find a balance between the individual rights of investors on the one hand and the regulatory needs of societies on the other.¹⁴⁶

The move began initially with the inclusion of provisions in the preamble to investment agreements, such as those of the Energy Charter Treaty or the NAFTA. The former recalls “the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects.” It recognizes “the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these

¹⁴⁴ Rudolf Dolzer, *Indirect Expropriation: New Developments?*, 11 N.Y.U. ENVTL L.J. 64, 80 (2002); Ralf Buckley, *International Trade, Investment and Environmental Regulation: An Environmental Management Perspective*, 27 J. WORLD TRADE 101, 117–18 (1993).

¹⁴⁵ See generally NEWCOMBE & PARADELL, *supra* note 49, at 504; Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law*, 50 INT’L & COMP. L.Q. 811, 816–17 (2001); ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 69 (James Crawford et al. eds., 2012); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT’L ECON. L. 1037 (2010).

¹⁴⁶ Christoph Schreuer, *The Concept of Expropriation Under the ETC and Other Investment Protection Treaties*, 5 TRANSNAT’L DISPUTE MGMT. (2005), available at http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf.

purposes.”¹⁴⁷ The latter contains the following language: the parties “UNDERTAKE each of the preceding [investment and trade objectives] in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations.”¹⁴⁸

Similarly, the 2012 US Model BIT declares in its preamble that the other objectives of the BIT are to be achieved “in a manner consistent with the protection of health, safety and the environment.”¹⁴⁹ In its operative part, Article 12 of the 2012 US Model BIT, dealing with the environment, is consistent with the 2004 US Model BIT in that recognizes the inappropriateness of encouraging investment in those instances when it weakens or reduces environmental protections.¹⁵⁰ It furthermore replicates language from the 2004 version when it states:

Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.¹⁵¹

The added language in the 2012 U.S. Model BIT imposes an affirmative obligation on the parties to ensure that the parties do not waive or derogate from domestic environmental laws or labor laws and mandates that the parties “effectively enforce” these rules.¹⁵² A new clause was added that provides the parties with

¹⁴⁷ The Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Conference, pmbl., 40 (Dec. 1994).

¹⁴⁸ North American Free Trade Agreement, U.S.-Can.-Mex. (Jan. 1, 1994).

¹⁴⁹ 2012 U.S. Model Bilateral Investment Treaty, Treaty Between the Government of the United States of America and the Government of ____ Concerning the Encouragement and Reciprocal Protection of Investment, art. 12(2), available at <http://www.state.gov/documents/organization/188371.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

more regulatory space (the 2012 U.S. Model BIT uses the term “discretion”) “with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.”¹⁵³ This expanded regulatory space is conditioned on the discretion being exercised in a reasonable manner.

Compared with the 2012 US Model BIT, the 2004 Canadian Model BIT is more explicit. Article 10 is structurally analogous to Article XX GATT and Article XIV of the General Agreement on Trade in Services (“GATS”). The provision states:

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) to protect human, animal or plant life or health;
- (b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- (c) for the conservation of living or non-living exhaustible natural resources.¹⁵⁴

Other agreements incorporate the relevant GATT and GATS rules by way of reference.

In this context, it is important to draw a distinction not only between direct expropriations and indirect expropriations,¹⁵⁵ but

¹⁵³ *Id.* art. 12(3).

¹⁵⁴ 2004 Canada Model Bilateral Investment Treaty, Agreement Between Canada and ___ for the Promotion and Protection of Investments, art. 10, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

¹⁵⁵ The majority of today’s disputes no longer concern direct expropriations, but rather indirect expropriations. See generally W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, BRIT. Y.B. INT’L L. 115, 118 (2003). See Dolzer, *supra* note 144, at 66 (stating that “it is not unreasonable to assume that the legal issues in the foreign investment context

also to distinguish compensable expropriations and non-compensable regulation. Non-compensable regulations are often described as “regulatory takings” or “regulatory deprivations” and are state actions that are not singular, but rather exemplify abstract-general rules that are on their face non-discriminatory.¹⁵⁶ The present analysis is only concerned with regulatory takings, which is governmental rule-making that is not normally directed at an individual investor, but rather is directed at investors that formulate abstract-general rules applicable to a variety of circumstances. One recent example of such a governmental rule is the ban on printing logos onto cigarette packages in order to better protect public health.¹⁵⁷

It is this latter distinction that is important for the purposes of this comparison. By 1980, the *Restatement (Third) of the Foreign Relations Law of the United States* already provided guidelines with respect to expropriations in general, developing the concepts of unreasonable interference, undue delay, and the effective enjoyment of property as criteria. Section 712 of the *Restatement* provides that:

A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation¹⁵⁸

may, for the time being, be dominated by the definition of expropriation”); see generally Schreuer, *supra* note 146, at 5-45.

¹⁵⁶ Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984). See generally Ratner, *supra* note 76, at 478; L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID REV. – FOREIGN INV. L.J. 293, 294 (2004).

¹⁵⁷ See generally Jennifer M. Freedman, *Australia Said to Face WTO Complaint over Tobacco Packaging, Ban on Logos*, BLOOMBERG (Mar. 5, 2012, 3:03 AM), available at <http://www.bloomberg.com/news/2012-03-05/australia-said-to-face-wto-complaint-over-ban-on-tobacco-logos.html>.

¹⁵⁸ See Restatement (Third) of Foreign Relations Law of the United States § 712(1) (1986) (clarifying that this section applies to direct as well as indirect expropriations).

Subsection (1) applies . . . to other actions of the government that have the effect of “taking” the property, in whole or in large part, outright or

At the same time, the *Restatement* also made clear that:

A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, . . . and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.¹⁵⁹

Article 1110 of NAFTA has served as a blueprint for a number of other agreements, spelling out the requirements as follows:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with [provisions pertaining to valuation and payment procedures].¹⁶⁰

in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. *Id.* § 712 Comment (g).

¹⁵⁹ *Id.* § 712 Comment (g).

¹⁶⁰ North American Free Trade Agreement, art. 1110, Dec. 17, 1992, T.I.A.S. No. 03,725. In its attempt to create a convention on expropriations, the OECD suggested language similar to the NAFTA text:

A Contracting Party shall not expropriate or nationalize directly or

The failed Multilateral Agreement on Investment (MAI)¹⁶¹ used similar language to NAFTA, but, importantly, used language that attempted to clarify the difference between the right to regulate and the need to compensate. A provision in the Annex spelled out that: “[a] Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement.”¹⁶²

Moreover, the interpretative note to Article 5 concerning expropriations and compensation spelled out that:

The reference in Article IV.2.1 to expropriation or nationalisation and ‘measures tantamount to expropriation or nationalisation’ reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or

indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as “expropriation”) except:

- a) for a purpose which is in the public interest,
- b) on a non-discriminatory basis,
- c) in accordance with due process of law, and
- d) accompanied by payment of prompt, adequate and effective compensation

Draft Convention on the Protection of Foreign Property, Org. for Econ. Cooperation & Dev., Oct. 12, 1967, 7 I.L.M. 117, 126.

¹⁶¹ See generally Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT’L ECON. L. 713, 756-73 (2002).

¹⁶² Negotiating Group on the Multilateral Agreement on Investment (MAI) at the Organisation for Economic Co-operation and Development, *Chairman’s Note on the Environment and Related Matters and on Labour*, Mar. 9, 1998, available at <http://www.oecd.org/daf/mai/pdf/ng/ng9810e.pdf>. The MAI was negotiated between 1995 and 1998, but never attained the necessary support by countries to come into existence. See generally Mary E. Footer, *On the Laws for Attraction: Examining the Relationship Between Foreign Investment and International Trade*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 105, 112-13 (Roberto Echanti & Pierre Sauvé eds., 2013).

investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.¹⁶³

The change in treaty language is a good indicator that a growing amount of weight is being given to non-economic values. Accordingly, it has become increasingly apparent that international investment law has turned away from seeing investment promotion and protection as its sole purpose, at the expense of other key values.

Over the course of the last fifteen to twenty years, a number of additional criteria have been developed in the case law that shed light on this distinction.¹⁶⁴ However, the case law has failed to establish bright-line rules or, in the words of the tribunal in *Generation Ukraine*, to establish a “checklist” or a “mechanical

¹⁶³ *Indirect Expropriation” and the “Right to Regulate” in International Investment Law* 9 (Org. for Econ. Co-operation & Dev., Working Papers on Int'l Inv. No. 2004/4, 2004), available at <http://www.oecd.org/investment/internationalinvestmentagreements/33776546.pdf>.

¹⁶⁴ Other approaches exist, namely the “sole effects” doctrine applied in the jurisprudence of the Iran-U.S. Claims Tribunal, NAFTA decisions, and a small number of ICSID cases. In the case of the Iran-U.S. Claims Tribunal, however, it is important to bear in mind the particular circumstances of its creation and the cases it dealt with, which were characterized mainly by claims related to the seizing of physical property by the new government or individuals and groups closely associated with the new government, or related to deprivation through the appointment of new managers. Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U. L. REV. 83 (1977). See, e.g., Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1984); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, ¶¶ 71-72 (Feb. 17, 2000). See generally Rosalyn Higgins, *The Taking of Property By the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 331 (1982). But see Schreuer, *supra* note 147, at 119 (citing the Convention Establishing the Multilateral Investment Guarantee Agency of 1985, which defines expropriation as “any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment”); and Dolzer, *supra* note 144, at 91 (stating that “[i]t is also beyond doubt, however, that the more recent jurisprudence of arbitral tribunals reveals a remarkable tendency to shift the focus of the analysis away from the context and the purpose and focus more heavily on the effects on the owner.”).

test.”¹⁶⁵ The criteria includes: (1) whether the measure is discriminatory, (2) the extent to which governments interfere with property rights, (3) the purpose of the measure, (4) whether the measure is proportional regarding the impact on the investor and the public policy that is being pursued, and (5) to what extent the measure is contrary to legitimate investor expectations.¹⁶⁶ Echoing this development, Philippe Sands states that “those charged with interpreting and applying treaties on the protection of foreign investment need to take into account the values that are reflected in norms that have arisen outside the context of the investment treaty which they are applying.”¹⁶⁷

3.2.1.1.1. *Non-Discrimination*

A measure will not pass muster if it is de jure or de facto discriminatory. As is true in other areas of international economic law, discriminatory treatment in international investment law is a cause for host state liability, unless justified in narrow circumstances. The rationale is simple: without a level playing field between domestic and foreign operators, foreign competitors are likely to be at a disadvantage due to the lack of political connectedness and inability to exert as much political pressure as their domestic counterparts.

¹⁶⁵ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, ¶ 20.29 (Sept. 16, 2003). See generally *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 265 (Mar. 17, 2006).

¹⁶⁶ See generally, Katia Yannaca-Small, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 445, 462 (Katia Yannaca-Small ed., 2010); Higgins, *supra* note 165, at 322-54; Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 *BERKELEY J. INT'L L.* 1, 11-25 (2011) (discussing the standard used in finding indirect expropriation, which focuses on the purpose of the regulatory measure); Ratner, *supra* note 76, at 482-83 (providing a break down of several factors used to assess government interference); Waelde & Kolo, *supra* note 145, at 827 (listing criteria numbers (1), (3) and (4), but acknowledging that they are not the end of analysis, as the balancing of several relevant criteria is necessary); and Burns H. Weston, “*Constructive Takings Under International Law: A Modest Foray into the Problem of “Creeping Expropriation,”*” 16 *VA. J. INT'L L.* 103 (1975).

¹⁶⁷ Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 *N.Y.U. ENVTL. L.J.* 198, 202 (2002).

One of the paradigmatic cases in this regard is *Ethyl Corp. v. Canada*.¹⁶⁸ Concerned about the health and environmental effects of a fuel additive called methylcyclopentadienyl manganese tricarbonyl ("MMT"), the Canadian government attempted to ban its importation, but did not provide evidence of a harmful health effect from the use of MMT.¹⁶⁹ Moreover, Canada prohibited only the importation of MMT, not the production of MMT by its domestic producers, thus hinting at some form of protectionist agenda.¹⁷⁰

A similar motivation appears to have been behind a later decision by the Canadian government to ban the export of polychlorinated biphenyl (PCB) waste, which led to a complaint by a U.S. company. The arbitral decision pointed out that the record clearly indicated that the measure was put in place not on the basis of health or environmental concerns, but rather as a protectionist measure benefitting the domestic PCB waste industry.¹⁷¹ The tribunal found that the Canadian policy was primarily aimed at the protection of the Canadian PCB disposal industry from foreign, especially U.S., competition.¹⁷² Such motivations, if sufficient evidence can be found, can in most cases lead to a finding of a measure's illegality without the need for further evidence.

3.2.1.1.2. *Extent of Interference with Property Rights*

Often described as the most contentious, this element concerns the extent to which a governmental measure must impact investor rights to constitute an expropriation.¹⁷³ Not every miniscule interference is reason for bringing an investment claim; rather, an

¹⁶⁸ *Ethyl Corp. v. Gov't of Canada*, Decision on Jurisdiction, NAFTA-UNCITRAL, (June 24, 1998). See generally Alan C. Swan, *Ethyl Corporation v. Canada, Award on Jurisdiction (Under NAFTA/UNCITRAL)*, 94 AM. J. INT'L L. 159 (2000).

¹⁶⁹ Moloo & Jacinto, *supra* note 166, at 29.

¹⁷⁰ Waelde & Kolo, *supra* note 145, at 834.

¹⁷¹ *S.D. Myers, Inc. v. Gov't of Canada*, Partial Award (NAFTA-UNCITRAL), ¶ 193 (Nov. 13, 2000).

¹⁷² *Id.* ¶ 194.

¹⁷³ Waelde & Kolo, *supra* note 145, at 837.

investor must absorb such interference as a regular commercial risk.¹⁷⁴ Yet, overbearing regulations may render property useless without appropriate compensation.¹⁷⁵ It is therefore necessary to find the proper balance between these two poles.¹⁷⁶ Unlike direct expropriations, where property is taken away by governmental measures, this type of situation is characterized by significantly reducing the commercial value of the property for the investors.¹⁷⁷ At one extreme, which the *Tecmed* tribunal pointed out, are situations in which the deprivation is total and extends over time. In such situations regulatory measures could be an “indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure[s] have been affected in such a way that... any form or exploitation thereof... has disappeared.”¹⁷⁸

Other situations are not as clear-cut. Oftentimes, profit is not completely withheld, but is reduced, as was the case in *Pope & Talbot v. Canada*. Since the company’s sales were not entirely prevented, the tribunal found that the interference was not “sufficiently restrictive to support a conclusion that the property has been taken away from the owner.”¹⁷⁹ A similar situation that was truly regulatory in nature was at issue in *S.D. Myers v. Canada*, concerning a ban on PCB waste export to the U.S. The tribunal concluded that regulations constitute lesser interference than expropriation.¹⁸⁰ These tribunal decisions, together with others,¹⁸¹

¹⁷⁴ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶¶ 335-36 (Sept. 11, 2007); and *Starrett Housing Corp. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 112, 156 (Aug. 14, 1987).

¹⁷⁵ Rudolf Dolzer & Margrete Stevens, *BILATERAL INVESTMENT TREATIES* 25-26 (1995); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 30 (1986-1987); Waelde & Kolo, *supra* note 145, at 835.

¹⁷⁶ Ratner, *supra* note 76, at 498; Waelde & Kolo, *supra* note 145, at 840.

¹⁷⁷ *But see Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 112 (Aug. 30, 2000) (deciding that the government’s adoption of the Ecological Decree amounts to indirect expropriation); *see also* Waelde & Kolo, *supra* note 145, at 838.

¹⁷⁸ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003).

¹⁷⁹ *Pope & Talbot, Inc. v. Gov’t of Canada*, UNCITRAL-NAFTA, Damages, ¶ 99 (May 31, 2002).

¹⁸⁰ *S.D. Myers, Inc. v. Gov’t of Canada*, NAFTA-UNCITRAL, Partial Award, ¶¶ 281-82 (Nov. 13, 2000).

¹⁸¹ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award,

point to a shift away from the earlier examination of the impact on the investor as the sole criterion for determining whether a governmental measure is expropriatory or regulatory.¹⁸²

3.2.1.1.3. Purpose of Governmental Measure

Notwithstanding some contrary decisions,¹⁸³ there appears to have been a slow, albeit steady, recognition that the purpose of the measure plays a role in the evaluation of a comprehensive measure.¹⁸⁴ The tribunal in *S.D. Myers* referenced this type of thinking when it found that a tribunal “must look at the real interests involved and the purpose and the effect of the governmental measure.”¹⁸⁵ These interests may be subject to change over time through the coming into power of a new government with different priorities, through new scientific insights requiring new regulatory measures to combat risks that were previously unknown (for instance, climate change),¹⁸⁶ or through societal changes that favor protection of the environment

¶ 20.32 (Sept. 16, 2003); *Glamis Gold, Ltd. v U.S.*, ICSID Case, Award, ¶ 536 (June 8, 2009); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 142 (Dec. 16, 2002); *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 263 (May 12, 2005).

¹⁸² *But see generally Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 111 (Aug. 30, 2000).

¹⁸³ *See supra* note 164.

¹⁸⁴ *See Glamis Gold, Ltd. v. United States*, ICSID, Award, ¶ 356 (June 8, 2009) (finding that, after evaluating the treatment of the claimant through a comprehensive analysis, the international minimum standard of treatment was not breached); G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, (1962) (stating that “the existence of generally recognized considerations of public health, safety, morals or welfare will normally lead to a conclusion that there has been no ‘taking.’”). *See also* SORNARAJAH, *supra* note 63, at 374 (explaining that “non-discriminatory measures relating to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state.”); Fortier & Drymer, *supra* note 156, at 326 (describing the international law of indirect expropriation as “very sketchy and rough”).

¹⁸⁵ *S.D. Myers, Inc. v. Gov't of Canada*, NAFTA, Partial Award, 40 I.L.M. 1408, ¶ 285 (Nov. 12, 2000).

¹⁸⁶ Markus Wagner, *Taking Interdependence Seriously: The Need for a Reassessment of the Precautionary Principle in International Trade Law*, 20 CARDOZO J. INT'L & COMP. L. 713 (2012).

over other considerations.

A number of investment tribunal decisions have recognized that the purpose of a governmental measure is an element in reaching the decision of whether compensation is mandatory or not. The *Feldman* tribunal's decision may contain the most specific rationale to date, explaining that "governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions, and the like."¹⁸⁷ This decision was clearly informed by the idea that not every governmental regulation, so long as it is reasonable, is compensable. A measure's purpose is often, though not always, closely tied to the requirement that a measure be non-discriminatory. There have been cases in which the purpose of the measure may be laudable or genuinely based on the protection of important societal values, yet such a measure fails because of a protectionist purpose.¹⁸⁸ In many ways, this is reminiscent of the situation in the WTO.

3.2.1.1.4. *Proportionality*

International investment law had for the longest time functioned without making explicit reference to the principle of proportionality. This changed when the principle, guided substantially by the European Court of Human Rights' jurisprudence in *James v. United Kingdom*,¹⁸⁹ was introduced into investment law by the decisions in *S.D. Myers*¹⁹⁰ and *Feldman*¹⁹¹ and

¹⁸⁷ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002).

¹⁸⁸ *S.D. Myers, Inc. v. Gov't of Canada*, NAFTA, Partial Award, 40 I.L.M. 1408, ¶¶ 252-57 (Nov. 13, 2000).

¹⁸⁹ *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 4 (1986). See also Stephan Schill, *Cross-Regime Harmonization Through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights*, 27 ICSID REV. 87, 107 (2012).

¹⁹⁰ *S.D. Myers, Inc. v. Canada*, NAFTA, 40 I.L.M. 1408, ¶¶ 252-57 (Nov. 13, 2000).

¹⁹¹ *Marvin Feldman v. Mexico*, Award, ICSID Case No. ARB(AF)/99/1 (Dec. 16, 2002).

reiterated later in the *Tecmed* case.¹⁹² This principle or analytical structure spells out that state action must not only serve a legitimate goal, but must also be suitable (i.e., the purported goal must be furthered by the measure), necessary (i.e., that no less intrusive measure exists which achieves the same objective) and, finally, proportional in a strict sense (i.e., the measure must appropriately balance the competing interests of public policy and private rights).¹⁹³ It is important to recognize that the principle of proportionality serves in the large majority of cases as a control against governmental overreach or, at the very least, forces governments to be more precise in their own assessments and reasoning, lest they be subject to judicial review.¹⁹⁴ It thus reflects an approach that recognizes that rights are rarely absolute and allows for a “more or less,” rather than an “all or nothing” approach.¹⁹⁵

The *Tecmed* decision has laid down a considerable amount of this analytical structure.¹⁹⁶ The case concerned a claim made by an investor that the Mexican government failed to renew a temporary operating license for a landfill for hazardous waste and, therefore, breached its obligations contained in a BIT. The government’s argument for refusing to renew the license consisted of lack of reliability and operated against certain regulatory requirements.

¹⁹² *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award, ICSID Case No. ARB(AF)/00/2 (May 29, 2003).

¹⁹³ See generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75-6 (2008); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 Years of the New York Convention: ICCA International Arbitration Conference (Albert Jan van den Berg ed., 2009), available at http://lsr.nelco.org/nyu_plltwp/146. See generally Robert Alexy, *THEORIE DER GRUNDRECHTE* (1985); Aharon Barak, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

¹⁹⁴ Henckels, *supra* note 76, at 229; Kingsbury & Schill, *supra* note 193; Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT’L DISP. SETTLEMENT 95, 115-16 (2012). But see generally Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 761 (2008).

¹⁹⁵ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 21 (1977).

¹⁹⁶ See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 121 (May 29, 2003) (recognizing that even non-discriminatory regulations enacted for a legitimate public purpose may entail compensatory responsibility).

However, the refusal to grant the license only came about after considerable protest by the local population, which prompted the company to relocate to a different site. In the meantime, the investor wanted to maintain the landfill for five months until the new facility had been created.¹⁹⁷ Today, it remains one of the only decisions that attempts to distinguish an appropriate use of governmental regulatory power from compensable expropriation. It inquired into “whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.”¹⁹⁸ Moreover, the tribunal recognized that “[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”¹⁹⁹

The *S.D. Myers* decision is important not only for recognizing that there is a duty to enact measures that are least restrictive, but also for referencing WTO law in this regard.²⁰⁰ Similar approaches have been taken by other arbitral tribunals, although sometimes without explicitly referencing the principle of proportionality or without making its underlying assumptions explicit.²⁰¹ In *LG&E*, the tribunal stated that it was required to balance the “degree of the measure’s interference with the right of ownership” against “the power of the State to adopt its policies,” while being mindful of the “context within which a measure was adopted and the host

¹⁹⁷ *Id.* ¶ 99. The tribunal in the end decided that the decisive criterion for the refusal to grant the license lay not in the alleged violations of permits, but rather in political considerations. See Henckels, *supra* note 76, at 232-33.

¹⁹⁸ *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, ¶ 122 (May 29, 2003). See Henckels, *supra* note 76, at 232-33; Stephan Schill, ‘Revisiting a Landmark’: *Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed*, 3 *TRANSNAT’L DISP. MGMT.* 1, 10-13 (2006).

¹⁹⁹ *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, ¶ 122 (May 29, 2003).

²⁰⁰ *S.D. Myers, Inc. v. Gov’t of Canada*, Partial Award, 40 *I.L.M.* 1408, ¶¶ 215, 221, 255 (Nov. 13, 2000).

²⁰¹ See, e.g., *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12 (2006). See also *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 197 (Aug. 25, 2006) (finding the measure of pesification of the economy was “a bona fide regulatory measure of general application, which was reasonable . . . and proportionate to the aim of facing such an emergency”).

State's purpose."²⁰² Importantly, unlike the holding in *Tecmed*, it found that social welfare considerations must stand behind property rights "where the State's action is obviously disproportionate to the need being addressed."²⁰³ In *El Paso v. Argentina* and *Continental Casualty v. Argentina*, the tribunal found that as long as measures were generally applicable they would only be compensable if they were "unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair"²⁰⁴ or "intolerable, discriminatory or disproportionate."²⁰⁵

3.2.1.1.5. *Legitimate Investment-Backed Expectations*

A final criterion oftentimes mentioned is the extent to which an investor relies on expectations at the beginning of the investment and to what extent the investor could foresee changing circumstances in the regulatory structure. It is clear that these expectations must not be entirely left to the subjective assessment of the investor, but must be objectified in some way.²⁰⁶ The assessment of whether a particular investor has suffered deprivations that were unexpected is itself not wholly objective. But, as the *Chinn* case before the PCIJ already made clear, investors constantly face changing circumstances and not all expectations must necessarily be fulfilled.²⁰⁷ Moreover, states may change the regulatory structure over time and investors are not immune to changing market conditions or changing regulatory environments. What is important then is not that the regulatory landscape changes, but that the circumstances change either dramatically or

²⁰² LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 189-94 (Oct. 3, 2006).

²⁰³ *Id.* ¶ 195.

²⁰⁴ El Paso Energy Int'l Co. v. Argentina, ICSID Case No. ARB/03/15, Award, ¶ 241 (Apr. 27, 2006).

²⁰⁵ Cont'l Casualty Co. v. Argentina, ICSID Case No. ARB/03/9, Award, ¶ 276 (Sept. 5, 2008).

²⁰⁶ YANNACA-SMALL, *supra* note 166, at 474.

²⁰⁷ Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12, 1934).

abruptly, or both.²⁰⁸

An inquiry into the propriety of a regulatory change requires an investigation of the circumstances and deliberations of the time prior to the investment, for instance what type of promises were made at that time and what expectations were raised with respect to the time that a particular project would be permitted.²⁰⁹ This was an issue in the *Methanex* case, which dealt with a California ban on a fuel additive (MTBE). The tribunal stated that compensation required a showing of “specific commitments” that “had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.”²¹⁰ Moreover, in that particular case, the tribunal found that investors must have been aware of the potential for changing regulatory circumstances, especially with regard to health or environmental issues.²¹¹

Taken together, these points were summarized by the *Feldman* tribunal, which stated that “[g]overnments, in their exercise of regulatory power, frequently change their laws and regulations in

²⁰⁸ A different standard was contemplated in the *Tecmed* case, according to which

[a] foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003). While this statement was made *obiter dictum*, it has been cited approvingly by subsequent tribunals, e.g., *MTD Equity Sdn. Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case ARB/01/7, Award, ¶ 114 (May 25, 2004); *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case UN 3467, Final Award, ¶ 185 (Jul. 1, 2004); *Eureko BV v. Republic of Poland*, Partial Award, ¶ 235 (Aug. 19, 2005).

²⁰⁹ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, ¶ 150 (May 29, 2003); and *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12 (2006), ¶ 316.

²¹⁰ *Methanex Corp. v. United States*, NAFTA-UNCITRAL, Ch. 11, Part IV-Ch. D, Final Award, ¶ 7 (Aug. 3, 2005).

²¹¹ *Id.* at 10. *But see generally* *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 124-27, 150 (May 29, 2003). The tribunal decided that in the process of deciding whether to invest in the landfill, the investors substantially relied on a useful lifespan of ten years for the operation.

response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.”²¹²

A number of tribunals have taken a different approach than the previously held “sole effect” doctrine, which focused almost exclusively on the economic impact of a measure with respect to the investor. The *Saluka* decision is instructive in this regard:

Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.²¹³

Realizing that legitimate investment-backed expectations deserve protection while simultaneously recognizing that regulatory frameworks are subject to change over time (due to scientific discoveries, developments in risk assessment or shifting societal attitudes) is important, as it allows for greater coherence in distinguishing two situations: those in which compensation is required, from those in which an investor simply faces a different regulatory environment and must bear the risk associated with an investment.

Only a small number of tribunals have recognized this distinction, because very few cases in which true regulatory changes occurred have been decided. As the *Pope and Talbot* tribunal explained, it is important to keep in mind in this context that “a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriations.”²¹⁴ The danger in allowing many measures to escape compensation because the state could invoke the moniker

²¹² Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 112 (Dec. 16, 2002).

²¹³ *Saluka Investments B.V. v. Czech Republic*, Partial Award, ¶ 264 (Mar. 17, 2006).

²¹⁴ *Pope & Talbot Inc. v. Canada*, NAFTA-UNCITRAL Ch. 11, Damages, ¶ 99 (May 31, 2002).

“regulation,” when such compensation would otherwise be justified, is clear. Yet relying on the economic impact of any measure without taking into account the wider context in which a particular measure takes place appears problematic. The proper weight to lend to these factors cannot be determined in the abstract, but rather it is the task of adjudicators to properly weigh and balance the evidence presented to them. There may well be times in which the economic effect on an investor is the most important element of the overall equation, though in practice such instances may be rare in true regulatory expropriation cases. The changing nature of investment arbitration already underway will determine whether this line of cases will continue into the future.

3.2.1.2. *Summary*

The *Feldman* tribunal has carefully summarized the problem that regulatory action poses:

The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.²¹⁵

²¹⁵ Marvin Feldman v. Mexico, Award, ICSID Case No. ARB(AF)/99/1, ¶ 112 (Dec. 16, 2002).

When evaluating these circumstances, coming up with a bright-line approach is a difficult, if not impossible, task. One of the core questions is thus the proper balancing between the rights of the investor and the ability of governments to regulate. Carefully balancing the elements of discrimination, the extent of interference with property rights, the purpose of governmental action, proportionality, and the legitimate expectations of the investor becomes key and does not allow for mechanical evaluation.²¹⁶

This leaves considerable discretion on the part of decision makers in the interpretation of almost all of these factors,²¹⁷ leading some to resign themselves to referencing Potter Stewart²¹⁸ when they say, "I know it when I see it."²¹⁹ But the growing jurisprudence appears to indicate that the sole criterion of economic impact is no longer a view that is likely to prevail in the future. The 2012 U.S. Model BIT encapsulates similar rules when it posits, in the context of expropriation, that the economic impact of government action is not the sole criterion for determining whether an indirect expropriation exists. Other factors include "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" as well as "the character of the government action."²²⁰ Moreover, the 2012 Model BIT explicitly states in Article 4(b) the right to regulate: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."²²¹

²¹⁶ In this sense, calls for maintaining the sole effect doctrine are misguided, as only the totality of circumstances may provide a tribunal with all of the necessary facts to make appropriate findings. This debate has crystallized in WTO law in the context of the SPS Agreement. See generally Wagner, *supra* note 67, at 192 et seq.

²¹⁷ For an overview of the literature, see Ratner, *supra* note 76, at 484.

²¹⁸ See generally *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

²¹⁹ See generally Fortier & Drymer, *supra* note 156, at 327.

²²⁰ United States 2012 Model Bilateral Investment Treaty, Annex B, art. 4, ¶ a, §§ ii-iii, 2012.

²²¹ *Id.* at Annex B, art. 4, ¶ b.

3.2.2. WTO Law: Trade Regulation in the SPS and TBT Areas

Under the WTO Agreement, the so-called standard of review has undergone considerable debate since the inception of the institution.²²² Indeed, the debate in WTO law has concentrated on this procedural vision of the extent to which WTO dispute settlement organs can make inquiries into domestic regulatory decisions. Rather than adding to the existing general literature, this section focuses on how the WTO's dispute settlement organs and scholars have debated the question of how much regulatory space WTO members should be accorded. This has been particularly at issue in cases concerning the SPS²²³ and TBT Agreements.²²⁴

The AB in the *Hormones* case remarked on the delicate balance that must be struck between permitting WTO members the necessary regulatory space and ascertaining that domestic measures are not taken for protectionist purposes.²²⁵ This statement embodies the realization that while adjudication by panels and the AB may evaluate to what extent a member is in compliance with its obligations and thus fulfill its role of ensuring the "security and predictability [of] the multilateral trading

²²² Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996); ROSS BECROFT, *THE STANDARD OF REVIEW IN WTO DISPUTE SETTLEMENT: CRITIQUE AND DEVELOPMENT* (2012); Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT'L ECON. L. 491 (2004); Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT'L ECON. L. 635 (2003).

²²³ David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865, 875 (1999-00); SPS Agreement, *supra* note 141.

²²⁴ TBT Agreement, *supra* note 142. This section outlines the pertinent legal questions surrounding the regulatory space according to WTO members within disputes concerning the SPS Agreement and the TBT Agreement.

²²⁵ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 115, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones* Appellate Body Report] (stating that the SPS Agreement reflects the "balance established . . . between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves."); see generally Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 92-96, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US – Clove Cigarettes* Appellate Body Report].

system,”²²⁶ the determination of what the applicable standard of review consists of is also a political statement over the distribution of power between different levels in a multi-level governance system such as the WTO.

3.2.2.1. SPS Agreement

The SPS Agreement allows members to take measures to protect human, animal, and plant life or health from sanitary and phytosanitary risks. It does so by employing a science-based approach. For example, WTO members wishing to block the importation of goods on the basis of a risk involving human, animal, or plant life or health need to produce scientific evidence justifying the measure. Article 2.2 SPS Agreement specifically demands that measures be “based on scientific principles” and “not maintained without sufficient scientific evidence.”²²⁷ Combined with the rules contained in Articles 3.1 and 3.2 SPS Agreement, which encourage members to follow international standards in developing internal measures and which create a rebuttable presumption of WTO consistency of an internal measure, the SPS Agreement elevates international standards in the subject matters covered by the SPS Agreement to a quasi-requirement. Under Article 3.3 SPS Agreement, deviations from such international standards in order to meet a higher level of protection must be justified with scientific evidence.²²⁸ This involves procedural and substantive requirements, such as carrying out a new risk assessment,²²⁹ which compels members to “take into account available scientific evidence.”²³⁰ Only in circumstances in which “scientific evidence is insufficient” are WTO members allowed to deviate from international standards, provided that these members “seek to obtain the additional

²²⁶ DSU, *supra* note 99, art. 3.2.

²²⁷ SPS Agreement, *supra* note 141, art. 2.2.

²²⁸ Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶ 237, WT/DS367/AB/R (Nov. 29, 2010).

²²⁹ SPS Agreement, *supra* note 141, art. 5.1.

²³⁰ *Id.* art. 5.2.

information necessary for a more objective assessment of risk," which has to be carried out "within a reasonable period of time."²³¹ What follows is a more detailed analysis of the SPS Agreement provisions as they relate to the degree to which WTO members enjoy regulatory space in their decision-making process concerning SPS matters.²³²

WTO members, while having the right to take WTO measures under Article 2.1 SPS Agreement, must adhere to a number of requirements in order to be in compliance with the SPS Agreement. The basic obligation contained in Article 2.2 SPS Agreement lays out that any measure is limited in scope "only to the extent necessary" and must be based on "scientific principles and . . . not maintained without sufficient scientific evidence."²³³ This basic obligation is buttressed by Article 5.1 SPS Agreement, which mandates that a risk assessment be carried out when putting in place measures that deviate from international standards.²³⁴ Under the AB's jurisprudence, the measure that a WTO member puts in place must show "the existence of a sufficient or adequate relationship" with the scientific evidence that the WTO member has acquired.²³⁵ Sufficiency requires verifiable data to support the conclusions and a "certain level of objectivity."²³⁶ While this may indicate that a higher evidentiary threshold is necessary for more trade-restrictive measures, the AB has consistently pointed out that WTO members also enjoy latitude – i.e. regulatory space – when it remarked "responsible, representative governments commonly act from perspectives of prudence and precaution where risks of

²³¹ *Id.* art. 5.7.

²³² See generally Wagner, *supra* note 67; TRACEY EPPS, INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO'S SPS AGREEMENT (Alan O. Sykes & Mary E. Footer eds., 2008); JACQUELINE PEEL, SCIENCE AND RISK REGULATION IN INTERNATIONAL LAW (2010).

²³³ SPS Agreement, *supra* note 141, arts. 2.1-2.2.

²³⁴ *Id.* art. 5.1.

²³⁵ Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, ¶ 80, WT/DS76/AB/R (Feb. 22, 1999) [hereinafter *Japan – Agricultural Products II* Appellate Body Report].

²³⁶ Panel Report, *Australia – Measures Affecting Importation of Salmon (Recourse to Article 21.5 by Canada)*, ¶ 7.48, WT/DS18/RW (Feb. 18, 2000). See generally also Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, ¶ 84, WT/DS245/AB/R (Nov. 26, 2003) [hereinafter *Japan – Apples* Appellate Body Report].

irreversible, e.g. life-terminating, damage to human health are concerned."²³⁷

International standards play a large role in determining whether a WTO member is in compliance with WTO law.²³⁸ In order to achieve a higher level of harmonization, the SPS Agreement is designed so that WTO members are in quasi-automatic compliance if their measures are "based on the relevant international standards, guidelines or recommendations."²³⁹ Promulgated outside the ambit of the WTO itself,²⁴⁰ the SPS Agreement allows WTO members to put in place measures that result in a higher level of protection than that provided by international standards. In such instances however, WTO members have to provide scientific justification for deviating from an international standard.

The contention in most situations concerning an SPS measure is, therefore, if and to what extent a WTO member has scientific evidence to back up the need for a higher level of protection than that afforded by an international standard. A WTO member is then obligated to carry out a risk assessment under Articles 5.1-5.3 SPS Agreement. In this context, the AB's jurisprudence has

²³⁷ EC - Hormones Appellate Body Report, *supra* note 225, ¶ 124.

²³⁸ See Markus Wagner, *International Standards*, in RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 238 (Tracey Epps & Michael J. Trebilcock eds., 2014) for an overview of the importance of international standards in the Agreement on Technical Barriers to Trade. See JUNJI NAKAGAWA, INTERNATIONAL HARMONIZATION OF ECONOMIC REGULATION (Jonathan Bloch & Tara Cannon trans., 2011), for the development and application of standards in international economic law.

²³⁹ SPS Agreement, *supra* note 141, arts. 3.1-3.2. See generally Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and the International Trade of Dairy Products*, 54 FOOD & DRUG L.J. 55, 57 (1999); David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865, 875 (2000).

²⁴⁰ The Codex Alimentarius Commission develops standards, guidelines, and recommendations for food safety relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice. The International Office of Epizootics develops relevant standards, guidelines, and recommendations for animal health and zoonosis. The Secretariat of the International Plant Protection Convention, in cooperation with regional organizations operating within the framework of the International Plant Protection Convention for plant health, develops international standards, guidelines, and recommendations for plant health.

recognized that the factors that WTO members may consider are not limited to those that Article 5.2 SPS Agreement mentions, and that a member's measures do not take place in a laboratory, but rather in "human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."²⁴¹ This leaves open the question—thus far unanswered by the AB or the panels—whether non-scientific factors (e.g. cultural preferences or subjective positions such as different societal risk perceptions) can be taken into consideration.²⁴² While some authors claim that there is only a "low empirical barrier" to be crossed,²⁴³ the AB's jurisprudence in *EC – Hormones* indicates a considerable amount of caution and maintains a central role for scientific evidence. The *EC – Hormones* case makes clear that states have regulatory space only after substantial empirical barriers have been overcome. It is, however, also an indication that the AB – unlike the panels deciding SPS cases²⁴⁴ – has recognized that there is a complex interplay of factors that goes beyond the laboratory setting.

The AB has taken a similarly permissive approach to a number of other questions. Regarding what level of risk WTO members have to accept, it recognized the accountability that domestic decision-makers have when deciding whether to institute an SPS measure. It thus allowed WTO members to use minority viewpoints in the scientific community and required only an inquiry to "determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence[,] . . ." provided that it meets "standards of the relevant scientific

²⁴¹ *EC – Hormones* Appellate Body Report, *supra* note 225, ¶ 187. See generally *Japan – Apples* Appellate Body Report, *supra* note 236, ¶ 207.

²⁴² David Winickoff et al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 *YALE J. INT'L L.* 81, 85 (2005) ("[V]alue judgments and public participation play an important role in generating reliable and conclusive risk assessments, especially in new and contested risk situations."); Caroline E. Foster, *Public Opinion and the Interpretation of the World Trade Organisation's Agreement on Sanitary and Phytosanitary Measures*, 11 *J. INT'L ECON. L.* 427, 427 (2008) (advocating a democratic approach to risk-taking).

²⁴³ M. Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, 5 *J. INT'L ECON. L.* 825, 837 (2002).

²⁴⁴ Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 8.91-8.160, 8.94-8.100 (Aug. 18, 1997) [hereinafter *EC – Hormones* Panel Report].

community.”²⁴⁵ Similarly, the AB held that when implementing a measure subsequent to carrying out a risk assessment, a measure must have an “objective relationship” to the risk assessment and must have been “sufficiently warrant[ed].”²⁴⁶ The panel had earlier required a much stricter nexus, interpreting the meaning of the term “based on” as having to conform much more strictly to the results of the risk assessment.²⁴⁷

Finally, the SPS Agreement is cognizant of the fact that there is a considerable amount of uncertainty in virtually all scientific inquiry. Article 5.7 SPS Agreement was found to reflect the precautionary principle and operates as a “qualified exemption” to other provisions of the SPS Agreement.²⁴⁸ Article 5.7 SPS Agreement requires a showing of the following: (1) insufficient scientific evidence; (2) a measure must be adopted “on the basis of available pertinent information;” (3) a WTO member invoking this provision must seek additional scientific information; and (4) the measure is subject to review within a “reasonable period of time.”²⁴⁹

The reflection of the precautionary principle indicates a certain amount of regulatory space, provided that these preconditions are met. Again, however, the AB made clear that the regulatory space given to WTO members is not unlimited. The provision may only be invoked in situations in which “the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks.”²⁵⁰ At the same time, the AB rebuked attempts by the panel level²⁵¹ to mandate a “critical mass” standard “that would call into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient.”²⁵²

²⁴⁵ Appellate Body Report, *United States – Continued Suspension*, ¶¶ 590–91, WT/DS320/AB/R (Oct. 16, 2008) [hereinafter *US – Continued Suspension Appellate Body Report*].

²⁴⁶ *EC – Hormones* Appellate Body Report, *supra* note 225, ¶¶ 189, 193.

²⁴⁷ *EC – Hormones* Panel Report, *supra* note 244, ¶ 8.137.

²⁴⁸ *Japan – Agricultural Products II* Appellate Body Report, *supra* note 235.

²⁴⁹ *Id.* ¶ 89.

²⁵⁰ *Japan – Apples* Appellate Body Report, *supra* note 236, ¶ 179. See generally also *US – Continued Suspension* Appellate Body Report, *supra* note 245, ¶ 674.

²⁵¹ *Id.* ¶¶ 703–05.

²⁵² Panel Report, *United States – Continued Suspension of Obligations in the*

In order to rely on a minority viewpoint, the AB found it sufficient that a member provide a “qualified and respected scientific view that puts into question the relationship between the relevant scientific evidence and the conclusions in relation to risk, thereby not permitting the performance of a sufficiently objective assessment of risk on the basis of the existing scientific evidence.”²⁵³ In these areas, the AB’s findings in general comport with a more lenient approach than that accorded to WTO members by the panels.²⁵⁴

3.2.2.2. TBT Agreement

The situation with respect to the TBT Agreement has recently been clarified to a certain extent through a number of WTO decisions.²⁵⁵ These disputes arose in quick succession after a relative dearth of cases concerning the TBT Agreement. Although none of these cases has dealt with the issue of regulatory space in greater detail, a close reading of the cases reveals a general approach towards how the issue of regulatory space is to be dealt with under the TBT Agreement. The findings in these cases involved a balancing between the dual goals of liberalizing trade and preserving a member’s right to pursue legitimate policy

EC – Hormones Dispute, ¶ 7.648, WT/DS320/R (Mar. 31, 2008). See generally Wagner, *supra* note 67, at 177–78.

²⁵³ *US – Continued Suspension* Appellate Body Report, *supra* note 245, ¶ 677.

²⁵⁴ See generally Wagner, *supra* note 67, at 194 et seq.

²⁵⁵ Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/R (June 29, 2012) [hereinafter *US – COOL* Appellate Body Report]; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) [hereinafter *US – Tuna II* Appellate Body Report]; Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter *US – COOL* Panel Report]; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) [hereinafter *US – Tuna II* Panel Report]; Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011) [hereinafter *US – Clove Cigarettes* Panel Report]; *US – Clove Cigarettes* Appellate Body Report, *supra* note 225. See generally RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE (Tracey Epps & Michael J. Trebilcock eds., 2014).

objectives.²⁵⁶ The starting point for this analysis is Article 2.2 TBT Agreement, which includes helpful elements to identify the amount of regulatory space that WTO members have:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.²⁵⁷

The provision entails elements that can be pursued in trying to identify the regulatory space that WTO members have: including that a technical regulation (1) pursue a legitimate objective, (2) is not to be prepared, adopted or applied so as erect unnecessary obstacles to trade, (3) is no more trade restrictive than necessary, and (4) Members take account of the risk that non-fulfillment may create.

Similar to Article 5.2 SPS Agreement,²⁵⁸ Article 2.2 TBT Agreement contains a list of legitimate objectives that may be pursued, such as national security, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment.²⁵⁹ The wording indicates clearly that these objectives are not exhaustive, and that WTO members may invoke other objectives.²⁶⁰ The AB and the panel have reinforced this interpretation on numerous occasions. For example, in the *Sardines* case, the European Community made the argument that a Codex Alimentarius standard was an ineffective or inappropriate means for the fulfillment of legitimate objectives

²⁵⁶ See *US - Clove Cigarettes* Appellate Body Report, *supra* note 225, ¶¶ 92-96 (recognizing that “Members’ right[s] to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives,” provided such measures do not constitute a “disguised restriction on international trade”).

²⁵⁷ TBT Agreement, *supra* note 142, art. 2.2.

²⁵⁸ SPS Agreement, *supra* note 141, art. 5.2.

²⁵⁹ TBT Agreement, *supra* note 142, art. 2.2.

²⁶⁰ See *id.*

because it failed to meet three objectives: consumer protection, market transparency, and fair competition.²⁶¹ In *U.S. – Tuna II*, the AB interpreted Article 2.2 TBT Agreement as containing a non-exhaustive list of legitimate objectives, which were intended as “examples” to “provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2.”²⁶² The AB also noted that “objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered a legitimate objective under Article 2.2.”²⁶³ In *Clove Cigarettes*, Indonesia unsuccessfully challenged the legitimacy of the United States’ stated objective, i.e. the reduction of youth smoking.²⁶⁴

In the *COOL* case, the United States declared that the objective of the provision was to provide consumer information about the origins of certain meat products, thereby preventing confusion on the side of the consumer.²⁶⁵ Procedurally, the AB reinforced the point made by the panel, namely that it is incumbent on the complaining party to prove that a measure did not pursue a legitimate objective.²⁶⁶ Substantively, the AB left no doubt that it is a legitimate objective for a WTO member to convey to consumers product information for the purposes of preventing deceptive practices and protecting consumers.²⁶⁷ The AB in *COOL* reiterated its position from *U.S. – Tuna II*, pointing not only to the text of Article 2.2 TBT Agreement itself,²⁶⁸ but also to other provisions, such as the preamble of the TBT Agreement, and Articles XX(b), XX(d), and IX GATT.²⁶⁹ The preamble recognizes that a member shall not be prevented from taking measures necessary to achieve

²⁶¹ Panel Report, *European Communities – Trade Description of Sardines*, ¶ 7.113, WT/DS231/R (May 29, 2002). See generally Committee on Technical Barriers to Trade, *Eighteenth Annual Review of the Implementation and Operation of the TBT Agreement*, ¶ 2.2, G/TBT/33 (Feb. 27, 2013).

²⁶² *US – Tuna II* Appellate Body Report, *supra* note 255, ¶ 313.

²⁶³ *Id.*

²⁶⁴ *US – Clove Cigarettes* Panel Report, *supra* note 255, ¶¶ 7.345

²⁶⁵ *US – COOL* Panel Report, *supra* note 255, ¶ 7.581.

²⁶⁶ *US – COOL* Appellate Body Report, *supra* note 255, ¶¶ 442, 449.

²⁶⁷ *US – COOL* Appellate Body Report, *supra* note 255, ¶ 451.

²⁶⁸ *Id.* ¶ 451.

²⁶⁹ *Id.* ¶¶ 445, 462.

its legitimate objectives “at the levels it considers appropriate.”²⁷⁰ Canada argued in *COOL* that, when a WTO member pursues an objective not specifically listed in Article 2.2 TBT Agreement, such an objective has to conform to the “significant elements of commonality of the explicitly listed objectives” found in that provision.²⁷¹ The AB disagreed, noting that even though Canada had not elaborated on alleged elements of commonality that would “illuminate the relevant *type* of objective” and thus serve to delineate the class of legitimate objectives that fall within Article 2.2 TBT Agreement, it would be “difficult to discern such commonality amongst the disparate listed objectives that are, moreover, ‘expressed at a high level of generality.’”²⁷² The AB concluded that “any relevant ‘commonality’ would have to relate to the nature and content of those objectives themselves,” and rejected Canada’s position that such commonality can only be found in limited situations where Article 2.2 TBT Agreement objectives are explicitly listed in other covered agreements.²⁷³

The range of legitimate objectives is therefore rather wide, but subject to the limitation stated in Article 2.2 TBT Agreement, namely that any risk assessment must be carried out by taking into account the “available scientific and technical information, related processing technology or intended end-uses of products.”²⁷⁴

Article 2.2 TBT Agreement contains two elements that relate to a necessity test, specifically the prohibition on “creating unnecessary obstacles to international trade” and the requirement that technical regulations be “no more trade-restrictive than necessary to fulfill a legitimate objective.” This means that a technical regulation that is more trade restrictive than necessary is by default an “unnecessary obstacle to international trade.”²⁷⁵

²⁷⁰ TBT Agreement, *supra* note 142, at pmb1. (noting that this wide latitude is “subject to the requirement that [such measures] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with [the TBT Agreement]”).

²⁷¹ *US - COOL* Appellate Body Report, *supra* note 255, ¶ 435.

²⁷² *Id.* ¶ 444.

²⁷³ *Id.*

²⁷⁴ TBT Agreement, *supra* note 142, art. 2.2.

²⁷⁵ *US - Tuna II* Appellate Body Report, *supra* note 255, ¶ 318. See generally Ludivine Tamioiti, *Agreement on Technical Barriers to Trade*, in MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, VOLUME 3: WTO - TECHNICAL BARRIERS AND

According to the AB in *U.S. – Tuna II*, the following factors are relevant in determining whether a technical regulation is “more trade-restrictive than necessary”: (i) the degree of contribution made by the measure to the legitimate objective at issue, (ii) the trade-restrictiveness of the measure, and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued through the measure.²⁷⁶ At the heart of the analysis is a comparison between the challenged measure and an alternative measure that is less trade restrictive, but still capable of achieving the government’s legitimate objective. The importance of properly identifying the objective pursued by the measure becomes evident when taking into account that the AB has developed a jurisprudence in which the weighing and balancing that takes place is highly dependent on the competing values in any situation.²⁷⁷ In the *Clove Cigarettes* case, the U.S. proffered human health and safety, and specifically the reduction of youth smoking, as its objective.²⁷⁸ The panel found, referring to the AB’s jurisprudence in *Brazil – Retreaded Tyres*, that there was “a genuine relationship of ends and means” between the objective pursued and the measure at issue.²⁷⁹ In *U.S. – Tuna II*, the objectives of the measure at hand were the protection of animals and the prevention of deceptive practices that could mislead consumers.²⁸⁰ Importantly, the AB came to the conclusion that the alternative measure proposed by Mexico – catching Tuna by “setting on dolphins” – would not “achieve the United States’ objectives to an equivalent degree as the measure at issue.”²⁸¹ Rather, the alternative measure would contribute to a higher mortality rate among dolphins and lead to other adverse health effects in dolphin populations.²⁸² In the final case, *U.S. – COOL*, the AB made findings with respect to all three of the elements of the analysis set forth in *U.S. – Tuna II*. Applying the three-factor *U.S. – Tuna II* analysis, the AB found that: (i) while the COOL

SPS MEASURES mn. 16 (Rüdiger Wolfrum et al. eds., 2007).

²⁷⁶ *US – Tuna II* Appellate Body Report, *supra* note 255, ¶ 322.

²⁷⁷ *US – COOL* Appellate Body Report, *supra* note 255, ¶ 387.

²⁷⁸ *US – Clove Cigarettes* Panel Report, *supra* note 255, ¶ 7.347.

²⁷⁹ *Id.* ¶ 7.417.

²⁸⁰ *US – Tuna II* Appellate Body Report, *supra* note 255, ¶ 303.

²⁸¹ *Id.* ¶ 330.

²⁸² *Id.*

measures made some contribution to the objective pursued – conveying to consumers information as to the origin of meat products and thereby preventing deceptive practices – it was unable to ascertain the degree to which the measure contributed to the objective;²⁸³ (ii) the measures were considerably trade-restrictive because of the limiting effect of the measure on the competitive opportunities for imported livestock compared to the situation before the COOL measures took effect;²⁸⁴ and (iii) the consequences that may arise from the non-fulfillment of the objective would not be particularly grave, as the unwillingness of consumers to pay for the measure was not widespread.²⁸⁵

3.2.2.3. Summary

The analysis undertaken by the AB in the TBT cases discussed above is similar to the AB jurisprudence in the areas of the GATT and the SPS Agreement. In the case of the GATT, there has been a move away from a “least-restrictive means” test to one that is “less-restrictive means” based, supplemented by a proportionality test that weighs and balances a series of factors, including: the contribution made by the compliance measure to the enforcement of the law or regulation at issue; the importance of the common interests or values protected by that law or regulation; and the accompanying impact of the law or regulation on imports or exports.²⁸⁶ The “weighing and balancing” was further explained by the AB in *EC – Asbestos*, when the AB posited that, the more important the common values pursued, the more easily the WTO dispute settlement organs would accept the necessity of a Member’s measure “designed to achieve those ends.”²⁸⁷ The effect of this jurisprudence is that the AB provided WTO members with regulatory space when taking internal measures. The AB’s

²⁸³ *US – COOL* Appellate Body Report, *supra* note 255, at 476.

²⁸⁴ *Id.* ¶ 477.

²⁸⁵ *Id.* ¶ 478.

²⁸⁶ *Korea – Various Measures on Beef* Appellate Body Report, *supra* note 138, ¶ 164. See generally ANDREW D. MITCHELL, *LEGAL PRINCIPLES IN WTO DISPUTES* 177 et seq. (James Crawford & John S. Bell eds., 2008).

²⁸⁷ *EC – Asbestos* Appellate Body Report, *supra* note 134, ¶ 172.

jurisprudence with respect to the SPS Agreement, as shown above, has similarly provided WTO members such regulatory space when taking SPS measures. However, this discretion is not unfettered. The AB's TBT Agreement jurisprudence shows a similar trajectory, though with a somewhat more cautious stance.²⁸⁸ It does so on the basis of its general approach with respect to the TBT Agreement which has been to balance the "desire to avoid creating unnecessary obstacles to international trade" and "the recognition of Members' right to regulate."²⁸⁹ Given the AB's tendency to provide more regulatory space when vital or highly important values are at stake, it is not surprising that this is especially true in cases where human health or life is concerned, whereas the same may not be true in instances when the values are considered to be less important.

3.3. *Regulatory Space for Domestic Decision-Makers: Converging Trends in Trade and Investment Law?*

The analysis of the ways in which international trade and investment law deal with the question of how much regulatory space is to be accorded to states or WTO members has shown a trend towards convergence of the two fields, though important differences remain.

One important difference, further elaborated below, is the institutional setting of each field. While the WTO has an integrated dispute settlement mechanism for arbitrating trade law issues, international investment law is far more disparate in both its substantive and procedural rules. Moreover, the existence of a WTO appellate mechanism has led to the development of a jurisprudence, which, while not always uniform, has attained a much greater degree of coherence than is the case in international investment law.²⁹⁰ The existence of a dispute settlement

²⁸⁸ Mitchell & Henckels, *supra* note 39, at 161.

²⁸⁹ *US – Clove Cigarettes* Appellate Body Report, *supra* note 225, ¶ 96.

²⁹⁰ See Thomas Schultz, *Against Consistency in Investment Arbitration*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE* (King's Coll. London – The Dickinson Poon Sch. of Law, Research Paper No. 2013-3) (providing a view that investment law as a field should shun

mechanism and a relatively consistent line of cases elicit a clearer jurisprudence with respect to the amount of regulatory space that is being accorded to WTO members.

Properly understood, regulatory space is not an occasion for states or WTO members to decide in an unfettered manner whether to either treat investors in contravention of the existing investment agreements or to prohibit a product from entering a WTO member's territory. Rather, it is the recognition that, under particular circumstances a state or a WTO member has discretion – within limits – to deny the (full) enjoyment of an investment or the importation of a particular product, provided that a justification can be provided. Like other dispute settlement organs, the AB has attempted to delineate this regulatory space between two competing goals: permitting WTO members to react to situations in which particular values may be at risk, while trying at the same time to curb potential abuse.

The recognition that the WTO's approach before 1995 or directly after 1995 did not take account of the complexities that WTO members face has led to a shift of the jurisprudence of the dispute settlement organs. This is the case with respect to the GATT after the AB's decision in *Korea – Beef* in which the AB openly introduced not only a different conception of necessity (from *least-restrictive* means testing to *less-restrictive* means testing), but also proportionality testing through a process it described as “weighing and balancing.”²⁹¹ The *Korea – Beef* approach enables the AB to more adequately react to situations or new developments as they arise and contextualize its response depending on the different elements that factor into the “weighing and balancing.” Such a development is not without risk, namely because of the inherent power shift towards adjudicatory bodies. These measures – recalibrating necessity within a larger move to proportionality analysis – contribute to a wider regulatory space for WTO members. Similarly, the jurisprudence of the AB has

consistency for its own sake) (forthcoming). See generally Arato, *supra* note 40, at 571-578. But see Federico Ortino, *Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures*, 3 J. INT'L DISP. SETTLEMENT 31, 44 (2012) (identifying the lack of internal consistency in investment decisions as a “failure in the legal reasoning of investment tribunals”).

²⁹¹ *Korea – Various Measures on Beef* Appellate Body Report, *supra* note 138, ¶¶ 164, 166.

shown – with different scope, as described above – that WTO members enjoy a considerable amount of regulatory space under both the SPS Agreement and the TBT Agreement.

International investment law is currently witnessing a number of discourses that may have profound implications for the field. These discourses include the varying schools of thought that conceive of international investment law as public law,²⁹² as well as other voices that argue over the legitimacy of international investment law.²⁹³ Some of those discourses revolve around the question of to what extent the field should undergo development similar to that of international trade law. Decisions such as *SD Myers*, *Glamis*, *Tecmed* and *Continental* are indications that the field is moving towards greater acceptance of values that compete with the protection of investors' rights, and is becoming increasingly deferential to states' regulatory judgments. This is evident, for example, when the panel in *Glamis* posited that it would invalidate a state's measure only if there was a "manifest lack of reasons for the legislation,"²⁹⁴ or when the panel in *Lemire v. Ukraine* said that it was the "inherent right" of a state "to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by its Parliament and Government."²⁹⁵

Yet at the same time, there is considerable disagreement over the course that international investment law should take. Different

²⁹² See, e.g., Schill, *supra* note 32 (discussing the hybrid nature of investment arbitration, which combines substantive public international law and procedural international commercial arbitration); Burke-White & von Staden, *supra* note 75 (discussing the shift in investor-state arbitration to a new public-law context and the need for arbitral tribunals to develop standards for reviewing states' public regulatory activities); SCHNEIDERMAN, *supra* note 57.

²⁹³ Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. OF INT'L L. 471 (2009); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Julia Hueckel, *Rebalancing Legitimacy and Sovereignty in International Investment Agreements*, 61 EMORY L.J. 601 (2012).

²⁹⁴ *Glamis Gold, Ltd. v. USA*, ICSID, Award, ¶ 805 (June 8, 2009).

²⁹⁵ *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 505 (Jan. 14, 2010) (referring to the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders," especially in cases when "the purpose of the legislation affects deeply felt cultural or linguistic traits of the community" [emphasis in original]) (quoting *S.D. Myers Inc. v. Gov't of Canada*, Partial Award, 40 I.L.M. 1408, ¶ 263 (NAFTA-UNCITRAL 2000)).

tribunals have arrived at different conclusions when interpreting the same language and the same general situation. For example, after the peso crisis in Argentina, the ICSID tribunal in *Enron* took a narrow view when applying the necessity test by using general international law rules under the law of state responsibility,²⁹⁶ whereas the tribunal in *Continental Casualty* explicitly referenced international trade law.²⁹⁷ Each tribunal arrived at a different conclusion in its ruling.²⁹⁸ Other investment tribunals have similarly diverged over what standard is to be applied when determining whether a state's action is in violation of an IIA.²⁹⁹ It is also worth mentioning how much the governmental measures differ in both fields. Domestic trade measures generally result in restrictions on the importation of a certain commodity into a particular country, even though the exporting state is still able to sell these goods to markets in other countries. In matters of investment law, investors suffer a potentially greater risk, as governmental measures could threaten their investments in their entirety.

The current state of discourse in international investment law over the degree to which states should be afforded regulatory space can best be described as being in a state of flux. Nevertheless, comparing the situation as recent as a decade ago with today's landscape yields a remarkable shift in the discourse.³⁰⁰ As some have pointed out, the current discourse is under-theorized.³⁰¹ There is value – though it is not an end in itself – in

²⁹⁶ *Enron Corp. & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, ¶¶ 322–45 (May 22, 2007).

²⁹⁷ *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, ¶¶ 189–230 (Sept. 5, 2008). For a critical view of this decision, see José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense*, Y.B. INT'L INV. L. & POL'Y 319 (2010–11).

²⁹⁸ David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383, 384–93, 400–07 (2010).

²⁹⁹ Caroline Henckels, *Balancing Investment Protection and the Public Interest*, 4 J. INT'L DISP. SETTLEMENT 197, 203 nn. 34–37 (2013). See also Arato, *supra* note 40, *passim*.

³⁰⁰ Mitchell & Henckels, *supra* note 39, at 103–26.

³⁰¹ Henckels, *supra* note 299, at 214; Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS OF HUMAN RIGHTS 47, 67–68 (2010), available at

creating an adjudicatory system that provides something similar to what the WTO's DSU calls the "security and predictability [of] the multilateral trading system."³⁰² Participants in an adjudicatory system would be better equipped to anticipate the decisions of a tribunal if decisions were made in a more consistent fashion. Moreover, by being open and clear about how they adjudicate the degree of regulatory space states have, tribunals also contribute to dissolving the legitimacy problem—real or perceived—that international investment law is facing. Regardless of what position one takes in the debate concerning the desirability of such a convergence,³⁰³ there is undeniably a profound shift in the international investment law discourse towards the incorporation of additional values when evaluating investment claims and thus a closer approximation of the jurisprudence of other international tribunals, notably that of the WTO.³⁰⁴

4. UNDERSTANDING THE DIFFERENCES

This section will explain some of the reasons for the differences between the fields of international trade and investment law. It focuses on textual, contextual, and institutional explanations for these differences, as well as the divergent epistemic communities the fields engender. This is certainly not a complete list, but rather an attempt to explain some of the salient differences that account for why international trade and investment law have taken different approaches to deciding the amount of regulatory space.

4.1. *Text and Context*

The most significant difference between the two fields is that,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569412.

³⁰² DSU, *supra* note 99, art. 3.2.

³⁰³ Alvarez & Brink, *supra* note 297, at 332; Arato, *supra* note 40, at 558; Burke-White & von Staden, *supra* note 75; Sweet & Mathews, *supra* note 193, at 154.

³⁰⁴ See Henckels, *supra* note 76, at 224 nn.1-2; Roland Kläger, *Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness*, 11 J. WORLD INV. & TRADE 435, 446-48 (2010).

while WTO law has positively codified justifications for governments wishing to protect interests that are not fundamentally economic, investment treaties have historically not included similar provisions. As outlined above, justificatory clauses have only recently become more common in IIAs. Therefore, the starting point for the debate on providing regulatory space in the two fields is different. Since the inception of the WTO, jurisprudence has developed that takes the justificatory clauses in treaty provisions seriously, the most well-known of which is Article XX GATT. For example, the AB stated in *U.S. – Shrimp* that:

[t]he task of interpreting and applying the chapeau is, hence, essentially 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 the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.³⁰⁵

The AB has made similar findings regarding the relationship between members' rights³⁰⁶ and the justificatory provisions such as those found in Article XX GATT, the SPS Agreement, and the TBT Agreement.³⁰⁷

It may have been easier in the past to forego the recognition of regulatory space in international investment law. Some of the reasons include the absence of similar justificatory language in international investment law agreements, combined with more discrete cases of direct expropriation. Thus, José Alvarez and

³⁰⁵ *US – Shrimp* Appellate Body Report, *supra* note 137, ¶ 159.

³⁰⁶ *See, e.g.* GATT, *supra* note 1, arts. I, III, XI.

³⁰⁷ *See supra* Section II, B, 2.

Tegan Brink criticize the ICSID tribunal's *Continental* decision for its adoption of the AB's Article XX GATT jurisprudence without sufficiently explaining the rationale for doing so.³⁰⁸ Their argument that the two-tiered analysis under Article XX GATT – first determining which of the justifications in (a) through (j) applies, and then deciding whether a measure runs afoul of the chapeau – influences the way in which the term “necessary” is interpreted, is valid.³⁰⁹ This is the reason why this article does not focus on interpreting the term “necessary” on its own, but rather uses the concept of regulatory space. Cases involving the distribution of essential services such as water and cases involving health or environment or other public concerns have been brought before international investment tribunals.³¹⁰ In these instances – and especially in cases where such policy decisions follow a genuine democratic process – it will be increasingly difficult to avoid according states at least some regulatory space, even in the absence of the specific justificatory language that is usually contained in more modern BITs.³¹¹

The change that model BITs are undergoing concerning treaty language, and the growing variety in the types of challenges that are being brought before international investment tribunals, coincides with an increase in the number of countries from which investments are made. The addition of justificatory clauses in model BITs takes place at roughly the same time when investment streams are changing from being predominated by unidirectional investments from developed to developing countries to investment streams that are increasingly multi-directional. Countries that were previously almost exclusively capital-exporting now find themselves being brought before tribunals as respondents in a system that they had previously had a great interest in maintaining.

An additional element that is worth pointing out consists of the

³⁰⁸ Alvarez & Brink, *supra* note 297, at 345. For a similar criticism concerning the neglect of contextual arguments with respect to “likeness,” see Kurtz, *supra* note 39, at 755 et seq. and 759 et seq.

³⁰⁹ Alvarez & Brink, *supra* note 297, at 345-48. *But see generally* Mitchell & Henckels, *supra* note 39, at 158-59.

³¹⁰ Schill, *supra* note 32, at 3, 14-15.

³¹¹ Alvarez & Brink, *supra* note 297, at 329; Mitchell & Henckels, *supra* note 39, at 93.

functional differences between international trade and investment law. The former has traditionally been portrayed as pitting states against a less powerful investor, whereas the latter involves disputes between two WTO members.³¹² Moreover, the purpose of WTO law can correctly be summarized as having “twin objectives of trade liberalization (positive) and the prevention of protectionism (negative).”³¹³ Traditionally, one of the goals of investment law has been the protection of investors against powerful states – a goal that is not likely to vanish any time soon. The following statement demonstrates this view: “At [the heart of international investment law] lies the right of a private actor to engage in an arbitral litigation against a (foreign) government over governmental conduct affecting the investor.”³¹⁴

But it could be argued that, in certain cases, limiting the goal of international investment law solely to the protection of investors is a very narrow view of the *raison d'être* of this field of law. Rather – in parallel to how WTO law has been described – international investment law cases involving public policy matters not only have the positive objectives of providing protection for investors and the promotion of foreign direct investment, but also the negative goal of preventing that very protection from allowing responsible governments to make public policy choices.

This ties in significantly with the different remedies available in both systems. WTO law is designed to bring an offending member “back into compliance” – in other words, its remedies are entirely prospective and any countermeasures can be executed against such a member only after the Dispute Settlement Body made a finding of non-implementation. This is a function of the diplomatic origin of the GATT / WTO regime and of the desire to incentivize members to reposition themselves so that the trade system can function at the most efficient state that WTO members agreed upon. By contrast, international investment law’s remedies are – by and large – retrospective and are designed to monetarily reprimand a state for the wrongs it has inflicted upon an investor. There can be no doubt that these differences are important and that

³¹² Alvarez & Brink, *supra* note 297, at 349.

³¹³ *Id.* at 347.

³¹⁴ Int'l Thunderbird Gaming Corp. v. United Mexican States, NAFTA-UNCITRAL, Separate Opinion by Thomas Wälde, ¶ 13 (Jan. 26, 2006).

they play a crucial role in evaluating the different regimes.³¹⁵ At the same time, it is at least worth inquiring whether certain regulatory expropriation cases – such as when an investor challenges the regulatory fabric of the host state by challenging general and abstract provisions concerning, for example, health or environmental measures – should be analyzed differently from traditional expropriation cases. It is at least questionable whether, in a case concerning the health impact of harmful substances, the traditional investment law remedy is truly retrospective. Given that the findings of investment tribunals may deter other states from adopting the same measures, investment law can be prospective under certain conditions.³¹⁶

4.2. Institutional Reasons

Another explanation for the differences between investment law and trade law with respect to the amount of regulatory space lies in the different institutional designs within each field. As discussed above, the adjudicatory systems in the two fields are remarkably different. Two specific and interrelated features of investment law, which distinguish it from trade law, are worth pointing out – the lack of the existence of an appellate mechanism, and the lack of a system of precedent.

The most salient difference, which critics of the move towards more regulatory space in international investment law are quick to point out, is the ad hoc nature of international investment law adjudication.³¹⁷ Unlike WTO law, which has an appellate mechanism, international investment law is a radically decentralized system with “no authoritative voice” to resolve differences.³¹⁸ This is unsurprising, given the very nature of international investment law with its thousands of individual bilateral and multilateral instruments with differing venues,

³¹⁵ Alan Sykes, *Public v. Private Enforcement of International Economic Law: Of Standing and Remedy*, 34 J. LEG. STUD. 631 (2005).

³¹⁶ Indeed, Philip Morris’ Notice of Arbitration, *supra* note 15, ¶ 49, demands “discontinuance of the plain packaging legislation.”

³¹⁷ Arato, *supra* note 40, *passim*; Roberts, *supra* note 39, at 48.

³¹⁸ Roberts, *supra* note 39, at 48-52.

compared to the very existence of the WTO as a unifying institution.³¹⁹ Indeed, this difference leads to divergences in a great number of cases. There have been debates over the years concerning the introduction of a "WTO-style" appellate procedure in investment law. Even though the decisions rendered by the WTO AB are not binding on the panels or even on the AB itself, its findings are nonetheless regularly followed and regarded as having precedential value.³²⁰

The lack of an appellate mechanism – suggested in various forms³²¹ – in the realm of international investment law has been continuously debated over the last decade.³²² Most of the criticism has been directed at the potential of prolonging disputes and endangering the finality of an arbitration award, both of which are valued in the current system as important characteristics.³²³ Given the highly fragmented nature of international investment law, it is unclear how such an appellate system could actually be implemented in practice. Parties would have to agree to submit to an additional layer of scrutiny, and treaties would presumably have to be amended.³²⁴ It is beyond the scope of this paper to

³¹⁹ Franck, *supra* note 293, at 1619-22; Donald McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, 1 J. INT'L DISP. SETTLEMENT 371, 382-86 (2010).

³²⁰ In particular fields, some panels have been reticent to do so. For an analysis of the different SPS Agreement jurisprudence between various panels and the AB, see Wagner, *supra* note 67, at 194.

³²¹ See VAN HARTEN, *supra* note 57, at 180-84; Franck, *supra* note 293, at 1617-25; David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 54-73 (2006); United Nations Conference on Trade and Development (UNCTAD), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note, No. 2, (2013), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (discussing concerns with the current investment law dispute resolution system, including deficit of legitimacy and transparency, and inconsistencies in awards).

³²² See the contributions in KARL P. SAUVANT, *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* (2008); and McRae, *supra* note 319; Gantz, *supra* note 321.

³²³ W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 103-06 (1992).

³²⁴ See generally Nicolas Hachez & Jan Wouters, *International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?* 22-3 (Katholieke Universiteit Leuven – Leuven Centre for Global Governance Studies, Working Paper No. 81, 2012), available at <http://ssrn.com/abstract=2009327>; and ICSID Secretariat, *Possible*

further analyze the reasons why these proposals are unlikely to succeed. Nevertheless, it is worth pointing out the advantages of such a system. The contribution of the AB as an institutional factor towards building a coherent jurisprudence in WTO law can hardly be overstated. While other changes in the procedure put in place during the Uruguay Round were important, such as the adoption of panel or AB decisions by the Dispute Settlement Body through the process of reverse consensus, the addition of a permanent appellate mechanism could be described as a crucial element in the success of the WTO's adjudicatory mechanism.³²⁵ A permanently staffed appellate mechanism could deflect criticism with respect to the independence and impartiality of the tribunals that is leveled against the current system of investment arbitration.³²⁶ As mentioned before, coherence is not a virtue in and of itself,³²⁷ but it has served other areas in international law rather well. There is also no doubt that the introduction of an appellate mechanism comes at a cost,³²⁸ but one that other systems have found worth paying.

Given that the likelihood of an institutional reform is at this time rather small, another mechanism that may bring about greater coherence is the use of previous decisions as a form of quasi-precedent.³²⁹ The arbitral panel in *Saipem S.p.A. v. Bangladesh*, similar to a large number of other decisions,³³⁰ recognized on the

Improvements of the Framework for ICSID Arbitration 4-5 (Discussion Paper, Oct. 22, 2004), [available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf).

³²⁵ An additional element for the generally positive view of the WTO jurisprudence's legitimacy was the careful jurisprudence of the first wave of members of the AB.

³²⁶ Gantz, *supra* note 321, at 68; Hachez & Wouters, *supra* note 324, at 23.

³²⁷ See Schultz, *supra* note 290, at 2.

³²⁸ Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from Each Other: Updating the Bello/Calvo Doctrine in the BIT Generation*, 3 RES PUBLICA ARGENTINA 75, 94 (2007).

³²⁹ Other mechanisms exist in that regard, such as the annulment committees under Article 2(1) of the ICSID Convention, and the domestic court's refusal to enforce particular awards even though their systemic efficacy is doubtful. For an in-depth analysis of previous decisions used as a form of quasi-precedent, see Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1021 (2006).

³³⁰ A similar statement can be found in *ADC Affiliate Ltd. and ADC &*

one hand that it was not bound by previous decisions. However, it did point out that

[a]t the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.³³¹

Jan Paulsson similarly found that there is a growing body of coherent jurisprudence in investment disputes when he stated, “[t]hat a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes.”³³² This has been confirmed by empirical studies showing that certain awards enjoy greater respect than others and consequently are cited more frequently.³³³ The proposition that there is no de jure precedent in

ADMC Mgmt. Ltd. v. Hungary, ICSID Case No. ARB/03/16, Award, ¶ 293 (Oct. 2, 2006) (stating, after pointing out the non-binding nature of previous decisions, that “cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.”).

³³¹ Saipem S.p.A. v. People’s Republic of Bangladesh, Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007).

³³² Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, ICCA CONGRESS SERIES NO. 13, 12 (2007). See generally Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357 (2007); J. Romesh Weeramantry, *The Future Role of Past Awards in Investment Arbitration*, 25 ICSID REV. 111, 113 (2010) (“[A]ntecedent awards in the reasoning of [why] investment tribunals are so frequent that the practice has almost become an integral part of the investment arbitration award reasoning process”).

³³³ Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129, 148-53 (2007) (reviewing the role that precedent has played in 207 publicly available decisions, awards, and orders rendered since 1972—including decisions rendered by early

international investment law has, however, been countered with the view that there is a *de facto* precedent regime.³³⁴

Arbitrators disagree over the issue of precedent, as evidenced by the decision in *Burlington Resources v. Ecuador*. In that case, the divided panel noted, “it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.”³³⁵ However, one of the panelists found that an arbitrator has a duty to “decide each case on its own merits, independently of any apparent jurisprudential trend.”³³⁶

Gabriele Kaufmann-Kohler, an arbitrator in the *Saipem* decision, summed up the tendency of international investment law – with a different trajectory compared to commercial arbitration, a field in which precedent is virtually non-existent³³⁷ – as follows: “in investment arbitration, there is a progressive emergence of rules through lines of consistent cases on certain issues, though there are still contradictory outcomes on others.”³³⁸

The point here is not to take a position in the debate about the value of an (unlikely to be implemented) appellate mechanism, or the reasons for or against the use of precedent in the highly decentralized system of international investment law.³³⁹ However,

ICSID tribunals, ICSID, ICSID (AF), and certain non-ICSID investment treaty tribunals); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT’L L. 301 (2008) (analyzing ICSID decisions from the past ten years, and indicating that “there is a tendency among ICSID tribunals to contribute to a homogeneous development of the methodology of international law”).

³³⁴ Cheng, *supra* note 329, at 100; Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REV. 95 (2010); Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 270 (Colin Picker et al. eds., 2008) (observing that “an accretion of decisions will likely develop a *jurisprudence constante* – a ‘persisting jurisprudence’ that secures ‘unification and stability of judicial activity.’”).

³³⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 187 (Dec. 14, 2012).

³³⁶ *Id.* ¶ 187.

³³⁷ Weeramantry, *supra* note 332, at 112.

³³⁸ Kaufmann-Kohler, *supra* note 332, at 373.

³³⁹ It is worth pointing out, however, that precedent functions as a limitation to those who would otherwise be less encumbered to decide according to their

both mechanisms have, at least in the case of the WTO, contributed to the development not only of a consistent jurisprudence, but also the development of overarching principles. More importantly, this finding has held true across a number of treaties. The wide-ranging use of the proportionality principle would not have been developed in the absence of a permanent appellate mechanism that is not dependent on reappointment in any particular dispute. The jurisprudence in the SPS Agreement area may be particularly instructive. The AB has created a coherent jurisprudence involving the amount of regulatory space a WTO member has with respect to a number of SPS Agreement provisions. It did so against a number of panel decisions that fought a rearguard action holding a rather narrow view of what options WTO members have to justify their domestic measures.³⁴⁰

There is little doubt that international investment law has matured into a system that has developed or is in the process of developing overarching principles. Instituting an appellate mechanism and using precedent are helpful elements in providing a basis for a coherent jurisprudence. Over a period of time, they are capable of elucidating such principles with greater force than is possible under a fragmented system currently present in international investment arbitration. Conversely, the lack of an appellate mechanism or use of precedent are factors that explain why international investment law is only beginning to follow the footsteps of international trade law.

4.3. Different Epistemic Communities

Another important difference concerns the actors that participate in international adjudication. One's experience and background presumptively have an impact on not only what decisions are being made concerning a particular question, but also how decisions are made. Such decision-making involves a number of complex considerations, including personal and professional

own sense of what consists of a just outcome. Precedent would require arbitrators to justify their desires to deviate from previous findings.

³⁴⁰ Wagner, *supra* note 67, at 197.

interests.³⁴¹ These considerations may not only consist of interests advancing the field with one's own vision in mind of what it should look like, or what is best for society in the aggregate, but may also consist of the desire to maintain one's relative position in a particular area (e.g. reappointment for a coveted position).

In this sense the background of an actor, or what epistemic community she belongs to, is of great importance.³⁴² Both WTO law and international investment law have originated as areas of "exotic and highly specialized [knowledge]." ³⁴³ To varying degrees, the two fields have moved away or are moving away from their respective traditional paradigms. While trade law used to be almost entirely dominated by lawyers operating in offices equivalent to the United States Trade Representative in the U.S., or offices equivalent to the Directorate General in the EU, the trade-focused concerns exhibited by these actors have been replaced with a considerably wider angle incorporating, for example, health or environmental concerns.³⁴⁴ There is a debate currently in international investment law over the question to what extent an arbitrator's background has an impact on the decisions she renders.³⁴⁵

³⁴¹ See, e.g., Ratner, *supra* note 76, at 517 (noting that there is an "arbitral culture," and when arbitrators deviate from the traditional arbitrator methodology, for unfair procedures and unconvincing opinions, "they have failed" at their arbitration duties). See generally McRae, *supra* note 6, at 3-6.

³⁴² See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992) (defining epistemic communities as consisting of "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area."). The use of the concept of epistemic community does not preclude the possibility that different epistemic communities can at least partially converge, nor that individuals can belong to more than one epistemic community. In the context of international investment law, see Schill, *supra* note 32, at 3, 11; Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 465-466 (2010); Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW 142 (Andrea Bianchi & Anne Peters eds., 2013); Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

³⁴³ Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682, ¶ 8 (Apr. 13, 2006).

³⁴⁴ See also Simma & Pulkowski, *supra* note 30, at 519 (noting that "the WTO has increasingly 'opened' to a common culture of international lawyers.").

³⁴⁵ See generally Roberts, *supra* note 39, at 85; José Augusto Fontoura Costa,

A considerable number of participants in the field of international investment arbitration originate from the area of commercial arbitration. That field is characterized by an equality of arms between the two sides in arbitration. Under such a paradigm, the question of whether states enjoy a certain amount of regulatory space inherently contests fundamental assumptions about how arbitration works.³⁴⁶ The challenge that international investment law has faced over the last years derives from a wholly different framework: public international law. As public law, the field is infused with deference to domestic decisions, paving the way for providing regulatory space for states. Another element that separates the two fields is the idea that commercial arbitrators decide individual and discrete cases with little or no policy implications. Thus, the dissenting arbitrator in *Fraport v. Philippines* remarked that “the integrity of this interpretative process must not be compromised by the pronouncements of other arbitral tribunals in their interpretation of different treaties in wholly unrelated factual and legal contexts.”³⁴⁷

Those adjudicators coming from a public international law perspective proceed on different assumptions, namely that their decisions are contributing towards a global world order. The impact of such a starting point is visible with increasing frequency, as more and more individuals cross the “boundary” between these epistemic communities. The much-criticized³⁴⁸ *Continental* decision may serve as an example where one of the arbitrators may have had decisive influence in the inclusion of Article XX GATT

Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields, 1 Oñati Socio-Legal Series (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832382.

³⁴⁶ Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State - Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARB. INT'L 3, 4-5 (2010); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review Through Comparative Public Law*, 3 J. INT'L DISP. SETTLEMENT 1, 9 et seq. (2012) (asserting that “public international law approaches have greater value for understanding why states deserve deference” and pointing out that deference is rooted in the public law concept of separation of power).

³⁴⁷ *Fraport A.G. Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, Dissenting Opinion of Bernardo Cremades, ¶ 7 (Aug. 16, 2007).

³⁴⁸ See e.g., Footer, *supra* note 162, at 134; Alvarez & Brink, *supra* note 297.

jurisprudence in the panel's decision.³⁴⁹

Stephan Schill has aptly summarized the difference between private commercial and public international lawyers, stating:

[They] often have different perspectives on and different philosophies about the role of law, the State, and the function of dispute resolution. Also, their audiences and conceptual approaches are often different. Whereas public international lawyers embed international investment law firmly in general international law and approach the topic against that background, commercial arbitral lawyers focus on dispute settlement and see investment treaty arbitration as a subset of international (commercial) arbitration.³⁵⁰

The traditional paradigm of international investment law posits that decisions in one case should not have larger policy implications. However, that paradigm is – in a certain category of cases involving the regulatory fabric of a country – no longer valid. This is true for cases that rather clearly implicate public policy choices. The foremost current example is the challenge against Australia's measure concerning the plain packaging of cigarettes and the decision by Germany to place restrictions on the use of coal-fired power plants.³⁵¹ In such cases it is hard to argue that states – especially when a measure has been passed with considerable democratic safeguards – should not be accorded

³⁴⁹ For other examples, see Roberts, *supra* note 39, at 86. See also Commission, *supra* note 333, at 136 (noting, “[a]s to investment treaty decisions and awards emanating from ICSID tribunals, however, the tribunal members are no longer ever-changing. Put simply, their backgrounds, qualifications, experiences in international law and their regular interactions, both professionally and otherwise, have contributed to the development of an esprit de corps amongst ICSID and other investment treaty arbitrators.”). For a fundamental critique of the investment law system, including the aspect of the relatively small pool of investment arbitrators, see *Public Statement on the International Investment Regime*, 31 August 2010, OSGOODE HALL L. SCH., available at http://www.osgoode.yorku.ca/public_statement and Tom Toulson, *Investment Treaty Arbitration is 'Unfair'*, *Say Academics*, GLOBAL ARB. REV. (Sept. 10, 2010).

³⁵⁰ Schill, *supra* note 32, at 888.

³⁵¹ For a number of other cases involving governmental regulatory powers see Schill, *supra* note 32, at 3, 14-15.

regulatory space.³⁵²

Marrying public law maxims with a dispute settlement community that has, to a significant degree, evolved from commercial arbitration creates friction and brings about challenges and disputes over the supremacy of interpretative primacy.³⁵³ One of these frictions lies in the adjustment of expertise that adjudicators will have to bring with them. This requirement of adjustment is true for all participants. Some convincingly argue that some commercial arbitrators have an insufficient grounding in public international law and appreciation that they are no longer refereeing a match that concerns only the disputing parties, while some public international lawyers have an inadequate grasp on economics, commercial law, and how to conduct proceedings.³⁵⁴ It should also be recognized that international investment law is not alone in facing such a change or clash of legal culture(s), but that other fields – including international trade law – have undergone similar challenges.³⁵⁵

The need for regulatory space may not have been apparent in a certain category of international investment disputes at a time when the disputes oftentimes concerned discrete governmental measures against an investor. Such disputes more closely resemble the paradigm of commercial arbitration – a field that has spawned a large number of international investment arbitrators who shaped, to a large extent, the ethos that dominated the field of investment arbitration for a considerable period of time. The changing nature of investor-state proceedings, and the influx of participants and commentators with different paradigms, has led to a changing discourse over the extent public policy considerations should play in investment arbitration. Similar developments have taken place

³⁵² *But see* Wälde, *supra* note 346 (addressing some procedural challenges arising in investment disputes, and suggesting that arbitral tribunals have a duty of restoring equality of arms affected by government powers).

³⁵³ Weiler, *supra* note 140, at 194-97.

³⁵⁴ Jan Paulsson, *Avoiding Unintended Consequences*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 241, 262-63, (Karl P. Sauvant et al. eds., 2008). *See generally* Schill, *supra* note 32, at 889; William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 *YALE J. INT'L L.* 283, 331 (2010).

³⁵⁵ Joseph Weiler addresses the difference between the culture under the GATT and the WTO in Weiler, *supra* note 140, at 194-97.

in WTO law, which saw a stronger recognition of public policy questions, not only between the periods of the GATT and the WTO (due to different procedures in the dispute settlement process), but also since the inception of the WTO in 1995.

5. CONCLUSION

This article shows that international trade and investment law, despite their differences, are two closely related fields; and, in many ways, constitute two sides of the same coin. Both areas have undergone, or are currently undergoing, considerable changes with respect to the degree to which they permit states and WTO members regulatory space in determining domestic public policy. To show the development of the slow convergence, and how the two systems deal with allowing states to make policy decisions in such fields as the environment or human health, this analysis focused on (1) regulatory expropriations in the case of international investment law, and (2) the SPS Agreement and the TBT Agreement in the case of WTO law.

The debate over regulatory space is particularly vigorous in international investment law, where the traditional paradigm of the protection of investors has had to contend with views that favor balancing public policy matters against the need for investors to be protected against governmental intrusion.³⁵⁶ Over the last years, this development has manifested itself in different schools of thought ranging from debates about the legitimacy of the entire international investment law enterprise to arguments over the public law nature of the field.

WTO adjudicators have incorporated competing interests into their decisions. Indeed, an overarching jurisprudence across different treaties has developed under the WTO umbrella. Some arbitrators have made explicit reference to the jurisprudence of not

³⁵⁶ The stakes in international investment arbitration are rising. Several awards have ranged in more than 100 million dollars, while a number of pending cases involve damage claims above one billion dollars. Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 BERKELEY J. INT'L L. 196, 196 (2012).

only the WTO, but also other international tribunals such as the European Court of Human Rights. This, of course, does not mean there should be a wholesale convergence between international investment law and WTO law. As Mary Footer rightly points out, “[t]here are . . . limits on the extent to which WTO jurisprudence can be brought into investment arbitration,” and referencing other fields of international law should certainly be more than “an opportunistic cross-referencing exercise.”³⁵⁷

This article has taken a different approach in comparing the amount of regulatory space, and found that there are indeed converging trends in not only the academic discourse between investment law and WTO law, but also the jurisprudence in both fields.³⁵⁸ The current development and discourse over international investment law is reminiscent of the debates in international trade law shortly after the creation of the WTO in 1995. This article has laid out some of the factors that explain the differences between the two fields. Some of the factors are textual, contextual, and historical. These reasons certainly do not constitute an exhaustive list. International investment law and WTO law have developed from different bases and have had different goals. Another factor that has led to a lack of coherent jurisprudence, with respect to taking account of domestic policy decisions in international investment law, has an institutional basis. It is unlikely that the current ad hoc system will be replaced with an AB-style forum where tenured judges carry out the decision-making.³⁵⁹ There may be reasons militating against this

³⁵⁷ Footer, *supra* note 162, at 138.

³⁵⁸ Whether, as Debra Steger suggests, trade and investment law should be fully integrated or whether the two fields should remain separate is not the point of this article. Steger, *supra* note 45, at 156. Others find a dangerous tendency “to hyperbolize the influence [of trade law] on [investment law]” 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 . . . [.]” calling those who argue for stronger convergence of rationales—though not necessarily for wholesale adoption—a “tribe of enthusiasts.” Desierto, *supra* note 39, at 6-10.

³⁵⁹ VAN HARTEN, *supra* note 57, at 180-84. Cf. Ratner, *supra* note 76, at 516-20. For a view against creating a standing body, see Paulsson *supra* note 42; SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 155-59 (2009); Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*,

approach, but such a position may have to be reviewed now that more investment tribunals are moving towards making decisions not only with respect to individual cases, but also with respect to more generally applicable regulatory policies. The final reasons why international investment law has been less welcoming in recognizing domestic policy decisions are the differences between the epistemic communities investment and trade law. While international trade law has been somewhat divorced from other fields of international law for some time, the distinction for international investment law has been more formidable. This, as well as the long-standing tradition of the participants in international investment law who have a background in international commercial arbitration, is another factor that should not be underestimated. Recognizing the reasons why important differences between the two fields remain may help shape the discourse over the convergence between international trade and investment law.

This article does not promote the view that substantive obligations in international investment law should be rewritten. Instead, it argues that some of the jurisprudence developed in international trade law as well as the discourse concomitant with these changes can serve as a form of blueprint for a future system of international investment law that takes these concerns seriously. The current system, having focused on individual rights, can evolve into one that takes contrasting societal goals seriously, while anchoring its collective interpretative exercise in the texts of existing investment agreements.

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in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231 et seq. (Karl P. Sauvant ed., 2008). See generally on the issue of harmonization of international jurisprudence YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 113 et seq. (2003); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998).